

**COMMENTS RESPONDING TO U.S. DOL's NOTICE OF PROPOSED CHANGES  
TO THE DAVIS-BACON CERTIFIED PAYROLL FORM**

**CONTROL NO. 1235-0008**

North America's Building Trades Unions ("NABTU") appreciates the opportunity to comment on the U.S. Department of Labor's ("DOL") proposed revisions to WH-347, the agency's Davis-Bacon certified payroll form ("Form WH-347"). 89 Fed. Reg. 70,670 (Aug. 30, 2024); U.S. DOL Supporting Statement for Davis-Bacon Certified Payroll, OMB Control No. 1235-0008 ("Supporting Statement"). DOL developed Form WH-347 decades ago to help contractors and subcontractors comply with the weekly reporting requirements of the Davis-Bacon and Related Acts ("DBRA") set forth in 40 U.S.C. § 3145 and 29 C.F.R. §§ 3.3-3.4, 5.5(a)(3)(ii).

NABTU is a labor organization composed of fourteen affiliated national and international unions, with approximately 290 state and local building and construction trades councils throughout the United States, which together represent more than three million workers. NABTU and its affiliates understand that the DBRA's proper implementation is critical to construction workers and their families. By upholding wages for construction workers on federal and federally assisted projects, the DBRA preserves area labor standards for the benefit of all workers in the construction industry. NABTU, therefore, commends DOL's efforts to improve compliance monitoring and enforcement on DBRA-covered projects, including its efforts to revise and improve Form WH-347.

DOL's proposed revisions to the Davis-Bacon certified payroll form will go a long way toward improving compliance monitoring on the part of contracting agencies, DOL, and the regulated community. For example, NABTU supports DOL's proposal to include a field on Form WH-347 for the applicable wage determination number because that information will help prime contractors ensure that all contractors on a covered project are using the proper wage scale and

paying workers the proper prevailing wage rates. NABTU also supports the proposal that submitters identify workers as either journeyworkers or apprentices to help contracting agencies and DOL monitor compliance with the DBRA's apprentice-to-journeyworker ratio requirements. NABTU fully supports the proposal requiring submitters to provide additional information on fringe benefit plans and registered apprenticeship programs, and the requirement that the individual certifying the payroll form provide their telephone number.

There are, however, additional pieces of information – especially with respect to fringe benefit plans – that could further aid regulators and industry stakeholders in their respective compliance monitoring efforts. NABTU's comments will focus on ways in which DOL can further improve Form WH-347 for the purpose of strengthening monitoring and enforcement of the DBRA and promoting accountability.

## **BACKGROUND**

The Davis-Bacon Act of 1931 is a minimum wage law that protects the wages and benefits of construction workers by prohibiting contractors and subcontractors on federal construction projects from paying less than the local prevailing wage. Prevailing wages are wage and fringe benefit rates that DOL's Wage and Hour Division ("WHD") establishes by locality, for each classification of construction worker, based on data it collects from construction projects in the area. 29 C.F.R. Pt. 1. Since the enactment of the Davis-Bacon Act, Congress has passed over 90 laws extending prevailing wage requirements to projects that receive various forms of federal assistance, including grants, loans, guarantees, insurance, tax credit bonds, and other innovative financing methods.

The DBRA is enforced, in part, through the Copeland Act, 40 U.S.C. § 3145(a), which requires covered contractors to submit weekly certified payroll reports to the government to ensure

compliance with prevailing wage requirements and other federal labor standards. 29 C.F.R. § 5.5(a)(3). The WHD requires that certified payroll reports contain the following categories of information: (1) the names and individual identifying numbers of the employees covered by the DBRA; (2) each employee’s work classification; (3) the hours worked by each employee each day; (4) the total hours worked each week; (5) the rate of pay, including the fringe benefit rate or cash equivalent; (6) the gross amount earned by employees each week; (7) payroll deductions, including mandatory and discretionally deductions; and (8) the net weekly wages of covered employees. *Id.* §§ 3.4, 5.5(a)(3)(ii). Each certified payroll report must be accompanied by a Statement of Compliance, certifying under penalty of perjury that the information being submitted by the contractor is accurate and true. *Id.* § 5.5(a)(3)(ii)(C).

Although DOL has primary implementation and enforcement authority under the DBRA, the contracting agencies – the agencies that enter into contracts for construction or provide DBRA-covered assistance to construction projects – have the day-to-day responsibility for enforcement. *See* Reorganization Plan No. 14 of 1950, reprinted 5 U.S.C. App. at pp. 126-28 (“Reorg. Plan No. 14”); *see also In the Matter of Paper, Allied-Industrial, Chem. and Energy Workers*, ARB No. 04-033 (ARB Nov. 30, 2005). Contracting agencies are responsible for obtaining certified payroll reports from contractors and subcontractors on a weekly basis and reviewing them to verify the correctness of employee work classifications, rates of pay, fringe benefit payments, hours worked, overtime pay, the apprentice-to-journeyworker ratio, allowable deductions, and the overall accuracy of the calculations.<sup>1</sup>

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<sup>1</sup> *See, e.g.,* U.S. DOL, Prevailing Wage Res. Book, *Davis-Bacon and Related Acts, Investigative Procedures and Remedies* (rev. Apr. 1, 2024), available at <https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book/dbra-investigative-procedures-remedies>; FAR 22.406-6(c).

