



May 17, 2022

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, DC 20210

Submitted via regulations.gov

RE: Davis-Bacon and Related Acts; Department of Labor Notice of Proposed Rulemaking Updating the Davis-Bacon and Related Acts Regulations; RIN 1235-AA40; WHD-2022-0001

Dear Ms. DeBisschop,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 230 national organizations to promote and protect the rights of all persons in the United States, and the 10 undersigned organizations, we write regarding the Department of Labor's Notice of Proposed Rulemaking (NPRM), which seeks to update and modernize regulations implementing the Davis-Bacon Act and the Davis-Bacon Related Acts ("Davis Bacon and Related Acts" or "DBRA") at 29 C.F.R. Parts 1, 3 and 5.

Public policy ought to ensure that workers receive decent and just remuneration for their labor and enjoy strong protections against unlawful workplace actions. Work undertaken with federal funds should preserve local wage standards and strengthen local economies. And taxpayer dollars should shore up a high road economy built on good jobs for all working people. We believe the proposed updates and reforms set out in the NPRM will help achieve these important objectives, by promoting more accurate, robust, timely, and fair prevailing wage determinations and strengthening DBRA compliance and enforcement. Workers, responsible contractors, and communities alike will benefit from the proposals. Accordingly, our organizations support the Department's important and long overdue update of the DBRA rules.

Alignment with Local Prevailing Wages

The Department's proposals related to the prevailing wage determination process will better ensure that wages for covered classifications on federally funded and assisted construction projects align with the wages that actually prevail locally for such work. The Davis-Bacon

Officers

Chair

Judith L. Lichtman
National Partnership for
Women and Families

Vice Chairs

Derrick Johnson
NAACP
Thomas A. Saenz
Mexican American Legal
Defense and Educational Fund

Secretary

Fatima Goss Graves
National Women's Law Center

Treasurer

Lee A. Saunders
American Federation of State,
County and Municipal Employees

Board of Directors

Gloria L. Blackwell

AAUW

Ray Curry

International Union, UAW

Jocelyn Frye

National Partnership for
Women and Families

Jonathan Greenblatt
Anti-Defamation League

Mary Kay Henry
Service Employees International Union

Damon Hewitt

Lawyers' Committee for
Civil Rights Under Law

Sherrilyn Ifill
NAACP Legal Defense and
Educational Fund, Inc.

David H. Inoue
Japanese American Citizens League

Benjamin Jealous
People for the American Way
Virginia Kase Solomon

League of Women Voters of the
United States

Samer E. Khalaf
American-Arab
Anti-Discrimination Committee

Joni Madison
Human Rights Campaign

Marc Morial
National Urban League

Janet Murguía
UnidosUS

Christian F. Nunes
National Organization for Women

Rabbi Jonah Pesner
Religious Action Center
of Reform Judaism

Rebecca Pringle
National Education Association

Lisa Rice
National Fair Housing Alliance

Anthony Romero
American Civil Liberties Union

Liz Shuler
AFL-CIO

Fawn Sharp
National Congress of American Indians

Maria Town
American Association of
People with Disabilities

Randi Weingarten
American Federation of Teachers

John C. Yang
Asian Americans Advancing Justice |
AAJC

President and CEO
Maya Wiley

Act aims “to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area” and acts “as a minimum wage law designed for the benefit of construction workers.”¹ Absent meaningful and robust prevailing wage requirements, contractors — both within and outside affected localities — would be encouraged to gain competitive advantage by lowering wages in order to keep their total bids low. It would also create the anomalous situation in which taxpayer dollars were used to drive down living standards, rather than raise them. This result is completely at odds with the purpose of the DBRA, at the expense of workers, responsible contractors, and local communities.

We believe that the updates and revisions to 29 CFR Part 1 (Procedures for Determination of Wage Rates) that we note below will improve the prevailing wage determination process, better effectuating the purpose of the Davis Bacon and Related Acts, by:

- **Appropriately aligning the wage selected with actual wages paid to significant shares of workers in covered job classifications:**

The Department proposes to restore a three-step prevailing wage determination process it used from 1935 until 1983. Under that system, prevailing wage rates for covered classifications were based, first, on the actual rate paid to a majority of workers in a job classification. If no single wage was paid to a majority of workers, the prevailing wage was based on the rate paid to a plurality of workers in the classification. If no single wage was paid to at least 30 percent of workers, the prevailing wage was based on a weighted average of wages paid to all workers in the classification.

