



VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

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

Re: RIN 1235-AA40, Notice of Proposed Rulemaking on Updating the Davis-Bacon and Related Acts Regulations

Dear Director DeBisschop:

On behalf of the Modular Building Institute (“MBI”) and each of the signatories below, I am writing to urge withdrawal and reconsideration of the U.S. Department of Labor’s Wage and Hour Division’s (“WHD”) Proposed Rulemaking Regarding Updates to the Davis-Bacon and Related Act published in the Federal Register on March 18, 2022, at 87 Fed. Reg. 15698. In particular, I request that the WHD retain the definitions in 29 C.F.R. § 5.1(l) (2000) and withdraw its proposal to expand the Davis Bacon Act (“DBA” or “the Act”) to off-site workers in prefabrication and modular construction under a newly-expanded version of “secondary construction sites.”

The DBA is clear and unambiguous. Coverage applies to mechanics and laborers employed “directly on the site of the work.” This means the physical place where the construction called for in the contract will remain when work on it has been completed. The Department’s current rule, as amended, correctly applies the DBA’s statutory framework by excluding from coverage permanent, previously established fabrication plants that are not located on the site of the work. See 29 C.F.R. § 5.1(l). This interpretation is consistent with Congressional intent and judicial precedent. In seeking to extend coverage to off-site workers, the WHD has widely departed from the letter of the law and acted outside of its legislative authority. If changes to the statutory language are to be made to the DBA, the WHD must reserve such action for Congress.

In addition, the WHD has overlooked the true costs of compliance for off-site modular construction factories that are presently exempted from DBA coverage. The up-front costs are far higher than the WHD’s very low estimate of \$78.97, particularly for small and disadvantaged businesses. Worse, an increase in wages will heavily impact construction costs on federal and federally-funded projects, inflating the price to the government and shutting out smaller, American businesses from equal competition. At a time when critical public works, such as affordable housing, school classrooms, and healthcare facilities, are in desperate need, expanding the current rule to off-site workers and increasing construction costs makes no sense.

Unless and until Congress acts, I strongly recommend that the WHD withdraw “secondary worksites” from the proposed rule and maintain the existing regulatory framework inclusive of the exceptions to coverage that have been a workable standard for decades.

I. About The Modular Building Institute

The Modular Building Institute (MBI) is the leading association for the modular construction industry and represents more than 400 manufacturers, contractors, and dealers in the modular building sector throughout the United States. Our modular building company members include both union and open-shop and engage in the construction of a wide range of federal, state, and local government projects, such as single and multi-family affordable housing projects, defense and military construction, government administrative buildings, public school buildings and classrooms, disaster recovery shelters, public health facilities, multi-use container storage, and mobile field offices.

In 2019, the top management consulting firm, McKinsey & Company, pronounced that “shifting construction away from traditional sites and into factories could dramatically change the way we build.”¹ The distinctive benefit of modular engineering is the customer’s structure is prefabricated and/or constructed off-site in controlled factory conditions that are safer for workers, uses the same materials, and designs to the same codes and standards as conventionally built facilities—but at less cost, more environmentally-friendly, and in about half the time. The factories are permanent, pre-established facilities situated at a dedicated location remote from the physical construction site. They form the operations of services provided to the general public and not established specifically for the performance of the federal contract or project.

Modular construction is recognized by U.S. federal agencies as a greener, faster, more cost-effective, and smarter alternative to traditional stick-built construction. Along with the U.S. General Services Administration’s approval of modular construction, the U.S. Departments of Housing and Urban Development, Defense, and Energy are increasingly promoting the industry as a responsible, environmentally conscious, and taxpayer friendly solution. Unfortunately, the WHD’s proposed rule will raise the cost of projects in areas such as affordable housing and school classrooms and undermine the very reason federal agencies have sought out modular construction as a viable solution to public needs.

Below are just a few of the concerns MBI members have about the proposed rule and the harmful impact it will have on the benefits of using modular construction for public works. In line with my previous letter submitted to the U.S. DOL on May 10, 2022, I reiterate my request for an extension of the comment period by an additional 60 days. This would allow the WHD to conduct further outreach and public feedback sessions with MBI members—a number of which are small businesses—and all other interested stakeholders in the modular construction industry directly affected by the proposed rule.

II. The Proposed Rule on Secondary Worksites Violates the DBA and Should Be Withdrawn.

MBI strongly opposes WHD’s proposal to revise the definition of “site of the work” to encompass “significant portions of a building or work at secondary worksites.” This is a sweeping change that directly violates the statutory language of the DBA. Under the DBA, a covered contractor or subcontractor must pay prevailing wages to all mechanics and laborers employed “directly on the site of the work.” The D.C. Circuit correctly ruled that the U.S. Department of Labor must follow a “strict geographical proximity test for evaluating what areas are ‘directly upon the site of the work’....” See *Building & Construction Trades Dep’t., AFL-CIO v. United States Dep’t. of Labor Wage Appeals Board*, 932 F.2d 985 (D.C. Cir.1991) (the “Midway” decision).

¹ See, “Modular Construction: From Projects to Products,” McKinsey & Company (June 18, 2019), posted online at <https://www.mckinsey.com/business-functions/operations/our-insights/modular-construction-from-projects-to-products>.

Applying this reasonable test, courts have consistently held that prevailing wages apply only to workers employed on the actual physical site of the public work. Time and again, courts have made clear that the U.S. Department of Labor may not expand the DBA to off-site workers. In fact, as you recall, in 2000 the Department revised its regulatory definition of “site of the work” in view of three U. S. appellate court decisions invalidating the Department’s regulation that extended coverage to off-site workers.² Among those seminal cases was *Ball, Ball & Brosamer, Inc. v. Reich*, where the D.C. Circuit Court of Appeals said:

In Midway, we determined “not surprisingly, that Congress intended the ordinary meaning of its words.” 932 F.2d at 992. That is, the limitation in the statute making it applicable to “‘mechanics and laborers employed directly upon the site of the work’ restricts coverage of the Act to employees who are working directly on the physical site of the public building or public work being constructed.” *Id.* The Secretary invites us to revisit Midway’s conclusion that the statutory phrase “directly upon the site of the work” is unambiguous in the context of this controversy, asking for a “broad construction” of the Act to accomplish its “remedial purposes” and citing policy arguments favoring a broadly defined federal work site. None of this offers any justification for ignoring the clear language of the Act. See *Central Bank of Denver v. First Interstate Bank of Denver*, --- U.S. ---, ---, 114 S.Ct. 1439, 1453-54, 128 L.Ed.2d 119 (1994) (“Policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result ‘so bizarre’ that Congress could not have intended it.”).