**1. Requiring Contractors and Subcontractors to Include Additional Information on Fringe Benefits Contributions in their Certified Payroll Forms Will Assist DOL, Contracting Agencies, and Industry Stakeholders in Their Compliance Monitoring Efforts.**

The construction industry consistently ranks among the top three industries in which wage and hour laws are ignored.<sup>2</sup> Because construction bids are typically awarded to the lowest bidder, aggressive competition in the sector leads to thin profit margins and a race to the bottom in labor practices. Many contractors respond to that competitive pressure by minimizing costs using illegal means. Low-road contractors have devised many tactics to avoid their prevailing wage obligations, and three of the top five most common violations under the DBRA involve fringe benefits.<sup>3</sup> Violators often target fringe benefit credits to deprive workers of the money they have earned while evading the notice of both workers and enforcement authorities.<sup>4</sup>

In fact, the largest prevailing wage theft case in U.S. history involved fringe benefits fraud.<sup>5</sup> On April 8, 2021, the Attorney General for the Commonwealth of Pennsylvania filed a criminal complaint against Glenn O. Hawbaker, Inc. (“Hawbaker”) – a major public works contractor –

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<sup>2</sup> *Low Wage, High Violation Industries*, U.S. DOL, Wage and Hour Div. (2023), <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries>; see also U.S. Gov’t Accountability Off., GAO-21-13, *FLSA: Tracking Additional Complaint Data Could Improve DOL’s Enforcement* 17 (Dec. 2020), <https://www.gao.gov/assets/720/711205.pdf>.

<sup>3</sup> *Fact Sheet #66E: The Davis-Bacon and Related Acts – Compliance with Fringe Benefit Requirements*, U.S. DOL (Oct. 2023), <https://www.dol.gov/agencies/whd/fact-sheets/66E-DBRA-compliance-fringe-benefit-requirements>.

<sup>4</sup> See, e.g., Joint Comment from the Pennsylvania Attorney General and the Pennsylvania State Department of Labor and Industry Responding to U.S. DOL’s March 18, 2022, Notice of Proposed Rulemaking on Updating the Davis-Bacon and Related Acts Regulations, at 3, <https://www.regulations.gov/comment/WHD-2022-0001-40890>.

<sup>5</sup> Press Release, Penn. Off. of the Att’y Gen., *Hawbaker Sentenced, Will Pay Workers More Than \$20 Million In Stolen Wages* (Aug. 3, 2021), <https://www.attorneygeneral.gov/taking-action/hawbaker-sentenced-will-pay-workers-more-than-20-million-in-stolen-wages/>.

alleging that the company underfunded the benefits of employees on federal and state prevailing wage projects. *Commonwealth v. Glenn O. Hawbaker, Inc.*, No. CP-14-CR-461-2021 (Centre County Court of Common Pleas). The complaint alleged that Hawbaker committed theft by using money intended for the retirement funds of workers on prevailing wage projects to contribute to the retirement accounts of *all* Hawbaker employees – including hundreds of employees on private sector projects and the company’s owners and executives.

Hawbaker was also charged with stealing funds intended for the health and welfare benefits of workers on prevailing wage projects and using them to subsidize the cost of the self-funded health insurance plan that covered all company employees. In August 2021, Hawbaker pleaded no contest to charges of theft by failure to make required disposition of funds received and agreed to pay over \$20 million in restitution to over 1,000 workers.

Recently, NorCal Construction Industry Compliance (“NCIC”) – a watchdog organization dedicated to monitoring public works projects for prevailing wage compliance – filed a complaint in northern California, alleging that a local construction company violated the state’s prevailing wage law by claiming an inflated health and welfare credit for construction workers on public works projects. *NCIC v. Sierra Nat’l Constr.*, Case No. 24CV019558 (Superior Court, Sacramento County). NCIC alleges that the company owes construction workers between \$1 to \$ 3 million. *See also In re Royal Roofing Co., Inc.*, ARB Nos. 03-127, ALJ Nos. 1999-DBA-29, slip op. at \*12-14 (ARB Nov. 30, 2004), *aff’d*, No. C 05-03605 JW, 2006 U.S. Dist. LEXIS 106134 (N.D. Cal. Sept. 18, 2006) (affirming ALJ’s order for nearly \$80,000 in backpay because employer’s contributions to a training fund were not annualized, rendering the fringe benefit credit excessive and unreasonable); *Cody-Zeigler, Inc., v. Adm’r, Wage & Hour Div.*, ARB Nos. 01-014, 01-015, ALJ Nos. 97-DBA-17, slip op. at \*43-65 (ARB Dec. 19, 2003) (affirming ALJ’s order for nearly

\$65,000 in backpay and finding that employer claimed improper fringe benefits credit for its profit sharing plan contributions, health plan contributions, and administrative costs of providing employee benefits); *In re William J. Lang Land Clearing, Inc.*, ARB Nos. 01-072, 01-079, ALJ Nos. 98-DBA-1 through-6, slip op. at \*25, \*45-50 (ARB Sept. 28, 2004), *aff'd* 520 F. Supp. 2d 870 (E.D. Mich. 2007) (affirming ALJ's order for nearly \$20,000 in backpay and finding that, among other things, the employer overstated the health plan contributions made on behalf of certain workers and claimed improper fringe benefit credit for sporadic bonuses).

Given the prevalence of prevailing wage violations related to fringe benefits contributions, NABTU recommends that Form WH-347 request the following information from covered contractors and subcontractors and make certain clarifications to enhance compliance and facilitate payroll review:

- In the revised Statement of Compliance as described in DOL's Supporting Statement, in the check box and fillable field for fringe benefits information, the form should prompt the submitter to: (1) identify the *type* of benefit plan (e.g., pension or retirement, health and welfare, vacation, training, supplemental unemployment), and (2) list the hourly fringe benefit credit claimed for each individual plan. DOL should make clear in its instructions to the revised form that vague designations for benefit plan types, such as "other," are not permitted. Currently, over 15 states with state prevailing wage laws require that contractors identify the plan type on their certified payroll forms – e.g., California, Connecticut, Hawaii, Illinois, Maryland, Maine, Minnesota, Missouri, New Jersey, New Mexico, Nevada, Ohio, Oregon, Pennsylvania, Rhode Island, and Washington.<sup>6</sup> In a joint letter,

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<sup>6</sup> See, e.g., Minn. Dep't of Lab. and Indus., *MN/DOT Payroll Form Instructions* (last accessed Sept. 30, 2024), *available at*

dated March 29, 2024, the Attorneys General from fourteen states made the same recommendations to DOL. A copy of that letter is attached hereto as Exhibit A.