The Department eliminated the three-step rule in 1982, despite its historic roots and longstanding use, and in doing so elevated weighted averages as the default backup where there was no majority rate. And, as the Department notes, over time this regime of “weighted averages” has become the predominant means of wage determination even though the rates so generated do not reflect wages paid to substantial shares of workers and, in fact, may not be rates actually paid to any workers in covered classifications. In addition, reliance on weighted averages creates the potential for a single employer’s rates that are exceptionally high or exceptionally low having outside influence in determining the prevailing wage, a result completely at odds with the purpose of the DBRA. The Department’s proposed restoration of the three-step rule as the second step in the wage determination process comports with the longstanding understanding of the term “prevailing” as “predominant” or “most frequent” and is consistent with the interpretation of “prevailing” as the “most widely paid rate.”² Restoration of the three-step rule is consistent with the purpose, language, and history of the Davis-Bacon Act and its implementing regulations and will end the anomalous results generated by weighted averages.

- **Updating wage determinations periodically between surveys to more accurately reflect current pay rates for covered classifications:**

¹ 87 FR 15698, citing *Universities Research Ass’n, Inc. v. Coudu*, 450 U.S. 754, 773 (1981) and *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954).

² 87 FR 15703

As the Department indicates, it endeavors to conduct wage determination surveys every three years, but in practice has often been behind schedule. As a result, a large share of published prevailing wage determinations used in bidding processes do not accurately reflect the wages and benefits currently prevailing for local construction workers in covered classifications. This problem almost uniquely applies to wage determinations not based on collectively bargained rates, since DBRA regulations allow for periodic updating of wage determinations as bargaining agreements are updated. A March 2019 DOL Office of Inspector General (OIG) review of wage determinations found that while 97 percent of collectively bargained rates were less than five years old, only 46 percent of non-bargained rates had been collected during that period. Moreover, 44 percent of non-bargained rates were six to ten years old, compared with only two percent of union rates.³ The Department's common-sense proposal to address this problem by relying on the Bureau of Labor Statistics Employment Cost Index to adjust non-collectively bargained rates that are more than three years old⁴ will better preserve local wage standards and alleviate the burdens out-of-date determinations place on workers and contractors alike. This change is particularly important for workers in states where union density is low — including southern states, which account for almost 60 percent of all Black workers. In Florida and Texas, union density is 6.5. and 6.1 percent, respectively, and these two states contain nearly 30 percent of the nation's Latino workers.⁵

- **Relying on additional, reliable information sources for DBRA wage determinations:**

We believe that the Department's proposal to allow the Wage and Hour Administrator to adopt state or local wage determinations as the Davis-Bacon prevailing wages under certain circumstances⁶ can improve the accuracy, efficiency, and reliability of wage determinations, in furtherance of the DBRA's purpose. Adoption of appropriate state and local prevailing rate determinations takes advantage of the expertise and resources of states and localities that, in the administration of their own prevailing wage laws, often conduct more frequent surveys than DOL and enjoy relationships with stakeholders that may facilitate broader contractor participation and create greater efficiencies. That said, DOL should not adopt such rates if the state and local rates are lower than the existing determination. Authorizing the Department to adopt state and local wage determinations, where appropriate, will also minimize needless duplication of efforts and reduce confusion among contractors and workers alike when projects are covered by both the DBRA and state or local prevailing wage requirements. This approach can also help facilitate more timely determination processes, which are beneficial to contractors, workers and affected communities.

Protecting Workers and Contractors

The Department's proposals to improve clarity and enforcement of DBRA requirements, which are well within its authority to offer, will protect workers as well as contractors who act lawfully. The construction

³ "Better Strategies Are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates," *U.S. Department of Labor Office of Inspector General*. March 29, 2019. <https://www.oversight.gov/sites/default/files/oig-reports/04-19-001--Davis%20Bacon.pdf>.

⁴ 87 FR 15716

⁵ "State of Working America Data Library," *Economic Policy Institute*, accessed May 11, 2022. <https://www.epi.org/data>.