...

“In the end, we reach the same conclusion we did in Midway. The statutory phrase ‘employed directly upon the site of the work,’ means ‘employed directly upon the site of the work.’ Laborers and mechanics who fit that description are covered by the statute. Those who don’t are not.”

Ball, Ball & Brosamer, Inc. v. Reich, 24 F.3d 1447, 1452-53 (D.C. Cir. 1994).

The Court further rebuked the Secretary of Labor for attempting an end run around the statute, stating, “[] the Secretary attempts to find any tiny crack of ambiguity remaining in the phrase ‘directly upon the site at the work’ and cram into it a regulation that encompasses other sites miles from the actual location of the public works-....” *Id.* at 1452.

In line with *Ball, Ball & Brosamer, Inc.*, the Department’s current regulatory framework adheres to the letter of the law by defining the site of the work to exclude permanent, previously established fabrication plants “not on the site of work, even where the operations for a period of time may be dedicated to the performance of a contract.”³ This language is transparent, unambiguous, and respects the DBA’s statutory language and judicial holdings.⁴

By expanding the meaning of “secondary worksites,” the WHD is again seeking to create an entirely new category of coverage that Congress never contemplated and courts have expressly rejected. The WHD has cited no legislative authority other than the DBA itself for expanding coverage to off-site

² See *Building and Construction Trades Department, AFL-CIO v. United States Department of Labor Wage Appeals Board*, 932 F.2d 985(D.C. Cir 1991) (Midway); *Ball, Ball and Brosamer v. Reich* (D.C. Cir 1994), and *LP Cavett Co. v. U.S. Department of Labor*, 101 F. 3d 1111 (6th Cir. 1996).

³ See 29 C.F.R. § 5.2(l)(3) (2000).

⁴ See FN 2, *supra*. See also, *Trucking v. Pa. Prevailing Wage Appeals Bd.*, 30 A.3d 616 (Pa. Commw. Ct. 2011) (holding “the definition in the 2000 amendment to 29 C.F.R. § 5.2(l), adopted by the Board, to be a reasonable interpretation of the phrase ‘directly on the site of the work,’ which is equally applicable to the similar phrases ‘directly upon the public work project’ and ‘at the job site’ in Section 2(7) of the Act.”); *Sheet Metal Workers’ Int’l Ass’n v. Duncan*, 229 Cal.App.4th 196 (Cal. App. 2014) (relying in part on the DBA to interpret similar state prevailing wage law to preclude work “performed at a permanent, offsite, nonexclusive manufacturing facility”); *United States v. BKJ Solutions, Inc.*, Case No. CIV-09-730-M (July 20, 2012) (W.D. Okla. 2012) (finding that “construction” as used in the DBA and Miller Act applies to work performed at the actual work site and not to fabricating the shells of the modular units off-site).

employees performing work at facilities not established solely for the contract project. Indeed, the phrase “secondary worksites” does not exist in the DBA and courts have refused to read such off-site workers into the law’s scope of coverage. The expansive definition of the term is a WHD invention based on a policy motive that improperly rewrites the DBA and overturns court precedent.

This is a serious overreach by an agency tasked with implementing Congressionally-approved language. As the D.C. Circuit Court of Appeals explained, “An agency can neither adopt regulations contrary to statute, nor exercise powers not delegated to it by Congress.”⁵ Here, Congress has not provided the WHD with authority to expand the DBA’s statutory language via rulemaking or “interpretation.” Only Congress, through legislative action, has constitutional authority to make such changes to the law. Unless and until Congress passes new legislation, the WHD must adhere to the DBA as written and preserve the exclusion from coverage for off-site workers. If the WHD moves forward with the proposed rule, we suspect the Department of Labor will face legal challenges; consequently wasting taxpayer dollars trying to defend a rule that disregards court precedent and Congressional intent.⁶

III. The WHD’s Definition for Secondary Worksites Fails To Account For Distinct Building Methods In The Modular Construction Industry.

The WHD’s unauthorized expansion of the DBA to off-site construction creates implementation challenges as well. The proposed rule defines a “significant portion” of work as “one or more entire portion(s) or module(s) of the building or work, as opposed to smaller prefabricated components, with minimal construction work remaining other than the installation and/or assembly of the portions or modules at the place where the building or work will remain.”

However, nothing in this definition quantitatively measures the point when a significant portion of work reaches a “minimal” amount of construction work remaining. In addition, it is unclear whether the calculation is based on construction of one module out of multiple modules in a structure or the entire structure itself. It is equally unclear how smaller structures such as modular containers or temporary and reusable structures fit within the scope of work.

These ambiguities make it impossible for a modular construction company to determine whether (and at what point) an off-site modular factory becomes a “secondary worksite” for purposes of coverage. This forces contractors to guess whether a construction project equates to “one or more entire portion(s) or module(s)” and the precise point a construction project reaches a “minimal” amount of work remaining. The determination will be further complicated if the project also involves the off-site manufacture of prefabricated components which are excluded from the “significant portion” test.

To the extent the DBA will operate by law, as the WHD proposes, government agencies that mistakenly omit the DBA contract clause in solicitations, contracts, or grants will automatically shift the burden to the contractor to determine coverage. Should a contractor mistakenly conclude the construction is outside DBA coverage, it could face an investigation, significant audit and legal costs, and possible penalties that will substantially harm its business, despite the contractor’s good faith

⁵ *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994).