- Additionally, in the check box and fillable field for fringe benefits information, the submitter should be prompted to include the telephone number and email of the plan's point of contact. Immediate access to the plan's point of contact for purposes of verifying the information in the certified payroll forms will conserve time and resources. Similarly, in the check box and fillable field for apprenticeship programs, DOL should require the contractor to include the telephone number and email of the program's point of contact.
- The terminology used to refer to fringe benefit contributions in the revised WH-347 and accompanying instructions should be consistent. For example, DOL's Supporting Statement describing the proposed changes to Form WH-347 uses the terms "Total Fringe Benefit Cost" and "Total Hourly Credit" interchangeably. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The revised form and instructions should use the same words to express the same meaning. Also, the term "cost" could be misinterpreted as including *all* costs incurred by the employer in providing the benefit. For example, the labor costs associated with office employees who fill out medical insurance claim forms for submission to an insurance carrier, paying and tracking invoices from carriers or plan administrators, etc. DOL treats

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<file:///I:/BCTD/DOL%20CPR%20Updates%202024/state%20CPR%20forms/Minnesota%20payroll%20form%20instructions.pdf>; Or. Bureau of Lab. and Indus, Wage and Hour Div., *Payroll/Certified Statement Form WH-38* (Jan. 2009), available at <https://www.oregon.gov/deq/FilterDocs/CWSRF-PayrollCertStatementForm.pdf>; R.I. Dep't of Lab. and Training, Div. of Workforce Reg. & Safety, Prof. Reg. Unit/Prevailing Wage Section, *Rhode Island Certified Weekly Payroll* (Jan. 2020), available at <https://dlt.ri.gov/documents/pdf/wrs/APS%20RI%20PW%20Certified%20Payroll%20Form%201.20%20Revision.pdf>.

such costs as “noncreditable” for DBRA purposes. *See* 29 C.F.R. § 5.33(b). To avoid confusion and enhance compliance, NABTU recommends using the term “hourly fringe benefit credit” when referring to a fringe benefit credit taken per plan per worker, and “total hourly fringe benefit credit” when referring to fringe benefit credits taken for *all* combined plans per worker.

- For consistency and clarity, Column 6B’s reference to “Total Fringe Benefit Cost” should be replaced with “Total Hourly Fringe Benefit Credit.” Column 6C’s reference to “Payment in Lieu of Fringe Benefits” should be replaced with “Total Hourly Wage Payment in Lieu of Fringe Benefits.”
- In Column 8 on deductions, the proposed form replaces “Other” with “Other (See Instructions)”. To facilitate compliance and reduce the burden on the submitter, the form *itself* should provide greater clarity on what is expected from the submitter. Form WH-347 should prompt the submitter to specify or itemize the deductions that fall under the “Other” category. To this end, the phrase “Other (See Instructions)” should be replaced with “Other (specify)” or “Other (explain)”. States such as Alaska, California, Connecticut, Minnesota, Pennsylvania, and Rhode Island include such prompts on their certified payroll forms.<sup>7</sup>

The above-referenced joint letter from the Attorneys General from fourteen states make similar recommendations to DOL.

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<sup>7</sup> *See, e.g.,* Alaska Dep’t of Lab. and Workforce Dev., Lab. Standards and Safety Div., Wage and Hour Admin., *Certified Payroll* (March 2019), available at <https://labor.alaska.gov/lss/forms/weekly-cert-payroll.pdf>; Cal. Dep’t of Indus. Rels., *Public Works Payroll Reporting Form A-1-131* (last accessed Sept. 30, 2024), available at <https://www.dir.ca.gov/dlse/forms/pw/dlseforma-1-131.pdf>; Conn. Dep’t of Lab., Wage and Workplace Standards Div., *Payroll Certification for Public Works Projects* (Dec. 9, 2013), available at <https://portal.ct.gov/dol/-/media/dol/2022-new-design-system/divisions/wage-and-workplace-standards/payrollcert1.pdf>.

Finally, robust monitoring and enforcement of the DBRA's fringe benefits provisions is not only a statutory obligation; it is good public policy. In the non-union construction sector, high worker turnover and lack of economies of scale create a situation where contractors lack incentives to provide health care and pensions to their employees.<sup>8</sup> Prevailing wage laws, however, incentivize contractors to provide benefits. One study found that state prevailing wage laws raise benefit levels for health care by 60 percent, and pension benefits by 105 percent.<sup>9</sup> DOL should therefore take the necessary steps to enforce and strengthen the DBRA's fringe benefit protections.

## **2. The Inclusion of Wage Determination Numbers on Form WH-347 will Help Prime Contractors Monitor their Projects for DBRA Compliance and Detect Violations Early On.**

NABTU fully supports DOL's proposal requiring contractors and subcontractors to list the applicable wage determination number on Form WH-347. DOL's proposal will help prime contractors ensure that contractors and subcontractors on the project are using the correct wage determination and paying construction workers the proper prevailing wage rates. As DOL's guidance explains, the "[d]illigent oversight [by the prime contractor] of subcontractors of all tiers will greatly reduce the potential for violations to occur."<sup>10</sup>

Prime contractors are ultimately responsible for the DBRA violations of their subcontractors. 29 C.F.R. § 5.5(a)(6). If a subcontractor owes back wages and is either unable or

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<sup>8</sup> See Jeffrey S. Petersen, *Health Care and Pension Benefits for Construction Workers: The Role of Prevailing Wage Laws*, 39 Indus. Rels. 246 (Apr. 2000).