⁶ 87 FR 15709

industry is noncompliant with wage and hour laws on a widespread basis.⁷ A 2009 landmark study measuring the incidence and type of wage violations experienced by low-wage workers in New York, Chicago and Los Angeles found high rates of wage theft among surveyed construction workers: In the week preceding the survey, 10.5 percent were paid less than the minimum wage, 66.1 percent did not receive overtime pay they had earned, and 65.5 percent were required to work off-the-clock with no pay.⁸ And a recent analysis of \$3 billion in wage theft recoveries between 2017 and 2020 featured sector-specific case studies, including multi-million-dollar recoveries from a major construction contractor in Washington, DC that had unlawfully misclassified 500 electrical workers as independent contractors, and another contractor in California that had engaged in numerous unlawful wage practices affecting more than 1000 employees.⁹ These lost wages are devastating for construction workers and their families. Pervasive wage theft also reduces tax revenue¹⁰ and makes it difficult for contractors who treat their workers lawfully to compete.¹¹ While some states have robust enforcement programs for their own prevailing wage laws, many do not, making federal enforcement essential.¹²

The proposed rule seeks to respond to widespread wage theft by promoting compliance with DBRA prevailing wage requirements with increased clarity at the front end. In particular, it requires covered contracts to state that independent contractors are also entitled to the prevailing wage, strengthens record-keeping requirements, and clarifies that DBRA requirements apply by operation of law and are binding on contractors regardless of whether contracting agencies erroneously omit such contractual requirements. It also includes essential provisions to strengthen backend enforcement of violations to better protect workers, including retaliation protections, strengthened procedures for cross-withholding to ensure recovery of back wages, and adoption of a strong and uniform standard for contractor debarment.

The Department's proposal to these provisions to enhance compliance and enforcement is well within its delegated authority to "prescribe reasonable regulations" for the Davis-Bacon Act, and to "prescribe appropriate ... regulations ... with respect to the compliance with and enforcement of such labor standards" including the Davis-Bacon Act.¹³

Employee Misclassification and Up-the-Chain Liability

⁷ "Low Wage, High Violation Industries," *U.S. Department of Labor Wage and Hour Division*, accessed May 3, 2022. <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries>.

⁸ Annette Bernhardt et al., "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities," *National Employment Law Project*. September 21, 2009. Pgs. 31, 34, 36. <https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

⁹ Ina Mangundayao et al., "More than \$3 billion in stolen wages recovered for workers between 2017 and 2020," *Economic Policy Institute*. December 22, 2021. Pgs. 6–8. <https://files.epi.org/uploads/240542.pdf>.

¹⁰ Nathaniel Goodell and Frank Manzo IV, "The Costs of Wage Theft and Payroll Fraud in the Construction Industries of Wisconsin, Minnesota, and Illinois: Impacts on Workers and Taxpayers," *Midwest Economic Policy Institute*. January 14, 2021. Pgs. 13–15. <https://midwestepi.files.wordpress.com/2020/10/mepi-ilepi-costs-of-payroll-fraud-in-wi-mn-il-final.pdf>.

¹¹ Andrew Elmore and Muzaffar Chishti, "Strategic Leverage: Use of State and Local Laws to Enforce Labor Standards in Immigrant Dense Occupations," *Migration Policy Institute*. March 2018. https://www.migrationpolicy.org/sites/default/files/publications/StateLaborStandardsEnforcement_FinalWeb.pdf.

¹² Celine McNicholas et al., "Two billion dollars in stolen wages were recovered for workers in 2015 and 2016—and that's just a drop in the bucket," *Economic Policy Institute*. December 13, 2017. Pg. 3. <https://files.epi.org/pdf/138995.pdf>.

¹³ 5 U.S.C. § APP. 1 REORG. PLAN 14 1950.

The Department’s proposed update clarifies and strengthens the applicability of DBRA protections to all laborers and mechanics on covered projects, regardless of employment classification. This will underscore employer accountability throughout webs of contracting arrangements and across corporate structures, and will boost compliance, reduce unfair competition, and help ensure that workers are paid what they are owed. The proposal reiterates that the term “employed” covers all individuals who are working as laborers or mechanics on covered projects, regardless of how their employers classify them. It includes language affirming up-the-chain liability of prime contractors and/or subcontractors for unpaid wages of lower-tier subcontractors. And it contains an inclusive definition of “prime contractor,” ensuring that any person or entity with all, or substantially all, of the responsibility for overseeing the contract — including controlling shareholders — are accountable for following the law.