⁶ The proposed rule even disregards past Department decisions finding off site construction to fall outside DBA coverage. See, e.g., Pub. Works Case No. 2007–009 (May 5, 2008), Wasco Union High School District (Department determined that modular units to be installed at a school site were not subject to prevailing wages because the units were fabricated at a permanent, offsite facility that was not integrally connected to the project site); Pub. Works Case No. 2008–008 (May 28, 2008) (Sunset Garden Apartments) (Department determined that the prevailing wage law did not apply to the fabrication of construction materials at a permanent, offsite facility).

attempt to interpret a definition that is, by its terms, confusing and challenging to apply in practice.⁷ This further increases the costs and risks of regulatory compliance, particularly for small and disadvantaged businesses. It is a risk that some prospective, small and large business federal government contractors in modular construction are less willing to take.

For current government contractors, we envision there will be necessary inquiries (of WHD and federal contracting agencies), requests for opinion letters, and a great deal of interpretive guidance regarding threshold coverage. This, too, contravenes the WHD's goal of reducing its administrative burden by updating the current rule. It also has the effect of interpreting DBA coverage in a piecemeal fashion. This will cause unpredictability and regulatory uncertainty—making it difficult for government contractors to price and bid on opportunities.⁸ There will be an overflow effect to federal agencies who must try to develop a coherent procurement approach in the light of these definitional gaps. Rather than place a greater burden on federal agencies and government contractors, a more logical option is to withdraw the definition of “secondary worksites” from the proposed rule and maintain the existing regulatory provisions consistent with the language of the statute.

IV. WHD's Prevailing Wage Determinations Need to Reflect Private Sector Market Rates in the Modular Construction Industry.

Because the WHD's proposed rule expands DBA coverage to off-site modular construction factories for the first time in the statute's history, there is little to no data gathered by the WHD sufficient to set prevailing wage rates for these workers. Modular construction factory workers perform a wide variety of tasks that cannot always or neatly be classified as “laborers and mechanics.” Nothing in the proposed rule accounts for combined jobs or describes the steps the WHD will take to determine coverage. Even if workers become covered, the WHD's proposed rule does not explain how it will collect wage data or assign labor categories to employees of newly covered contractors.

The WHD's proposal to identify wages as prevailing in cases where no wage rate is paid to a majority of workers, as long as at least 30% of workers are paid the same rate, will fail to generate accurate industry data. A 30% threshold of workers is simply too small a sample. In addition, the WHD's proposal to combine metropolitan and rural wage data will skew the accuracy of the data. This is likely to cause inflated wages in rural counties that have a lower wage scale and depressed wages in large metropolitan cities that have a higher wage scale.

The most accurate method of determining prevailing wage rates is to survey modular construction companies operating within the localities of the state where the work is to be performed using the majority rule. This methodology gathers wage data that is truly predominant in a diverse industry that includes small and large businesses, union and non-union, government contractors, commercial work only, or a mix of workforce models and customer sectors.

In the absence of a 50% return, a weighted average should be used based on data in similar business sectors and localities. Reverting to a 30% threshold will fail to account for size standard (large versus small), type of construction (e.g., home builds, commercial facilities, reusable, and temporary structures), and customer market (government contractor only, commercial only, or a combination).

Moreover, it is not appropriate or justifiable to use a site-based construction wage scale in a modular factory environment. As the WHD acknowledged in its proposed rule, nearly all of the WHD's prevailing wage determinations are issued for general types of construction (building, residential, highway, and heavy)—not a factory setting—and are applicable to a specific geographic area.

⁷ The expansion will also conflict with state prevailing wage laws that, by its terms or judicial interpretation, exclude off site workers from coverage, creating administrative challenges for contractors operating in those states.

⁸ *Sheet Metal Workers' Int'l Ass'n v. Duncan*, 176 Cal.Rptr.3d 634 (Cal. App. 2014), citing *McIntosh v. Aubry*, 14 Cal.App.4th 1576 (1993) (“[p]arties must be able to predict the public-works consequences of their actions under reasonably precise criteria and clear precedent. A nebulous standard or set of factors governing whether offsite work is covered by the prevailing wage law would create confusion and uncertainty.”) (internal quotes omitted).

These determinations are derived primarily from laborers and mechanics that perform traditional construction on site. By contrast, workers in a modular construction factory often perform a wide variety of jobs that potentially cut across various labor categories. On-site assembly, if any, is also distinct in its performance and engineering compared to the tasks involved in building a structure on site from scratch. The WHD's general wage determinations do not reflect these important differences in the modular construction industry. As a result, a significant number of conformances will become necessary. This creates the very administrative burden the WHD is attempting to reduce in its proposed rule.

To avoid this outcome, the WHD should withdraw the proposed rule and revisit its method for determining prevailing wage rates. Off-site workers should not be covered. But for any workers who are covered, labor categories and wage determinations must remain aligned with the job positions and market rates in the modular construction industry. The best means for obtaining accurate information is surveying modular construction business owners who have the direct knowledge and experience in hiring and managing their workforces. This will result in prevailing wage rates that properly reflect the wages and job positions in modular construction as opposed to wages and labor categories skewed by a methodology applied to workers in other construction fields.

V. The Costs of the WHD's Proposed Rule Are Burdensome and Prohibitive, Particularly For Small Businesses.

I am convinced that WHD has profoundly underestimated the economic costs of expanding the current DBA rule. The WHD's cost estimate was \$78.97 and allotted only one hour for review of the proposed rule and half an hour to implement it. It is difficult to see how government contractors will be able to comply fully with the proposed rule in less than two hours for no more than \$80 in expenses. For any federal government contractor, let alone a newly covered business, this cost estimate seems absurdly low.

The proposed rule itself is a whopping 432 pages in length and implements more than 50 material changes to the current prevailing wage regulations. Reading through the rule is a labor-intensive process and requires hours of parsing through complex concepts (particularly for a new contractor), while HR and payroll specialists will spend dozens of hours adjusting and managing payroll for hundreds to thousands of employees. This does not include upgrading or purchasing new time-keeping and payroll software systems, updating personnel policies and notices, training company personnel, and engaging outside experts such as compliance consultants and legal counsel, none of which the WHD took into account in its cost estimate. For MBI's small business members, the costs can rise to the thousands and for large-scale businesses tens of thousands—significantly higher than the \$78.97 claimed by the WHD.

