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

August 8, 2014

Mary Ziegler, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Proposed Extension of the Approval of Information Collection Requirements

Control Number 1235-0008

Dear Ms. Ziegler:

The International Union of Operating Engineers ("IUOE") submits these comments in response to the Wage and Hour Division's Notice, 79 *Fed. Reg.* 33001 (June 9, 2014), soliciting comments concerning its proposal to extend Office of Management and Budget approval of WH-347.

The IUOE, which is one of the 14 international unions affiliated with the Building and Construction Trades Department ("BCTD") supports the comments submitted by the BCTD in this matter.

The IUOE submits these commits to underscore the importance of the submission of certified payroll records and the collection of the information now required on the "Statement of Compliance." As discussed herein, expeditious investigation and enforcement of prevailing wage obligations are imperative to prevent evasion of payment of prevailing wages by Davis-Bacon violators; submission of certified payroll records and disclosure of at least the information required on the Form WH-347 is legally required and indispensable to enforcement. *See* BCTD comments for a legal analysis of the requirements under the Copeland Act, 40 U.S.C. 3145.

Additionally, Form WH-347 and the instructions provide information to contractors and subcontractors on their obligations under the Davis-Bacon Act, and thus, facilitate compliance.

A. Compliance Assistance: Notice to Contractors of Regulatory Requirements

In 1959, the Department of Labor issued its first of two All Agency Memorandums addressing the contents of the Statement of Compliance required in accordance with the Copeland Act. When the DOL developed the original "Statement of Compliance" in 1959 - Forms SOL-184 and 185 - the DOL had two goals in mind: 1) to provide compliance assistance to government contractors, and 2) to facilitate enforcement of labor standards by federal contracting agencies.

AAM No. 15, the first of the two AAMs, states that the "need for a standard payroll form has been apparent for some time,[1] as attested by the numerous request received from contractors and especially small contractors lacking elaborate record keeping facilities." According to the AAM, many federal agencies "attempted" to meet this need, but the "existence of many diversified forms served rather to emphasize the necessity for a standard form."

AAM No. 15 further states that contactors have "inquired about the availability of a standard payroll form which could be relied upon to meet the contractual and regulatory payroll requirements," and that promotion of the newly developed "Forms SOL-184 and 185 will serve not only to substantially assist such Government contractors, but also to facilitate labor standards enforcement by the Federal contacting agencies."

The current Form WH-347 was introduced in 1968 through AAM No. 77, about four years after the enactment of the fringe benefits amendments to the Davis-Bacon Act. AAM No. 77 states that the text of the Statement of Compliance will "no longer appear in 29 CFR 3.3(b); it is contained in new Forms WH-347 and WH-348."

B. Indispensable to Effective Enforcement

The DOL correctly predicted in 1959 that a "Statement of Compliance" would prove useful in the enforcement of labor standards.

The importance of certified payroll records to effective enforcement is described in comments submitted by the U.S. Navy, two state departments of labor, construction unions, and other interested parties in response to a 2008 Notice of Proposed Rulemaking, in which the Department of Labor proposed revisions to 29 CFR Parts 3 and 5, which would eliminate social security numbers and home addresses from documents that are provided weekly to non-employing government agencies, contractors, subcontractors, applicants, sponsors, and/or owners. *Protecting the Privacy of Workers: Labor Standards*

[1] AAM No. 15 (July 31, 1959), "Payroll form SOL-184 and 185, for voluntary use of contractors and subcontractors on Federal or Federally-assisted construction contracts subject to the Davis-Bacon and related Acts."

Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, 73 *Fed.Reg*. 62229-02 (Oct. 20, 2008).

In issuing the Final Rule, the DOL stated that "A majority of the comments raised concerns that the proposed changes could result in **difficulties in enforcing the applicable prevailing wage laws** because weekly submissions of certified payrolls containing social security numbers and addresses for individual workers are useful to government investigators and auditors in ensuring compliance with the Davis-Bacon and Related Acts and/or Copeland Act." 73 *Fed.Reg*. 77504-01 (Dec. 19, 2008) (emphasis added). Accordingly, based on those comments, the DOL stated that it made several modifications to address the concern that "eliminating access to social security numbers could work as a hardship for those monitoring compliance." *Id*. at 77507.

The DOL received 37 comments from a variety of sources in response to the Notice of Proposed Rulemaking: individuals (7), trade and professional associations (6), labor unions (12), governmental entities (5), Members of Congress (three letters signed by a total of 16 members, including Hillary Clinton and Ted Kennedy), law firms (2), and others (2). *Id*. at 77504. The following are excerpts of comments from government agencies and the regulated community which emphasize the critical importance of certified payroll records and information that enables investigators to identify and contact workers:

1. U.S. Navy

The Navy Labor Advisor commented that access by federal contracting agencies to employee addresses and social security numbers provides a "substantial tool to assist with enforcement of DBRA requirements" and further stated as follows (emphasis added):

> If address and social security information is no longer routinely available to the contracting agencies, it would be a **substantial impediment for effective DBRA enforcement** for the following reasons. First, the identity of individual employees could no longer be definitely established. Second, any need to contact such workers to conduct investigative interviews would be substantially inhibited. Many such workers are on the job site for only a limited amount of time and therefore, the ability to affirmatively identify them and contact them after they have completed their work on the job site is imperative to effective DBRA enforcement. Finally, if violations exist and back wages are collected on behalf of such employees, it may be difficult or impossible to distribute back wage payments to them without their address and social security information.