Reinforcing that all workers performing work as laborers and mechanics on covered projects enjoy DBRA prevailing wage protections, regardless of their classification, recognizes the realities of the construction industry and its high incidence of payroll fraud, especially in the non-union sector. Misclassification of employees as independent contractors and other fraudulent payment practices are rife in construction, at the expense of workers, responsible contractors, and taxpayers. The problem of misclassification is so pervasive in construction that it “provide[s] a competitive advantage to those who do not play by the rules.”¹⁴

- According to a 2020 National Employment Law Project analysis of misclassification studies by multiple states, at least 14 percent of construction employers in Maine, Massachusetts, and New York misclassified employees, while the estimate for Minnesota ranged from 15-to-30 percent. Misclassification in construction was higher than that among employers overall.¹⁵
- A 2021 study by the Midwest Economic Policy Institute found that significant shares of the construction workforce were misclassified or paid off the books in Wisconsin (10 percent), Minnesota (23 percent) and Illinois (20 percent). In addition to costing workers significant losses in wages and benefits, the researchers found that misclassification and other wage fraud by unscrupulous contractors cost the three states more than \$360 million annually in lost tax revenues.¹⁶
- In a typical month in 2017, the share of the construction workforce that was misclassified as independent contractors or working “off-the-books” ranged from 12.4 percent to 20.5 percent, increasing to between 13.0 percent and 25.6 percent during peak months of industry employment. The estimated costs to workers in lost overtime and premium pay ranged from \$811 million to \$1 billion, with associated losses in workers compensation, unemployment insurance, Social Security and Medicare contributions, along with federal and state income taxes even larger.¹⁷

¹⁴ Mark Erlich, “Misclassification in Construction: The Original Gig Economy,” *ILR Review*. November 2020. Pg. 25. https://lwp.law.harvard.edu/files/lwp/files/erlich_ilr_final_article_11.28.20.pdf.

¹⁵ “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries,” *National Employment Law Project*. October 2020. Pgs. 4-5. <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>.

¹⁶ Goodell and Manzo

¹⁷ Russell Ormiston, et. al., “An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry.” *Institute for Construction Economic Research*. January 2020. <https://faircontracting.org/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf>. See generally, National Alliance for Fair Contracting, “Stop Worker Misclassification.” <https://faircontracting.org/stop-worker-misclassification>

- An estimated one-third of construction workers in southern states such as North Carolina and Texas have been misclassified.¹⁸
- Misclassification exacts a special toll on workers of color who “are overrepresented in misclassification-prone construction [and certain low-wage sectors] ... by over 36 percent.”¹⁹
- Researchers at the UC Berkeley Center for Labor Research and Education recently reported that families of construction workers are 26 percent more likely than all working families to rely on one or more of the five largest means-tested safety net programs to get by, meaning that taxpayers help to shoulder the costs of payroll fraud in construction:²⁰

Relatedly, reaffirming up-the-chain liability for DBRA violations is important to promote self-policing of compliance, and to ensure that workers have appropriate recourse when they have been cheated, regardless of which entity is directly responsible for DBRA violations. Large-scale construction is an inherently fissured operation, with multiple specialized subcontractors retained to complete discrete aspects of a project.²¹ Competition for these subcontracts can be intense, as are pressures to gain an edge by cutting corners on labor costs. States with their own prevailing wage laws often provide for up-the-chain liability. And several states have imposed up-the-chain liability for subcontractors’ violations in the private sector as well, including California, Maryland, Virginia, New York, and most recently in legislation just passed by the Illinois legislature.²² The proposed regulations strengthening and clarifying these longstanding principles of contractors’ liability throughout the contracting chain reinforce accountability in taxpayer funded construction and help ensure workers will receive the wages they have earned, consistent with the purpose of the Davis-Bacon and Related Acts.