In addition, higher prevailing wages could drastically increase overall construction costs for federal and federally-financed public works.⁹ These costs ultimately will be passed along to government agencies in the form of higher prices, thereby increasing the agency's costs per project and requiring more taxpayer dollars. In turn, this negatively affects the agency's allocated budget and limits opportunities for additional public projects in critical sectors such as affordable housing, school facilities, and military installations. Many small and disadvantaged businesses in the modular sector will not have the budget to cover the costs of DBA prevailing wages.

Consequently, these businesses will be unable to compete for contract opportunities, limiting their ability to participate equally in the procurement process.

⁹ In addition, the shift to a prevailing wage will overturn the collective bargaining agreements in place for modular construction companies that have unionized workers.

The proposed rule also severely impacts small businesses and other diversified suppliers. These companies—many of whom are minority, veteran, women, and family-owned—will become newly covered under the proposed rule and do not have the capabilities or processes in place to track labor hours at the level of detail needed. Nor do they have the expensive payroll systems in place that will be necessary to manage the prevailing wage requirements. The administrative costs of tracking multiple rates of pay and fringe benefits based on the type of project across widely diversified trades and products are too prohibitive. The accounting alone will be overly complex, and there is little if no information available from WHD to provide real, practical guidance outside generic examples.

Small businesses who cannot afford a company-wide transformation of their entire operating systems will no longer be able to participate or be competitive in contract opportunities. Revising the DBA regulations to increase construction costs when the labor market is tight and supply chains and inflation are already out of control is inexplicable and unnecessary.

In fact, I have heard from many MBI members who are small- and family-owned businesses expressing distress because their budgets are extremely limited and they cannot afford the huge capital costs that would be required to restructure their operations. As a result, some have reported they will have to seek fewer government projects. This makes no sense when Congress made it clear through the Small Business Act that federal agencies should be encouraging greater participation from small businesses in procurement.

The expansion of the DBA would also negatively impact the American domestic modular construction industry, which includes some large operators but is largely comprised of veteran, minority, and female-owned companies. The costs that these smaller companies would face to implement the DBA requirements would in turn increase costs for domestically manufactured modular components, which creates a competitive disadvantage compared to off-shored modular components suppliers that do not similarly face DBA rules. As a result, the proposed rule, if implemented, could contribute to the diminution of the domestic modular construction industry that is increasingly sought by federal agencies as a cost-effective, climate-friendly, and community-oriented solution to housing and other building needs across the country.

VI. Conclusion – the WHD’s Proposed Rule Should be Withdrawn as Unauthorized, Premature, and Unduly Burdening Government Agencies and Contractors. The Department’s Current Exceptions to Off-Site Work Should Remain Intact.

It is clear that the WHD’s proposed rule is premature and requires reconsideration. Technical and engineering advancements in modular construction are helping to solve the housing crisis, support the needs of U.S. military branches, improve energy efficiency, and reduce the carbon footprint. These advancements will be hampered by rising costs and regulatory uncertainties due to the WHD’s unauthorized expansion of the DBA, a long-standing law that has remained untouched by Congress for 40 years because it does not need amending. Congress never intended the DBA to apply to workers who perform their jobs off-site. If the proposed rule is implemented, our members, including small and family-owned companies, will be faced with the undesirable choice between supporting government projects and simply maintaining a viable business for their customers and their employees.

For these reasons, I respectfully request that the WHD withdraw its proposal to expand DBA coverage to off-site prefabrication and modular construction and maintain the current rule’s exceptions consistent with the statute and 29 C.F.R. § 5.1(l) (2000). At a minimum, I ask the WHD to postpone any final rule pending further outreach to MBI, its 400+ members operating in localities across the United States, and other affected stakeholders to learn about the benefits of using modular construction in government programs to meet the essential needs of the public and improve the communities we serve. So you can hear from business owners personally, we have gathered in the Appendix a sample of the comments our members have submitted.

On behalf of MBI and the signatories below, thank you for the opportunity to comment on this matter.

Sincerely,

A handwritten signature in cursive script that reads "Tom Hardiman".

Tom Hardiman
Executive Director

Appendix: Additional MBI Member Comments

MBI Member and Associate Signatories:

Jon Hannah-Spacagna
Assistant Director
Modular Home Builders Association
Charlottesville, Virginia

Bostjan Jevsek
CEO
IteraSpace
New Paris, Indiana

Alan Rasmussen
VP Production
Modern Building Systems
Aumsville, Oregon

Ralph Tavares, PE
CEO/Founder
R & S Tavares Associates, Inc.
San Diego, California

Daniel Arevalo
Dir. of Engineering and Legislative Affairs
Mobile Modular Management Corporation
Mira Loma, California

Matthew Slataper
President
Ramtech Building Systems
Mansfield, Texas

Michael Bollero, Jr.
Sr. Vice President
Aries Building Systems, LLC
Houston, Texas

Stephen Shang
CEO
Falcon Structures
Manor, Texas

Mark DePasquale
CEO
National Portable Storage Association
Kansas City, Missouri

Amin Irving
President
Aslan Modular, LLC c/o Ginosko Development
Company
Novi, Michigan

Drew Welborn
Vice President
Whitley Manufacturing
South Whitley, Indiana

Vaughan Buckley
CEO
Volumetric Building Companies
Philadelphia, Pennsylvania

John Erb
General Manager & Director of Operations
Champion Commercial Structures
Williamsport, Pennsylvania

Jim Gabriel
President, CEO
Modlogiq Inc.
New Holland, Pennsylvania

John Buongiorno
Director
Axis Construction Corp.
Hauppague, New York

Brad Gudeman
Vice President
Modular Genius, Inc.
Joppa, Maryland

Michael Wilmot
President
Wilmot Modular Structures, Inc.
White Marsh, Maryland

Chuck Walen
Vice President Major Projects
Satellite Shelters, Inc.
Cocoa Beach, Florida