<sup>9</sup> *Id.* at 258.

<sup>10</sup> U.S. DOL, *What Am I Supposed to Do With All of These Certified Payrolls*, at 9 (last accessed Oct. 18, 2024), available at [www.dol.gov/sites/dolgov/files/WHD/prevailing-wage-presentations/dbra-seminars/What-Am-I-Supposed-to-Do-With-All-of-These-Certified-Payrolls.pdf](https://www.dol.gov/sites/dolgov/files/WHD/prevailing-wage-presentations/dbra-seminars/What-Am-I-Supposed-to-Do-With-All-of-These-Certified-Payrolls.pdf).

unwilling to make payment, the prime contractor will be held financially responsible. This can result in the contracting agency withholding contract payments and possibly debarment. Prime contractors, therefore, have an undeniable interest in ensuring consistent labor standards compliance on their projects. *See, e.g., In re Palisades Urb. Renewal Enters.*, ARB Nos. 07-124, ALJ Nos. 2006-DBA-0001, slip op. at 16 (ARB July 30, 2009) (“[I]t is well settled that a prime contractor is responsible for the back wages due [to] employees of its subcontractor under the Act, and is responsible for ensuring that all persons engaged in performing the duties of laborer or mechanic on the construction site receive the appropriate prevailing wages.”). Prime contractors are also in the best position to actively monitor DBRA compliance. Under DOL’s regulations and guidance, prime contractors are responsible for collecting *and reviewing* certified payrolls of all subcontractors on the covered project and submitting them to the relevant contracting agency. 29 C.F.R. § 5.5(a)(3)(ii)(A).<sup>11</sup>

Early detection and course correction by the prime contractor will reduce the number of worker complaints to WHD, thereby conserving agency resources. This is critical considering that the WHD is chronically underfunded and understaffed. The WHD is responsible for administering and enforcing over nine major laws in 11 million workplaces.<sup>12</sup> Over the last decade, the agency has lost 29 percent of its investigators. Currently, WHD has 733 investigators responsible for protecting more than 165 million workers throughout the United States and its territories.<sup>13</sup>

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<sup>11</sup> *See also id.* at 5.

<sup>12</sup> *Major Laws Administered/Enforced*, U.S. DOL, Wage and Hour Div. (last visited Oct. 17, 2024), <https://www.dol.gov/agencies/whd/laws-and-regulations/laws>.

<sup>13</sup> Jessica Looman, *Big Results for Workers in 2023*, U.S. DOL Blog (Dec. 7, 2023), <https://blog.dol.gov/2023/12/07/big-results-for-workers-in-2023>.

Finally, DOL's proposal to include wage determination numbers on its certified payroll form will promote uniformity and facilitate compliance. Currently, Iowa, Minnesota, New Mexico, Rhode Island, and South Dakota require contractors and subcontractors on state prevailing wage projects to include wage determination numbers (or the state's equivalent of wage determination numbers) on their respective payroll forms.<sup>14</sup>

**3. Form WH-347 Should Include a Column for Paycheck Numbers or Direct Deposit Transaction Numbers to Assist DOL and Contracting Agencies in Their Compliance Investigations.**

To facilitate DBRA investigations, NABTU recommends that DOL include a column on WH-347 prompting contractors and subcontractors to list the paycheck number or direct deposit transaction number that corresponds with, and corroborates, the wages reported for each worker on the certified payroll form. Check numbers and direct deposit transaction numbers will go a long way in helping investigators track and verify wages paid to workers.

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<sup>14</sup> Iowa Dep't of Transp., *Certified Transcript of Labor Payroll* (last accessed Sept. 30, 2024), available at <https://www.iowadot.gov/erl/current/CM/content/Appendix%202-14.pdf>; Minn. Dep't of Lab. and Indus., *MN/DOT Payroll Form Instructions* (last accessed Sept. 30, 2024), available at <file:///I:/BCTD/DOL%20CPR%20Updates%202024/state%20CPR%20forms/Minnesota%20payroll%20form%20instructions.pdf>; N.M. Dep't of Workforce Sols., *Weekly Payroll* (Feb. 2014), available at [https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/Weekly\\_Payroll\\_Form.pdf](https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/Weekly_Payroll_Form.pdf); R.I. Dep't of Lab. and Training, Div. of Workforce Reg. & Safety, Prof. Reg. Unit/Prevailing Wage Section, *Rhode Island Certified Weekly Payroll* (Jan. 2020), available at <https://dlt.ri.gov/documents/pdf/wrs/APS%20RI%20PW%20Certified%20Payroll%20Form%201.20%20Revision.pdf>; S.D. Dep't of Transp., *Certified Payroll Report* (last accessed Sept. 30, 2024), available at <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fdot.sd.gov%2Fmedia%2Fdocuments%2FSDDOTCertifiedPayrollReports.xlsm&wdOrigin=BROWSELINK>.