Operation of Law

The Department proposes to state explicitly that DBRA requirements are effective “by operation of law” even when they have been erroneously omitted from a covered contract.²³ Contracting agencies sometimes omit DBRA requirements from covered contracts, which leads to confusion and time-consuming and potentially costly disagreement and litigation about the applicability of those requirements. Too often this lack of clarity means that workers on covered projects do not receive DBRA-

¹⁸ Mandy Locke and Franco Ordenez, “Taxpayers and Workers Gouged by Labor-Law Dodge,” *McClatchy Washington Bureau*. September 4, 2014. <https://www.mcclatchydc.com/news/nation-world/national/article24772648.html>.

¹⁹ Brian Chen, “Testimony before Pennsylvania Democratic Caucus Policy Committee on Policy Solutions to Independent Contractor Misclassification,” *National Employment Law Project*. November 15, 2021. <https://www.senatormuth.com/wp-content/uploads/2021/11/Brian-Chen.pdf>.

²⁰ Ken Jacobs et. al., “The Public Costs of Low-Wage Jobs in the Construction Industry,” *UC Berkeley Center for Labor Research and Education*. January 2022. <https://laborcenter.berkeley.edu/wp-content/uploads/2022/01/The-Public-Cost-of-Low-Wage-Jobs-in-the-US-Construction-Industry-FINAL.pdf>.

²¹ David Weil, “The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It,” *Harvard University Press*. 2014. Pgs. 99, 233-234.

²² See California, https://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=218.7.&lawCode=LAB. Maryland, <https://law.justia.com/codes/maryland/2018/labor-and-employment/title-3/subtitle-5/section-3-507.2>. Virginia, <https://law.lis.virginia.gov/vacode/title11/chapter1/section11-4.6>. New York, <https://www.nysenate.gov/legislation/bills/2021/s2766>. Illinois, <https://chicago.suntimes.com/business/2022/4/13/23024107/illinois-construction-wage-theft-bill-pritzker-labor>.

²³ 87 FR 15749

required prevailing wages on time or at all.²⁴ By making the operation of law requirement explicit, the proposed rule promotes consistency in payment of prevailing wages to covered workers and clarity for contracting agencies and contractors.

As the Department observes, requiring prime contractors to be aware of underlying statutory requirements, regardless of whether those requirements were erroneously omitted from the contract, is entirely consistent with traditional contract doctrines. Numerous administrative and judicial decisions have applied this principle in various DBRA disputes,²⁵ meaning prime contractors should already be on notice of its potential applicability.²⁶ The proposed regulation therefore provides useful clarity as to the applicable legal regime, reducing disputes about whether DBRA requirements apply in the absence of a specific contract term. Indeed, the proposed regulation is more favorable to contractors than the traditional operation of law doctrine, in that it provides that the prime contractor be reimbursed for any increases in wages resulting from incorporation of a contract clause or wage determination that occurs after award.²⁷ The Department's proposal to apply the operation of law provision only to prime contracts, not subcontracts, indicates the targeted approach of this rule. Prime contractors are frequently repeat recipients of federal funds, engage directly with the contracting agency, and may reasonably be expected to be aware of generally applicable legal requirements, such as the DBRA.

Anti-Retaliation Protections

Worker complaints are a crucial part of the Department's enforcement scheme.²⁸ But the risk of employer retaliation against employees who report or complain about wage theft or other labor rights violations "is high and pervasive."²⁹ Indeed, the fact that wage theft is so widespread deters complaints because it reinforces their futility and heightens the possibility of retaliation. The landmark 2009 survey discussed above found that, among all survey respondents, 20 percent reported they had experienced a serious workplace problem like discrimination, illegal pay practices, or dangerous working conditions in the previous year but had not complained because they feared doing so would cost them their jobs (51 percent), lead to a reduction in hours (10 percent), or make no difference (36 percent). Another 20 percent said they had complained about illegal working conditions (including pay violations) or attempted to form

²⁴ Ben Penn, "Labor's Infrastructure Wins Depend on Avoiding Problems of 2009," *Bloomberg Law*. November 9, 2021. <https://news.bloomberglaw.com/daily-labor-report/labors-infrastructure-wins-depend-on-avoiding-problems-of-2009>.