APPENDIX

ADDITIONAL PUBLIC SUBMISSIONS FROM MBI MEMBERS

[Comment from Optimum Modular Solutions](#)

- **Agency** Wage and Hour Division
- **Posted** May 11, 2022
- **ID** WHD-2022-0001-28213

Like many states throughout the US, California has a major affordable housing and homeless crisis. Optimum Modular Solutions, an independent modular consulting firm, has been utilizing both wood (low-rise) and steel (high-rise) volumetric modular systems to assist developers and design teams in developing affordable and permanent supportive housing projects at a price point that "pencils". For example, the average cost per key for "affordable" multi-family projects in Los Angeles, CA exceeds \$550,000. By utilizing repetitive and efficient modular unit designs, we are working on low-rise and high-rise projects where the cost per key is in the range of \$200,000 - \$300,000! State funded programs such as Homekey are available to developers; however, they require projects to be completed within only 12 months of the date of the funding award, such is the need for expeditious housing solutions. Modular construction is the only method of construction that can deliver large-scale projects within such timeframes.

One of the major risks of doing business as a modular manufacturer is keeping the production line(s) busy, as salaries need to be paid regardless. Manufacturers can build a portion of this risk into their margins to overcome inevitable gaps in work and still be in a position to pay their employees. The significant increase in the cost of labor associated with the Davis-Bacon Act will at best drive up the cost of modular construction where affordable housing projects will no longer "pencil" and at worst result in modular manufacturers not being able to sustain gaps in their work and inevitably closing their doors. Modular manufacturers can have in excess of 500 employees.

Quite simply, the effects of the Davis-Bacon Act on modular manufacturers would be the difference between manufacturers helping to address the affordable housing and homeless crisis and them contributing to it!

[Comment from Out Of The Box Building Systems, LLC](#)

- **Agency** Wage and Hour Division
- **Posted** May 10, 2022
- **ID** WHD-2022-0001-27201

I am a small business women owned business in a competitive industry which is affected by this act. Given the shortage of available housing and high inflation, it doesn't make sense to expand Davis Bacon to offsite locations and take away a valuable resource for affordable housing solutions.

Comment from Shetler, Rock

- **Agency** Wage and Hour Division
- **Posted** May 13, 2022
- **ID** WHD-2022-0001-29532

As a small business owner, the expansion of Davis Bacon rates to offsite construction will create an administrative hardship leading to one of two outcomes – higher cost for construction or my company declining to bid on future federal work. We always have multiple projects being constructed in our facility at any given time with man power bouncing back and forth between projects as needed. The logistics of paying different labor rates for different projects and the employee relations aspects of employees only wanting to work on the higher paying projects which are side-by-side in the factory are management nightmares. Please do not expand the Davis Bacon rates to offsite construction.

Comment from SG Echo

- **Agency** Wage and Hour Division
- **Posted** May 11, 2022
- **ID** WHD-2022-0001-27438

The application of Davis Bacon wage rates and the various administrative requirements associated with such a program is not a good idea and is counter to the very concept of economical and efficient alternatives to classic conventional construction at the site. The modular industry is a highly competitive and relatively low margin business. To burden it with arbitrary and higher wage costs plus the administrative requirements will do nothing to keep modular costs and therefore prices to our clients as low as possible. The whole idea of modular construction is to help reduce costs and

reduce inefficiencies in the construction industry and the application of higher wage rates which may or may not reflect what the market really would dictate in terms of local wages does not contribute to improving our industry. After over 50 years in the construction industry I have never seen Davis Bacon wage rate application not increase the cost of the project. The good modular companies out there are offering competitive wages and benefits. In today's worker friendly market if you don't offer competitive wages you will not be able to staff your production lines. Let the market determine what are competitive wages and not a government dictate. We are a small company and any additional administrative overhead only hurts the industry.

Comment from Kerper, Chris - Modular Building Concepts, Inc.

- **Agency** Wage and Hour Division
- **Posted** May 11, 2022
- **ID** WHD-2022-0001-27705

Our Company is a small family owned business with over 35 years in the industry. What started as a "mom/pop" company has grown through the years providing modular solutions and employing many. By incorporating Davis-Bacon rates offsite this will directly impact our small business which in itself inherently is wrong. Where is the support for the small business owners? We also subcontract with small business owners which will directly impact them adversely. Much of our manufacturing takes place out of state which again will further add to costs making modular construction cost prohibitive all together.

On the leasing side: As it stands, Davis Bacon is hard enough administratively to meet as “modular construction & installation” falls into a grey area since we have nothing to do with the actual construction of project and provide temporary construction trailers. Our company does not actually go onsite since we are considered an equipment rental company. However, the landmine of paperwork required just for the setup of the trailer has caused a financial burden for our company and many others.

On the sale sides of things, modular construction will become more expansive which will no longer be an affordable option. This will impact affordable housing and commercial options for many small businesses.

The other downside of DB rates is the skilled labor required specifically to our type of construction. As it stands right now “general labor” is where we land however modular construction and trailer installation is a skilled labor specific to our industry. We do not have a “trailer union or apprenticeship program” which would further slowdown and add costs. All those labor costs make it cost prohibitive.

Comment from Hawkins, Phil - Modular Mobile

- **Agency** Wage and Hour Division
- **Posted** May 11, 2022
- **ID** WHD-2022-0001-27649

I lead a large regional modular building solutions provider and I have grave concerns about the proposed expansion of the Davis Bacon act. The proposed expansion will have a number of unfavorable outcomes for taxpayers, the government, school districts. A modular approach to construction is being adopted because it represents a sustainable, higher productivity approach. Projects can be completed more quickly at or slightly below the costs of conventional construction. Adding significant labor costs to a project will result in fewer modular projects, which will result in more waste, higher administrative costs and longer project timelines. Firms may choose to use modular providers outside of the US, who will have a cost advantage as they don't have to abide by the same rules.

This expansion also severely impacts our ability to use small businesses and other diversified suppliers. They don't have the capabilities or processes to track labor hours at the level of detail needed and will no longer be able to participate or be competitive. The administrative costs of tracking multiple rates of pay based on the type of project across lots of different trades are astronomical. We cannot manage this and would likely have to seek fewer government projects.