Several states including Alaska, California, Massachusetts, Pennsylvania, and Wisconsin include fields in their certified payroll forms for corresponding paycheck numbers.<sup>15</sup> Such information has played a key role in prevailing wage investigations. For example, the California Department of Industrial Relations utilized check numbers to uncover egregious prevailing wage violations on a farmworker housing project in southern California.<sup>16</sup> There, the state investigator discovered several discrepancies relating to the paycheck numbers listed on the certified payroll forms.<sup>17</sup> For example, the investigator found that the paycheck numbers listed on the certified payrolls for certain workers did not correspond to the workers' actual paychecks.<sup>18</sup> The investigator also discovered that the checks for over 25 workers were cashed at the same two banks, which were nowhere near the workers' homes. The signatures on those checks were also strikingly similar.<sup>19</sup> Those irregularities prompted the investigator to conduct a fuller

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<sup>15</sup> Alaska Dep't of Lab. and Workforce Dev., Lab. Standards and Safety Div., Wage and Hour Admin., *Certified Payroll* (March 2019), available at <https://labor.alaska.gov/lss/forms/weekly-cert-payroll.pdf>; Cal. Dep't of Indus. Rels., *Public Works Payroll Reporting Form A-1-131* (last accessed Sept. 30, 2024), available at <https://www.dir.ca.gov/dlse/forms/pw/dlseforma-1-131.pdf>; Mass. Dep't of Lab. Standards, *Weekly Certified Payroll Report and Workforce Participation Form* (last accessed Sept. 30, 2024), available at <https://www.mass.gov/doc/weekly-certified-payroll-report/download>; Penn. Bureau of Lab. L. Compliance, Prevailing Wage Div., *Weekly Payroll Certification for Public Works Projects LLC-25* (last accessed Sept. 30, 2024), available at <https://www.pa.gov/content/dam/copapwp-pagov/en/dli/documents/documents/mandatory-postings/llc-25.pdf>; Wis. Dep't of Transp., *Weekly Payroll Report* (last accessed Oct. 1, 2024), available at <https://wisconsindot.gov/Documents/doing-bus/civil-rights/labornwage/blankpayrollexcel.xls>.

<sup>16</sup> *Grant Constr., Inc.*, No. 20-0229-PWH (May 25, 2022) (Cal. Dept. of Indus. Rels., Div. of Lab. Standards Enf't).

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

investigation, which ultimately exposed an illegal kickback scheme.<sup>20</sup> The investigator found that the project foreman was cashing the workers' checks and paying the workers in cash at rates below the prevailing wage. The California Department of Industrial Relations ordered the contractor to pay \$588,285.78 in back wages to employees and \$1,129,134.34 in total damages.<sup>21</sup>

In another prevailing wage investigation by the California Department of Industrial Relations concerning the installation of HVAC equipment in multi-residential buildings in northern California, the paycheck numbers on the certified payroll reports helped investigators expose a contractor's failure to pay fringe benefits.<sup>22</sup> The contractor indicated on its payroll reports that it had satisfied its fringe benefits obligation by paying cash in lieu of benefits.<sup>23</sup> The check numbers the contractor listed on the payroll reports, however, did not match the check numbers on the checks cashed by the employees.<sup>24</sup> The contractor failed to produce documentary support for the payment of fringe benefits, and was ordered to pay \$112,741.62 in total damages.<sup>25</sup>

#### **4. DOL Should Require Certifying Officials to Provide Their Email Addresses on Form WH-347 to Facilitate Agency Outreach.**

Each certified payroll form submitted to the government must be signed by the contractor or subcontractor, or the contractor or subcontractor's agent who pays or supervises the payment of

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<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.* at 34.

<sup>22</sup> *Dynamic Home Performance Inc.*, No. 19-0002-PWH (Dec. 13, 2021) (Cal. Dept. of Indus. Rels., Div. of Lab. Standards Enf't).

<sup>23</sup> *Id.* at 13

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 22.

workers (collectively, “certifying officials”). 29 C.F.R. § 5.5(a)(3)(ii)(C). NABTU supports DOL’s proposal requiring certifying officials to list their telephone numbers on Form WH-347. NABTU recommends that the certifying official also provide an active email address. Ready access to more than one method of communication will facilitate agency outreach and expedite compliance investigations.

Emails are an integral and widely used method of communication for any business.<sup>26</sup> More than 90 percent of people between the ages of 15 and 64 use email, and 99 percent of email users check their inbox every day, with some checking 20 times a day.<sup>27</sup> 86 percent of individuals prefer to use email when communicating for business purposes.<sup>28</sup> Recent surveys suggest that telephone calls are not an effective means of communication, especially when the caller is unknown to the recipient. According to the Pew Research Center, eight in ten Americans don’t generally answer their phones when an unknown number calls.<sup>29</sup> To facilitate communications between WHD investigators and contractors, the agency should therefore require certifying officials to furnish an

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<sup>26</sup> Gleb Polyakov, *Email Isn’t Dead – In Fact, It’s Thriving*, Forbes (Nov. 20, 2023), <https://www.forbes.com/councils/forbestechcouncil/2023/11/20/email-isnt-dead-in-fact-its-thriving/>.

<sup>27</sup> *100 Compelling Email Statistics for 2024*, Porch Grp. Media (Mar. 5, 2024), <https://porchgroupmedia.com/blog/100-compelling-email-statistics-to-inform-your-strategy-in-2023/>.

<sup>28</sup> HubSpot, *State of Inbound 64* (2017), available at <https://cdn2.hubspot.net/hubfs/53/assets/soi/2017/global/State%20of%20Inbound%202017.pdf?hssc=20629287.2.1496934850159&hstc=20629287.0a1b72cbb0896633a33c4dfla2257f2b.1480713258238.1496863030008.1496934850159.350&hsCtaTracking=0b076251-595a-4310-8ecb-ab9b7a0e9bb4%7Cb542c667-fdcc-4b7d-9a7d-0687f73d05a2>.