²⁵ See, e.g., *U.S. ex rel. D.L.I. Inc. v. Allegheny Jefferson Millwork, LLC*, 540 F. Supp. 2d 165, 176 (D.D.C. 2008) ("When such provisions are omitted from a *prime* contract, they do become part of the contract by operation of law, and the prime contractor is charged with constructive knowledge of Davis-Bacon's requirements."); *Appeal of BUI Const. Co. & Bldg. Supply*, ASBCA No. 28707, 84-1 B.C.A. ¶ 17183 ("the wage determination schedule and the Labor Standards Provisions were binding on appellant from the contract's inception, and their omission from the solicitation did not constitute a contract change, entitling appellant to an equitable adjustment in contract price."). These decisions were issued after the Supreme Court's decision in *Univs. Rsch. Ass'n, Inc. v. Coutu*, 450 U.S. 754, 761 (1981), suggesting, consistent with the Department's careful analysis, 87 FR 15750, that *Coutu* imposes no bar to the proposed rule.

²⁶ Trade publications already advise contractors to be proactive in determining whether a project is covered. See Kim Slowey, "The Dotted Line: Beefing up Davis-Bacon compliance," *Construction Dive*. March 30, 2021. <https://www.constructiondive.com/news/the-dotted-line-beefing-up-davis-bacon-compliance/597398>.

²⁷ 87 FR 15749

²⁸ David Weil, "Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters," *Comparative Labor Law & Policy Journal*. June 28, 2007. Vol. 28, pgs. 125, 136. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=996901.

²⁹ Laura Huizar, "Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation," *National Employment Law Project*. June 2019. <https://s27147.pcdn.co/wp-content/uploads/Retal-Report-6-26-19.pdf>.

a union — of these, 43 percent reported their employers retaliated against them for their actions.³⁰ In another survey of low wage workers in the Chicago metro area, 48 percent “reported experiences involving retaliation.” Notably, for those survey respondents, of the 24 percent who made a complaint to a government agency — as is typically necessary for DBRA enforcement — a much higher portion, 80 percent, experienced retaliation.³¹

Compounding this problem, the risk of retaliation tends to be greater for workers who are already in relatively vulnerable positions.³² These workers are also least likely to be able to withstand the consequences of retaliation, which can quickly escalate as lost pay leads to serious financial, emotional, and legal issues. As a result, the most vulnerable workers are especially deterred from complaining.³³ These disproportionately include workers with low incomes, women, people of color, people with disabilities, undocumented workers, and others who face systemic discrimination in the workplace and other areas of society and are less likely to have access to institutional power and knowledge.³⁴ The fear of retaliation limits the ability of an enforcement program driven largely by complaints and worker participation to function effectively and to reach the workers most likely to be exploited. Robust protection against retaliation is accordingly necessary for effective enforcement, and within the Department’s delegated authority. As the Department explains, effective enforcement requires worker participation, which is chilled by the threat of retaliation, a problem the new anti-retaliation provisions seek to remedy by providing make-whole relief, which until now has been unavailable.³⁵ The Wage and Hour Division, which conducts DBRA investigations, has expertise in enforcing the anti-retaliation provisions in numerous other labor laws.³⁶

At a minimum, an anti-retaliation protection would put workers in the same position had they not been retaliated against. The proposed regulation would provide for “make-whole” relief,³⁷ which is a good start. To be more effective, however, anti-retaliation protections should go further to account for financial losses that are more difficult to quantify, like fees and penalties for missed payments due to a loss of income, and non-financial harms such as harassment.³⁸ The Department has authority to prescribe such regulations under 40 U.S.C. § 3145 and Reorganization Plan No. 14 of 1950, and it should do so.

Harmonizing Debarment Standards

³⁰ Elmore and Chishti. Pgs. 12, 24–25.

³¹ Brittany Scott, “Challenging the Business of Fear,” *Raise the Floor Alliance & National Economic & Social Rights Initiative*. 2016. Pg. 11. <https://www.raisetheflooralliance.org/report>.

³² David Weil and Amanda Pyles, “Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace,” *Comparative Labor Law & Policy Journal*. January 2006. Vol. 27, pg. 59. https://www.researchgate.net/publication/267260153_Why_Complain_Complaints_Compliance_and_the_Problem_of_Enforcement_in_the_US_Workplace.

³³ Huizar, “Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation”

³⁴ Deborah L. Blake, “Retaliation,” *Minnesota Law Review*. July 21, 2008. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1166863.