Implementing measures to increase construction costs when supply chains and inflation are already challenged, seems very short-sighted. I hope you will reconsider this unnecessary expansion of the Davis Bacon rules.

Best Regards,

Phil Hawkins

Comment from Tavares, Ralph

- **Agency** Wage and Hour Division
- **Posted** May 11, 2022
- **ID** WHD-2022-0001-28194

To Whom it May Concern:

An expansion of Davis Bacon into the offsite construction space will pose a number of financial burdens on upcoming construction projects that I believe need to be carefully considered before such an expansion could occur. Primarily I believe this country will experience a large burden in building more essential facilities and especially housing, especially in light of the shortages in housing many states seem to be experiencing lately. The regulatory hardships around developing

projects are already extremely onerous and adding more will only stifle the production of additional housing that is so desperately needed. At a time when the Federal Reserve is in the process of gradually increasing interest rates to combat inflation this seems like an extremely precarious moment to enact such legislation.

Comment from Indicom Buildings

- **Agency** Wage and Hour Division
- **Posted** May 11, 2022
- **ID** WHD-2022-0001-27916

Please consider these comments as a strong opposition to the expansion of the Davis Bacon rates to offsite construction.

As a modular manufacturer we depend on work from many sectors including federal contracts, state agencies, local school districts, and the private sector. However, this expansion will likely eliminate multiple potential sectors by forcing us to meet these requirements for all work done in our factory or simply stop pursuing projects where this would apply. It is safe to say the result will be lost revenue and lost jobs at our factory at a minimum.

As a modular manufacturer we depend on work from many sectors including federal contracts, state agencies, local school districts, and the private sector. However, this expansion will likely eliminate multiple potential sectors by forcing us to meet these requirements for all work done in our factory or simply stop pursuing projects where this would apply. It is safe to say the result will be lost revenue and lost jobs at our factory at a minimum.

Comment from Allgaier, Allison - Phoenix Modular Elevator

- **Agency** Wage and Hour Division
- **Posted** May 11, 2022
- **ID** WHD-2022-0001-27857

As a construction industry contractor directly affected by Davis-Bacon Act prevailing wage regulations, I write to the U.S. Department of Labor's Wage and Hour Division in response to the above-referenced proposed rule published in the Federal Register on March 18, 2022, at 87 Fed. Reg. 15698. I am extremely concerned about the negative impact this proposal will have on my business, the construction industry, government officials procuring public works construction contracts and hardworking taxpayers across the nation.

The rule's expansion of existing and new DBA regulations to additional prefabrication work, green energy construction, additional demolition work, improvements to private projects with government leasing, certain construction materials transportation, flaggers, surveyors and truckers will increase the regulatory burden and costs for new industries and types of construction projects typically not subjected to DBA regulations.

The rule also fails to fix and even exacerbates the WHD's flawed methodology and use of inaccurate wage data to establish a government-determined wage and benefit rate reflecting local standards. The proposal's changes, including returning to the "three-step process," cross-consideration of metropolitan and rural wage data, and counting "functionally equivalent" variable rates together, are likely to further distort the accuracy of WHD wage determinations - a process that is already deeply flawed. The DOL should abandon these changes to avoid exacerbating this problem.

The proposed rule is also a missed opportunity for true reform of DBA prevailing wage regulations. The proposal refuses to adopt BLS wage surveys and methodology, which use scientific statistical sampling techniques, to establish more accurate prevailing wage rates in a market. The proposed rule does not consider or seek to adopt the use of BLS data and methodology to improve its flawed wage determination process, yet it is willing to utilize BLS data for wage increases. Additionally, the lack of transparency around proper classification of workers under wage determinations is not addressed. The DOL should require that current collective bargaining agreements containing union work practices be published alongside wage determinations whenever union rates prevail in the WHD's wage determination process.

I am extremely concerned about the impact of the additional red tape, increased regulatory costs and broader adoption of nonmarket and nonlocal rates of compensation in this proposal on my business, the construction industry as a whole, government procurement officials and taxpayers. The DOL should instead be working to create opportunities for more industry small construction businesses and reduce inflationary pressures and needless costs harming the industry so we can help complete more infrastructure projects and spend taxpayer dollars wisely.

For the reasons outlined above, I request that the DOL immediately withdraw this proposed rule and consider commonsense and effective alternatives to modernize and reform deeply flawed Davis-Bacon Act regulations.

Thank you for the opportunity to comment on this matter.

[Comment from The Pacific Companies](#)

- **Agency** Wage and Hour Division
- **Posted** May 13, 2022
- **ID** WHD-2022-0001-29640

Our company, The Pacific Companies, develops and owns affordable housing across the western United States. We have completed approximately 200 projects over the past 20+ years, many of which have been financed with federal funding subject to the Davis-Bacon Act ("DBA"). The proposed revisions to the DBA will depress the construction of affordable housing. In a time where there are vast shortages of critically needed affordable homes, it is unbelievable to me that this Administration would impose new regulations that will drive up the cost of construction. Specifically, the proposed expansion of DBA to off-site modular construction will substantially eliminate the use of this technology which is currently helping facilitate construction of projects in rural areas where labor is more scarce and costs can be higher. Modular construction is also saving local, state and federal affordable housing financing resources, which allows more units to be built with the same amount of funding through lower construction costs. By imposing DBA wages on modular factories, more

resources will be needed to pay for these higher costs, which means that fewer affordable homes will be built overall. Additionally, there are many benefits to workers in modular factories that do not exist for on-site workers, such as a stable work environment that isn't subject to weather delays or changing locations, a safer and more controlled worksite, and construction methodologies that are physically easier for the worker to handle. It is simply not justifiable to import a site-based wage scale into a factory environment. Finally, any expansion of higher wages by changing the methodology of determining the wage rates will drive up costs and reduce production. The affordable housing sector already faces many headwinds, such as disrupted supply chains, labor shortages, massive inflation and higher interest rates. The last thing we need to do our job effectively is even higher costs driven by an expansion of DBA. To be clear, if these specific changes to DBA are implemented, we will cease using federal funding that triggers DBA for the construction of affordable housing, and we will shift our business to producing market-based housing or commercial developments. For an administration that claims to support the construction of affordable homes, these changes to DBA are not the way to demonstrate that.