<sup>29</sup> See Colleen McClain, *Most Americans don’t answer cellphone calls from unknown numbers*, Pew Rsch. Ctr. (Dec. 14, 2024), <https://www.pewresearch.org/short-reads/2020/12/14/most-americans-dont-answer-cellphone-calls-from-unknown-numbers/>.

email address as well as a telephone number. Requiring contractors and subcontractors to provide their email addresses to the government is not a novel concept.<sup>30</sup> Both New York City and the state of Rhode Island require certifying officials to list their email addresses on the certified payroll forms they complete.<sup>31</sup>

#### **5. DOL’s Proposal to Replace the Phrase “Work Classification” with “Labor Classification” on Form WH-347 May Create Confusion Among Contractors and Subcontractors.**

As explained above, DOL’s current certified payroll form prompts submitters to list the name of each employee performing DBRA-covered work, along with their “Work Classification.” DOL proposes to replace the phrase “Work Classification” with “Labor Classification.” The similarity between the term “labor” and “laborer” may cause confusion among contractors with little DBRA experience and embolden unscrupulous contractors to engage in the unlawful practice of craft misclassification. To avoid confusion, NABTU recommends that DOL preserve the phrase “Work Classification” as it currently appears on the WH-347, or use the term “Classification,”

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<sup>30</sup> See, e.g., U.S. DOL, Emp. Benefits Sec. Admin, *Form PR and Instructions Registration for Pooled Plan Provider* (last accessed Oct. 8, 2024), available at <https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-pr/form.pdf>; U.S. Dep’t of Health and Hum. Servs., *Office for Human Research Protections’ Incident Report Form* (last accessed Oct. 8, 2024), available at <https://www.hhs.gov/sites/default/files/irpt-pra-incident-report-form.pdf>; *Notice of Breach of Health Information*, Fed. Trade. Comm. (last accessed Oct. 8, 2024), <https://www.ftc.gov/business-guidance/health-breach-form>.

<sup>31</sup> N.Y.C. Off. Of the Comptroller, Bureau of Lab. L., *Certified Payroll Report* (last accessed Oct. 8, 2024), available at [https://comptroller.nyc.gov/wp-content/uploads/documents/Certified\\_Payroll\\_Report\\_formfillable\\_2019.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/Certified_Payroll_Report_formfillable_2019.pdf); R.I. Dep’t of Lab. and Training, Div. of Workforce Reg. & Safety, Prof. Reg. Unit/Prevailing Wage Section, *Rhode Island Certified Weekly Payroll* (Jan. 2020), available at <https://dlt.ri.gov/documents/pdf/wrs/APS%20RI%20PW%20Certified%20Payroll%20Form%201.20%20Revision.pdf>.

which is the term that appears throughout DOL’s DBRA regulations and the form’s Statement of Compliance. *See, e.g.*, 29 C.F.R. §§5.5(a)(1)(i)-(iii), 5.5(a)(3)(i)(B), 5.5(a)(3)(ii)(C)(3).

Craft misclassification is a common violation on DBRA projects.<sup>32</sup> Craft misclassification occurs when contractors deliberately classify certain workers – e.g. Ironworkers, Pipefitters, Sheetmetal Workers – as Laborers for the purpose of paying them a lower rate.<sup>33</sup> *See, e.g., United States ex rel. IBEW, Local Union No. 98 v. Farfield Co.*, 5 F.4th 315 (3d Cir. 2021) (finding that contractor misclassified electricians as laborers and groundmen for the purpose of paying them less and holding that contractor violated the False Claims Act by misrepresenting the workers’ classifications on certified payrolls submitted to the government); *Leonard S. Fiore, Inc. v. Commonwealth, Dep’t of Lab. & Indus.*, 526 Pa. 282, 287 (Pa. 1991) (“[I]t remains uncontradicted that [the employee] worked at least some or most of his hours as a carpenter and was paid entirely as a laborer. Therefore, it is ineluctable that [contractor] violated the requirement of paying prevailing wages.”).

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<sup>32</sup> *Fact Sheet #66E: The Davis-Bacon and Related Acts – Compliance with Fringe Benefit Requirements*, U.S. Dep’t of Lab., Wage and Hour Div. (Oct. 2023), <https://www.dol.gov/agencies/whd/fact-sheets/66E-DBRA-compliance-fringe-benefit-requirements#>; *see also Fact Sheet #66: The Davis-Bacon and Related Acts (DBRA)*, U.S. Dep’t of Lab., Wage and Hour Div. (Oct. 2023), <https://www.dol.gov/agencies/whd/fact-sheets/66-dbra>; U.S. DOL, *What Am I Supposed to Do With All of These Certified Payrolls*, at 8, [www.dol.gov/sites/dolgov/files/WHD/prevaling-wage-presentations/dbra-seminars/What-Am-I-Supposed-to-Do-With-All-of-These-Certified-Payrolls.pdf](http://www.dol.gov/sites/dolgov/files/WHD/prevaling-wage-presentations/dbra-seminars/What-Am-I-Supposed-to-Do-With-All-of-These-Certified-Payrolls.pdf); Dep’t of the Army, U.S. Army Corps of Eng’rs, Pamphlet No. 1180-1-8, 22, 71 (Aug. 15, 2022), available at [www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER%201180-1-8.pdf](http://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER%201180-1-8.pdf).

<sup>33</sup> *See* 116 Cong. Rec. E913 (July 11, 2019) (statement of Rep. Smith in the U.S. House of Representatives) (“Craft misclassification occurs when dishonest contractors misclassify high-skilled workers as general laborers ...to avoid paying the higher prevailing wage rate . . .”); *see also Misclassification in Davis Bacon/Prevailing Wage Cases is a Warning to Employers to “Be Careful Out There.”* JDSUPRA (May 20, 2024), <https://www.jdsupra.com/legalnews/misclassification-in-davis-bacon-2667146/>

DOL’s proposal to use the term “labor” to refer to at least 16 separate key classifications<sup>34</sup> may have the unintended effect of creating confusion and encouraging craft misclassification. In fact, no state with a prevailing wage law uses the term “labor” in its certified payrolls. For example, New Jersey, uses the term “occupational category”; Pennsylvania and Rhode Island use the term “work classification”; and Oregon uses the term “trade classification.”<sup>35</sup>

**6. DOL Should Provide Clear Notice to Contractors and Subcontractors that Certified Payroll Information Will Not be Treated as Confidential Under the Freedom of Information Act.**

States such as California, New Jersey, and New York make, or are in the process of making, their certified payroll reports available to the public for the purpose of promoting accountability and encouraging compliance.<sup>36</sup> DOL should strengthen accountability and transparency at the federal level by invoking its broad enforcement authority under the DBRA, *see* 40 U.S.C. § 3145,

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<sup>34</sup> U.S. DOL, *Prevailing Wage Resource Book, Davis-Bacon Surveys* (rev. Apr. 1, 2024) (listing key classifications for each category of construction).