³⁵ 87 FR 15746

³⁶ Jessica Looman, “Field Assistance Bulletin No. 2022-02: Protecting Workers from Retaliation,” *U.S. Department of Labor Wage and Hour Division*. March 10, 2022. <https://www.dol.gov/sites/dolgov/files/WHD/fab/fab-2022-2.pdf>.

³⁷ 87 FR 15747

³⁸ Huizar, “Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation”

The Department’s proposal to harmonize debarment standards under the DBA and the Related Acts would promote consistency in enforcement and clarity for the regulated community.³⁹ As the Department observes, its proposal fits within the Department’s long-established authority to adopt regulations governing debarment of Related Acts contractors.⁴⁰ While debarment is a powerful enforcement tool, its inconsistent use limits its effectiveness.⁴¹ Indeed, contractors that have violated labor laws, including DBRA requirements, frequently continue to receive federal contracts.⁴² In 2017, for example, federal agencies spent more than \$425 million on contractors found to have violated the DBA in 2016, according to U.S. Treasury and Labor Department records analyzed by the Center for Public Integrity.⁴³

The proposed rule seeks to impose more consistent consequences on truly bad actors by using the DBA’s “disregard of obligations” standard for all debarment cases, instead of the “aggravated and willful” standard from the current regulations implementing the Related Acts. There is no principled reason to employ two different standards for contracts that are otherwise subject to the same contractual requirements and, as the Department observes, frequently funded with both Davis-Bacon and Related Acts funding streams. The “disregard of obligations” standard is well developed in case law and the Department has experience enforcing it.⁴⁴ Crucially, this standard covers contractor behavior that is essential to compliance, but which may not be deemed “aggravated or willful,” such as failure to establish appropriate procedures to classify employee labor correctly and to ensure that lower tier subcontractors are in compliance.⁴⁵ As discussed elsewhere, misclassification of workers and failure to monitor subcontractors occur routinely and result in significant wage theft. Ensuring that this widespread and harmful behavior may subject contractors to debarment regardless of the federal funding stream will promote compliance and make enforcement more consistent.

The Department’s proposal to require a uniform three-year debarment period without early removal under the Related Acts to match the current requirements under the DBA will similarly promote clarity as to regulatory obligations and compliance. And the proposal to provide for debarment of responsible officers of both DBA and Related Acts contractors and subcontractors is consistent with existing law.⁴⁶ Making this authority explicit will promote robust enforcement, as illustrated by localities and states with similar provisions permitting principal debarment.⁴⁷

³⁹ 87 FR 15754

⁴⁰ See, e.g., *Janik Paving Constr., Inc. v. Brock*, 828 F.2d 84, 91 (2d. Cir. 1987); *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368, 372–73 (D.C. Cir. 1961).

⁴¹ Majority Committee Staff Report, “Acting Responsibly? Federal Contractors Frequently Put Workers’ Lives and Livelihoods at Risk,” *U.S. Senate Health, Education, Labor, and Pensions Committee*. December 1, 2013. Pg. 28.

<https://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf>

⁴² Ellen Nakashima, “Study: Contracts Given To Repeat Violators,” *The Washington Post*. May 7, 2002.

<https://www.washingtonpost.com/archive/politics/2002/05/07/study-contracts-given-to-repeat-violators/32a3521a-4177-4a2a-a0f5-a491fa8a6d7d>.

⁴³ Maryam Jameel, *Flawed System Lets Contractors Cheat Works on Federal Building Jobs*, NBC (Aug. 21, 2017),

<https://www.nbcnews.com/news/us-news/flawed-system-lets-contractors-cheat-workers-federal-building-jobs-n793736>.

⁴⁴ 87 FR 15755

⁴⁵ 87 FR 15755-56

⁴⁶ 87 FR 15757

⁴⁷ Karla Walter et al., “A How-To Guide for Strengthening State and Local Prevailing Wage Laws,” *Center for American Progress*. December 2020. <https://www.americanprogress.org/article/guide-strengthening-state-local-prevailing-wage-laws>.