[Comment from Emmons, Stuart](#)

- **Agency** Wage and Hour Division
- **Posted** May 12, 2022
- **ID** WHD-2022-0001-28833

I am an architect who has significant experience in modular construction, and have spent my career trying to get people in need off our streets in the United States and into stable housing - supported if necessary. We are WAY behind in housing - and modular housing is absolutely one of the directions we should be pursuing. Davis Bacon wages should not be in modular factories. These wages were intended for on site construction work as they always have been. Davis Bacon wages in modular factories are unfair and completely at odds with the goals to increase housing production. We all need to work together to make affordable housing affordable, and address our housing crisis together to make real progress. We in the modular housing industry are working hard to make a difference.

[Comment from Garcia, Mitzi - Modular Solutions, Ltd.](#)

- **Agency** Wage and Hour Division
- **Posted** May 11, 2022
- **ID** WHD-2022-0001-27701

Modular Solutions, Ltd has been a federal GSA contractor for over 20 years. As a small minority owned business every employee wears many hats, and davis bacon paperwork is a very large consumption of time allocation for a small business. We have been successful as a federal contractor by utilizing the walsh-healy "off-site" for our manufacturing determination. Any federal work on the actual federal work place is easy to track as employees are assigned to one job and one site away from the plant. Our team has always been very good at tracking this separation. As a small business, we sell to private and federal agencies. With the current labor shortages we are utilizing a hands on approach to training our employees in the plant.

The documentation that davis bacon requires would cause significant burden, and add substantial cost to the manufacturing process and projects we propose to the federal agencies. We have provided over \$30MM in federal projects since our company was formed in 1996, and the balance of factory labor vs. on site labor is easy to track. In the plant our staff are multi-tasking all day long, the depth of paperwork it would take to ensure 100% accurate reporting of davis bacon wages for "off-

site" manufacturing team would cause a huge hardship on our small business.

Please take this consideration, for small manufacturers everywhere that have cross trained employees that do multiple functions during the day on multiple projects. An employee might be on a federal project for 1 hour a day or 10 hours, depending on current mix of private/public work force. Most of the employees will bounce from station to station on any given day, and documentation of which project they worked on and which project is federal would be a huge undertaking that may cause our small minority firm to take a second look at doing any federal work.

Comment from Rasmussen, Alan - Modern Building Systems

- **Agency** Wage and Hour Division
- **Posted** May 13, 2022
- **ID** WHD-2022-0001-29600

To Whom It May Concern,

My name is Alan Rasmussen and I represent the third generation of our 50 year old, small family owned business, Modern Building Systems. We are located in Aumsville, Oregon and employ about 150 people at our commercial modular manufacturing company. We serve many varied industries and clients but one of our core industries is public schools and Headstart facilities. Utilizing off site construction we have been able to provide custom permanent building space solutions to education clients that face shoestring capital facility budgets. Allowing them to reduce crowding and provide better educational opportunities to our young people.

Listen here: https://www.youtube.com/watch?v=HYV_4KmESXU&t=38s
and here <https://www.youtube.com/watch?v=PryVEQiyfcw>

Of how we help state and federally funded clients stretch their capital budgets.

This proposed CFR revision will further make it difficult for these entities to be able to expand faster, have new more energy efficient buildings, and utilize modular construction which is a more green building technique.

This will happen because you will be needlessly and incorrectly making it more costly to build with offsite construction.

This doesn't even take into account the costly administrative burdens to our small business.

We urge that this proposed regulation be canceled! And if must be considered it should be legislatively with Congressional oversight. This proposal is a significant expansion of the current rules, not a new interpretation of existing rules.

Thank you for your time and consideration.

Sincerely,
Alan Rasmussen

Comment from EVstudio Architecture and Engineering

- **Agency** Wage and Hour Division
- **Posted** May 10, 2022
- **ID** WHD-2022-0001-26695

I strongly oppose the legislation to expand the Davis Bacon regulations to offsite manufacturing of buildings because, quite simply, offsite manufacturing is clearly manufacturing and not construction. It would no sooner apply to the fabrication of buildings offsite as it would the fabrication of any other building components. It's inappropriate to compare offsite manufacturing with construction because the nature of the jobs and working environment are so different. Please don't put manufacturing jobs in the US at risk by not understanding this crucial distinction.

Comment from Autovol

- **Agency** Wage and Hour Division
- **Posted** May 10, 2022
- **ID** WHD-2022-0001-27353

As a small business owner, the expansion of Davis Bacon rates to offsite construction that will create an administrative hardship will have a negative consequences such as higher cost for construction resulting in less affordable housing being possible to supply and my company having to decline bidding on future federal work. Our housing shortage problem across the country is in a crisis stage now, it doesn't make sense to expand Davis Bacon to offsite locations and take away a valuable supply resource for affordable housing.

Comment from Modular Elevator Manufacturing, Inc.

- **Agency** Wage and Hour Division
- **Posted** May 10, 2022
- **ID** WHD-2022-0001-27319

I am writing on behalf of Modular Elevator Manufacturing Inc. We are a small business located in the Los Angeles vicinity, and manufacture modular commercial elevators. We employ approximately 15 (mostly minority) factory workers and in if we had to pay Davis Bacon wages, there is no doubt, it would make us uncompetitive and resulting in closing our doors. All those that currently work for us would be put out of work, till other work was found. As a company that provides very good benefits, two weeks vacation, sick days, holiday pay, 401K, training, etc. it would be a shame to see our business go away.

We respectfully request that the requirement for Davis-Bacon wages be kept to the on site trades.

Comment from Nadler Modular

- **Agency** Wage and Hour Division
- **Posted** May 10, 2022
- **ID** WHD-2022-0001-27229

As a time when inflation is sky high and it's near impossible to obtain products and all [I] hear from clients is 'oh we can't afford that you want to add a tremendous cost.' You will be driving all the small business such as myself out onto the street.