<sup>35</sup> N.J. Dep’t of Lab & Workforce Dev., *Payroll Certification for Public Works Projects* (June 2023), available at [https://www.nj.gov/labor/wageandhour/assets/PDFs/wagehub/MW-562%20\(6-23\)%20PayrollCert-PublicWorks.pdf](https://www.nj.gov/labor/wageandhour/assets/PDFs/wagehub/MW-562%20(6-23)%20PayrollCert-PublicWorks.pdf); Penn. Bureau of Lab. L. Compliance, Prevailing Wage Div., *Weekly Payroll Certification for Public Works Projects LLC-25* (last accessed Sept. 30, 2024), available at <https://www.pa.gov/content/dam/copapwp-pagov/en/dli/documents/documents/mandatory-postings/llc-25.pdf>; R.I. Dep’t of Lab. and Training, Div. of Workforce Reg. & Safety, Prof. Reg. Unit/Prevailing Wage Section, *Rhode Island Certified Weekly Payroll* (Jan. 2020), available at <https://dlt.ri.gov/documents/pdf/wrs/APS%20RI%20PW%20Certified%20Payroll%20Form%201.20%20Revision.pdf>; Or. Bureau of Lab. and Indus, Wage and Hour Div., *Payroll/Certified Statement Form WH-38* (Jan. 2009), available at <https://www.oregon.gov/deq/FilterDocs/CWSRF-PayrollCertStatementForm.pdf>.

<sup>36</sup> *See Certified Payroll Reporting*, Cal. Dep’t of Indus. Rels., <https://www.dir.ca.gov/public-works/certified-payroll-reporting.html>; *Public Works Contractors Required to Report Certified Payroll Records Online*, N.J. Dep’t of Lab. and Workforce Dev. (July 17, 2024), [https://www.nj.gov/labor/lwdhome/press/2024/20240717\\_publicworks.shtml#:~:text=NJ%20Wa ge%20Hub%20users%20must,visit%20njwages.nj.gov](https://www.nj.gov/labor/lwdhome/press/2024/20240717_publicworks.shtml#:~:text=NJ%20Wa ge%20Hub%20users%20must,visit%20njwages.nj.gov).

Reorg. Plan No. 14, and making clear to contracting agencies and the regulated community that payroll information reported on the WH-347, or similar forms, will not be treated as confidential commercial information under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(4).

Although DOL’s Supporting Statement states that DOL provides no assurances of confidentiality with respect to Form WH-347, guidance from the U.S. Department of Justice suggests that for FOIA purposes, federal agencies should provide notice of nonconfidentiality at the time of submission.<sup>37</sup>

NABTU recognizes that federal case law is not uniform on whether an agency’s notice of nonconfidentiality is sufficient for purposes of disclosure under FOIA. *See, e.g., Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 434-35 (June 24, 2019) (leaving open the question of whether third-party information loses its confidential character under FOIA Exemption 4 if the government does not provide an assurance of privacy); *Citizens for Resp. & Ethics in Wash. v. Dep’t of Com.*, No. 18-03022, 2020 U.S. Dist. LEXIS 146783, \*8 (D.D.C. Aug. 14, 2020) (prefacing its holding by noting that withholding information under FOIA Exemption 4 is proper “only if [the agency] gave [the submitter] some assurance of confidential treatment”); *Am. Small Bus. League v. DOD*, 411 F. Supp. 3d 824, 830 (N.D. Cal 2019) (“Assuming without deciding” that an agency must provide submitter with an assurance of privacy for information to be considered confidential under FOIA Exemption 4).

Submitters should, nevertheless, be given notice that the possibility of disclosure exists because the threat of public disclosure will incentivize compliance. NABTU therefore

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<sup>37</sup> See U.S. DOJ, *Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential Under Exemption 4 of the FOIA* (updated Nov. 18, 2022) (where federal agencies do not intend to treat third-party information as confidential, notice should be given to the submitter at the time of submission).

recommends that DOL include the following notice in its revised WH-347 form and accompanying instructions: “DOL and federal contracting agencies make no assurances of confidentiality with respect to information submitted by contractors and subcontractors pursuant to 29 C.F.R. § 5.5(a)(3)(ii).”

## **7. NABTU Recommends Additional Clarifying Changes to Form WH-347.**

NABTU recommends the following clarifying changes to Form WH-347 that were not included in DOL’s Supporting Statement:

- In 2007, DOL’s Bureau of Apprenticeship and Training was renamed the Office of Apprenticeship. All references in WH-347 to the Bureau should therefore be replaced with “Office of Apprenticeship or its successor agency.”
- DOL’s Supporting Statement describes a new Column 2 that requires submitters to identify workers as either “(J) Journeyworkers” or “(A) Apprentices.” NABTU recommends reinforcing the principle that *only registered apprentices* may be paid less than the prevailing wage. *See* 29 C.F.R. §5.5(a)(4)(i)(A)-(B). To this end, NABTU recommends replacing “(A) Apprentices” with “(RA) Registered Apprentices.”
- The current Statement of Compliance on Form WH-347, prompts the submitter to certify that “the wage rates for laborers or mechanics contained therein are not less than the applicable wage rates *contained in any wage determination incorporated into the contract . . .*” (emphasis added). The text should be modified to account for situations where, for example, a contracting agency properly incorporates the DBRA contract clauses set forth in 29 C.F.R. §5.5, but omits the applicable wage determinations from the covered contract. NABTU therefore recommends replacing the italicized text with “required to be paid under the Davis-Bacon Act or any of its Related Acts.”