2. State Agencies

Illinois Department of Labor's November 17, 2008 comments state: "Currently, these recordkeeping requirements enable federal agencies to effectively enforce the Davis-Bacon Act and the Copeland Anti-Kickback Act. Eliminating these records will **only hinder DOL's efforts to timely and accurately enforce their laws.**" Emphasis added.

The West Virginia Department of Labor's November 7, 2008 comments state: "[E]nforcement at the state level will be **undermined** in states such as West Virginia that require contractors to submit the federal payroll reporting form (WH Form 347) on state-funded projects under 'little Davis-Bacon' Acts such as Chapter 21, Article 5 of the West Virginia Code titled Wages for Construction of Public Improvements. The deletion of worker addresses and social security numbers from the federal certified payroll report will translate to **weakened enforcement** in not only our state but other state labor agencies that also enforce similar 'little Davis-Bacon' Acts.'" Emphasis added.

3. Associated General Contractors

The Associated General Contractors of America stated in its comments:

> However, the text of the proposed rule not only removes the requirement of including employee SSNs and addresses in weekly payroll submissions, it prohibits such inclusion. It is unclear whether this would, in effect, prohibit subcontractors from providing such employee information in weekly payrolls submitted to prime contractors. If so, the prohibition raises concerns about a prime contractor's ability to make restitution and **to avoid unfair withholdings in cases of subcontractor underpayment of wages**, as discussed below.

4. Labor Unions

Individual labor unions and the Building and Construction Trades Department uniformly agreed that the proposed revisions would "seriously hamper" the "overall effectiveness" of investigations.[2]

5. Law Firm

The law firm of Weinberg, Roger & Rosenfeld commented that (emphasis added):

[2] *See* November 19, 2008 comments of the International Union of Bricklayers and Allied Craftworkers.

> The weekly certified payroll reports provide a **critically important tool** allowing the federal government to ensure compliance with the wage and fringe benefit requirement of the Davis-Bacon Act. Armed with certified weekly payroll records, federal agencies can interview workers and contractors and can compare the certified payroll records to other employer and worker records to determine if there has been underpayment of wages, misclassification of workers, fringe benefit abuses, or illegal kickbacks on federal construction projects.

6. Representative of Individual Employer

Jacquelin Brown (affiliated with unidentified EOE) commented that:

> We have used the last four digits of the Social Security Number on some of our monitoring documents and prefer to use the number on the initial submittal of an employee on the certified payrolls to enhance contract compliance staff's review of certified payrolls.

C. Devotion of Resources to Expeditious Enforcement of Complaints

The IUOE encourages the DOL to devote the enforcement resources needed to take full advantage of all tools – including the "Statement of Compliance" form and certified payroll records - available to this Agency as a result of disclosure requirements under the Davis-Bacon Act and Copeland Act.

Prompt review by contracting agencies and the Wage and Hour Division of "Statements of Compliance" and certified payroll records is particularly important in light of the fact that the Wage and Hour Division's usual practice is to investigate violations on only those projects currently under construction. The DOL's practice of devoting its enforcement resources to ongoing projects at which workers are present and available for interviews necessitates expeditious investigation and enforcement of labor standards.

Indeed, if a violation is discovered after a contracting agency has made its final payment under the construction contract and the complainant brings a blatant violation to the attention of the DOL, the DOL typically does not investigate. Consequently, the violator avoids liability even though the DOL has the authority to cross-withhold under other government contracts performed by the violator.

In amending 29 CFR 5.5(a) (2) in 1982 to permit cross-withholding,[3] the DOL recognized the need for ensuring that wrongdoers do not evade payment of back wages. The DOL stated in support of this amendment that prior to the amendment, federal agencies did not cross-withhold (*Silverton Construction Co., Inc.*, WAB Case No. 92-09 (Sept. 29, 1992), *quoting* 47 *Fed.Reg.* 23,658, 23660 (May 28, 1982):

> Both the Davis-Bacon Act and the CWHSSA require that all covered contracts contain language to permit the contracting agency to withhold funds to satisfy unpaid wages. Because neither statute specifically provides for cross-withholding, agencies generally have refrained from doing so. **Accordingly, many contractors and subcontractors have escaped payment of back wages because violations were not discovered until after final payment on the contract had been made.**
>
> The decision in Whitney Bros. precluded withholding from another contract under the language of the contract clause in the regulations as they existed at that time. In Decision No. B-177554 (March 22, 1973), the GAO recommended that the Department adopt regulations specifically permitting cross-withholding. In addition, GAO commented in favor of the cross-withholding provisions contained in the stayed DOL regulations of January 16, 1981, which were substantially identical to the current proposal.

The DOL's retention of the requirement that contractors and subcontractors file Form WH-347 and submit certified payroll records would foster the goal expressed in the above-quoted passage.

The IUOE appreciates the opportunity to file these comments.

Respectfully submitted,

JTC:as

[3] Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act), 47 *Fed.Reg.* 23,658 (May 28, 1982).