Comment from Estep, William – Parkline, Inc.

- **Agency** Wage and Hour Division
- **Posted** May 10, 2022
- **ID** WHD-2022-0001-26652

As the President of a small business, Parkline Inc., located in WV and TX, this expansion of Davis Bacon to modular offsite construction will create a significant administrative effort and will create challenges to locally manage, hire, maintain and train our skilled employees. Also, the skills and wages for factory based work are often quite different than one would encounter in the field / site construction. These markets for industrial and infrastructure modular buildings are highly competitive and already incur high shipping /transportation costs to get a modular building to site. This change in wage structure could lead to a lack of competitiveness and therefore result in local market layoffs of employees at our two manufacturing sites.

I am not an expert in law or in Davis Bacon overall, but it would seem that this type change is not an interpretation of existing rules, but rather a far reaching expansion and therefore should be subject to legislation by Congress.

Comment from Lawrence, Eric

- **Agency** Wage and Hour Division
- **Posted** May 12, 2022
- **ID** WHD-2022-0001-28340

I believe this is the single biggest threat to industry growth ever! At a time when inflation is high and housing inventory is low, it makes zero sense to force a 90-year old construction law onto the modular industry. As an employee of a small modular business, the expansion of Davis Bacon rates to offsite construction will create an administrative hardship leading to one of two outcomes – higher cost for construction or the company I work for declining to bid on future federal work. Given the shortage of available housing and high inflation, it doesn't make sense to expand Davis Bacon to offsite locations and take away a valuable resource for affordable housing solutions. Additionally, it will be impossible to impose traditional on-site construction rates to work performed in a factory as the tasks, skill set, and risk profiles are different. This proposal is a significant expansion of the current rules, not a new interpretation of existing rules. These changes should be done legislatively with Congressional oversight.

Comment from Hale, John

- **Agency** Wage and Hour Division
- **Posted** May 10, 2022 and May 13, 2022
- **ID** WHD-2022-0001-26741 and WHD-2022-0001-29196

As an employee in the modular industry for over 30 years, I find the use of Davis Bacon Wages to be highly detrimental to our business. I recently saw an opinion from the NJ Department of Local Government that from my understanding the NJ AG found not be applicable. It was targeted for duct work assembled off site.

Off-site, modular, prefabricated or whatever you want to call it has been in use for many years. Where does it stop? Almost all building components have some kind of assembly. A partial list are plumbing and electrical fixtures, cabinets, trusses, sprinkler piping, HVAC units, duct work, structural panels and more.

Just because a small group is not competitive in the market place doesn't mean legislation needs to change for them!!! This is about thousands of jobs and families that will be affected. STOP THE NONSENSE AND KEEP OUR JOBS!!!

A return to that "30 percent rule" for setting prevailing wage rates. Currently, if more than 50 percent of wage survey respondents report the same rate, DOL uses that rate as the prevailing wage. Under the proposed rule, DOL would be allowed to use a "predominant" rate of at least 30 percent.

According to a 2011 GAO report, only 12% to 14% of the construction workforce is covered by union contracts, yet 63% of all Davis-Bacon rates are Union rates. Thirty percent should absolutely not be considered an acceptable level of response to determine a "prevailing" rate. BLS scientific survey methods should be utilized to eliminate redundancy of the Davis-Bacon wage survey and to truly determine prevailing rates for both wages and benefits.

Enforcing by "operation of law," essentially eliminating the requirement to publish specific Davis-Bacon wage determinations in project bid and contract documents.

This puts too great a burden on contractors to navigate the myriad of wage decisions to determine if prevailing rates are to be paid and if so, which specific set of rates will apply. The lack of clarity and uncertainty that will result from this rule will certainly cause great hardship for many contractors. The current requirement to clearly state when prevailing wages are required and posting the specific wage decision in bid documents should be maintained as a requirement to provide clear and concise guidance on compliance with DOL requirements.

Revision of the definition of "site of the work" to include prefabricated components and delivery of products.

This will expose contractors to frivolous wage and hour violations due to the complexity and lack of clarity in the DOL regulations.

I strongly oppose these proposed changes as they would place additional burdens on contractors, drastically reduce clarity on compliance with Davis-Bacon regulations, further disenfranchise merit-shop employers in the wage survey process, and unnecessarily increase costs on taxpayer-funded projects.

Comment from Greenfield, Bruce

- **Agency** Wage and Hour Division
- **Posted** May 10, 2022
- **ID** WHD-2022-0001-27191

Given the shortage of available housing and high inflation, it doesn't make sense to expand Davis Bacon to offsite locations and take away a valuable resource for affordable housing solutions. My clients appreciate the benefits of modular building, which speeds their delivery to market for market rate housing, work force housing, affordable housing, senior living and hotel projects. I am concerned that increasing costs and regulations will have a detrimental effect on the housing supply overall, and our clients activity to develop housing. They don't need any more costs added to their projects at this time. This will definitely impact our business and reduce our workload.

Comment from Neeman, Jeffrey

- **Agency** Wage and Hour Division
- **Posted** May 10, 2022
- **ID** WHD-2022-0001-27230

As a minority owned small business owner, the expansion of Davis Bacon rates to offsite construction will create an administrative hardship leading to one of two outcomes – higher cost for construction or my company declining to bid on some future federal work.

Comment from Parks, Jennifer

- **Agency** Wage and Hour Division
- **Posted** May 11, 2022
- **ID** WHD-2022-0001-28208

I strongly oppose the proposed rule to apply the Davis-Bacon rates to offsite work. As a small business owner, it will be impossible to impose traditional on-site construction rates to work performed in our factory as the jobs, skills, environment and risks are different. The expansion of Davis-Bacon rates to offsite construction will create an administrative hardship leading to a drastic increase in cost for our product. Should this proposed rule succeed my company will be forced out of the ability to bid on federal work. Please reconsider updating the Davis-Bacon application to offsite federal work. Thank you.