## **CONCLUSION**

DOL's proposed changes to Form WH-347 will go a long way toward helping federal investigators and industry stakeholders effectively monitor labor standards compliance on covered projects. NABTU urges DOL to adopt the above recommendations to further promote the efficient administration of the DBRA.

# **EXHIBIT A**



March 29, 2024

Jessica Looman, Administrator  
U.S. Department of Labor  
Wage and Hour Division  
200 Constitution Avenue NW  
Washington, DC 20210

Dear Administrator Looman,

We, the undersigned Attorneys General of Pennsylvania, Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Maryland, Michigan, Minnesota, New Jersey, Nevada, New York, Rhode Island, and Washington D.C. submit this letter to urge you to update the certified payroll information contractors are required to submit in connection with work they perform on projects covered by the Davis-Bacon and Related Acts (“DBRA”), 40 U.S.C. §§ 3141-48; 29 C.F.R. § 5.1. In particular, contractors should be required to provide more detailed disclosures regarding the utilization of fringe benefit funds and other deductions taken from workers’ pay.

The undersigned enforce laws that protect workers’ economic security, health, and welfare, either by directly investigating and prosecuting violations of prevailing wage laws or by defending enforcement actions by state departments of labor in administrative or judicial appeals. It is all too common for employers and contractors to submit certified payroll records that on their face appear to comply with prevailing wage requirements while concealing that workers were paid off the books at non-prevailing rates of pay or were required to pay back part of their paychecks to their employers. Mandating that weekly certified payroll records include more detailed information would help prevent schemes by contractors seeking to evade legally required prevailing wages. Our collective enforcement experiences affirm the critical role that certified payroll records play in uncovering and proving violations of prevailing wage laws.

For example, in one case prosecuted by the Pennsylvania Office of Attorney General, an employer forced journeyman electricians and plumbers to record a portion of their hours as laborers according to predetermined ratios. Through his scheme, the contractor stole over \$64,000 from workers in the space of five years. Certified payroll records were crucial in that case; they established what representations the contractor made to public agencies, and provided evidence that he was forcing workers to record their time according to predetermined ratios.

In Massachusetts, the Attorney General cited a rail system construction and maintenance company for not paying the proper overtime and for submitting fraudulent certified payroll records. The Massachusetts Attorney General's review of the certified payroll records revealed the company claimed a type of fringe benefit that is not permitted under Massachusetts prevailing wage laws. The improperly claimed fringe amounts were paid to employees each week, but the amounts were not included in the calculation of overtime, resulting in an underpayment to employees of over \$192,000.<sup>1</sup>

The New York State Department of Labor, which the New York Attorney General represents in enforcement litigation, often receives DBRA certification forms during its investigations, and has found them especially confusing in cases involving annualization requirements. As indicated in paragraph 1 below, the present form does not clearly state that contractors should list, for each specific benefit fund or plan, not only the payments for supplemental benefits for prevailing-wage-work hours, but also the annualized hourly credit for such payments. It would also be helpful if the Department of Labor could provide official guidance to employers that may find the form confusing, whether through a DBRA "toolkit" similar to those made available for other statutes, or a web page or video analogous to those available from private entities, which may or may not be accurate.

The undersigned have observed that violators of prevailing wage laws are using complex schemes in which they misappropriate fringe benefit funds or take unlawful deductions to reduce workers' pay. These schemes can cause substantial losses to workers but can be difficult to detect given the level of information currently included on certified payroll records. However, if the Department of Labor were to require more detailed disclosure regarding the utilization of fringe benefit funds, violations would become much more easily detectable. Specifically, the undersigned suggest the Department of Labor consider requiring:

1. Disclosure of hourly rate equivalents claimed for each type of benefit the employer provides. Rather than only requiring employers to list a total hourly rate equivalent for the total amount of all fringe benefits provided, employers should be required to provide an hourly rate equivalent for each benefit claimed. This change would allow enforcers to more easily determine whether an employer is claiming fringe benefit credit for non-creditable costs, or is not calculating hourly rate equivalents in a lawful manner (e.g. claiming the same amount for employees with individual vs. family medical insurance).
2. Information about the benefit plans provided. Employers should be required to disclose whether benefits provided are self-funded or unfunded plans and to identify the entity responsible for administering benefits provided. If enforcers suspect a violation may be occurring, for example, in connection with an unfunded plan, enforcers would be on notice of the fact that the plan is unfunded and will know to inquire as to whether the plan was approved by the Secretary as required under the 2023 DBRA regulations.

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<sup>1</sup> New York-Based Rail System Company To Pay More Than \$220,000 for Overtime and Payroll Violations on Public Works Projects (May 10, 2022), <https://www.mass.gov/news/new-york-based-rail-system-company-to-pay-more-than-220000-for-overtime-and-payroll-violations-on-public-works-projects>.

3. Itemization of deductions. Another less easily detectable type of DBRA violations that the undersigned have encountered are unlawful deductions from workers' pay by employers. Mandating employers to itemize deductions from workers' pay would help highlight for enforcers those suspicious and possibly fraudulent deductions.

The undersigned believe that these changes to the information contractors on DBRA projects must provide on certified payroll forms will better enable detection of violations. Further, if violators believe their schemes will be too easily detectable by the inclusion of such additional information on certified payroll records, these simple disclosure requirements suggested by the undersigned may have a deterrent effect.

Respectfully Submitted,



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