All Construction Workers Benefit from Robust Prevailing Wage Rights and Protections, Including Workers of Color and Women Workers

Researchers studying the impacts of state prevailing wage laws (“little Davis-Bacon Acts”) have found strong and positive income effects for blue collar construction workers in prevailing wage states, with blue collar construction workers’ earnings increasing from 15.7 percent to 17.2 percent per year in states with strong or average prevailing wage laws. At the same time, because these laws result in little or no boost in salaries of managers or supervisors, they help reduce income inequality within the industry. Moreover, because wage premiums are greatest for blue collar construction workers whose incomes are lowest (18.8 percent for workers in the lowest 25th percentile of income compared with 16.4 percent for those in the top 10 percent), prevailing wage protections help reduce income inequality within the blue-collar construction workforce.⁴⁸

Other research finds that the wage premium Black (24 percent) and Asian-American (27 percent) blue-collar construction workers enjoy in states with prevailing wage laws exceeds that of White workers (17 percent). Latino workers, who are significantly over-represented in the blue-collar construction workforce relative to their overall labor force representation, experience a lower wage premium of only 10 percent — researchers attribute this difference to their concentration in residential construction, which is not as affected by prevailing wage laws. Because prevailing wage laws carry greater wage premiums for Black workers, wage gaps between Black and White non-Hispanic construction workers are lower in prevailing wage states than in non-prevailing states: Black workers in the latter are paid 74 cents to every dollar White construction workers receive, while Black workers in prevailing wage states earn 88 cents to every dollar White construction workers earn.⁴⁹

While some writers have suggested that prevailing wage laws depress Black workers’ participation in construction, more refined analyses have debunked these views. On the contrary, “given that racial and ethnic minority workers are more likely to live in low-income households, the Davis-Bacon Act contributes to people of color achieving middle-class incomes.”⁵⁰ A recent exhaustive statistical analysis using micro-data and two different methodologies across three different time periods concluded that “there is no consistent evidence supporting the hypothesis that state prevailing wage laws result in discriminatory outcomes.”⁵¹ And some research finds that strong or average prevailing wage laws

⁴⁸ Frank Manzo IV et. al., “The Economic, Fiscal, and Social Impacts of State Prevailing Wage Laws: Choosing Between the High Road and the Low Road in the Construction Industry,” *Illinois Economic Policy Institute and Smart Cities Prevail*. February 9, 2016. <https://illinoisepi.files.wordpress.com/2017/03/pw-national-impact-study-final2-9-16.pdf>.

⁴⁹ Jill Manzo, et. al., “State Prevailing Wage Laws Reduce Racial Income Gaps in Construction,” *Illinois Economic Policy Institute and Project for Middle Class Renewal*. February 28, 2018. Pgs. 5, 8. <https://faircontracting.org/wp-content/uploads/2018/03/ilepi-pmcr-prevailing-wage-reduces-racial-income-gaps-final-1.pdf>.

⁵⁰ Kevin Duncan, et al., “Building America with Prevailing Wage, The Davis-Bacon Act Delivers Good Middle-Class Jobs, a Stronger Economy, and the Best Value for U.S. Taxpayers,” *Illinois Economic Policy Institute*. April 14, 2017. https://illinoisepi.files.wordpress.com/2017/04/building-america-davis-bacon_final.pdf.

⁵¹ Dale Belman et. al., “The Effect of State Prevailing Wage Laws on African-American Employment in Construction,” *Institute for Construction Economics Research*. 2019. Pg. 16. <http://iceres.org/wp-content/uploads/2021/06/The-Effect-of-State-Prevailing-Wage-Laws-on-African-American-Employment-in-Construction-8-14-2019.pdf>

actually increase Black employment in blue collar construction jobs, while having “no discriminatory effect” on women’s employment.⁵²

Advocates representing a largely Latino construction workforce in Texas have also pointed to the crucial role up-the-chain liability plays in enabling these workers on covered construction projects to secure redress from prime and general contractors for wage theft committed by subcontractors. In the words of one local advocate: “In a conservative state like Texas, Workers Defense Project and other legal services organizations have brought successful claims for hundreds of thousands of dollars using Texas’ little Davis-Bacon Act.”⁵³ While some courts have found that the Davis-Bacon and Related Acts do not provide a private right of action, the regulations’ up-the-chain liability and proposed stronger anti-retaliation and enforcement provisions are important tools in protecting the rights of all workers on covered construction projects, especially workers most vulnerable to exploitation and abuse, to receive the pay and benefits to which they are entitled.

Conclusion

The Labor Department’s proposed update to its DBRA regulations will clarify and strengthen the rule by improving the wage determination process, providing anti-retaliation protections for workers, strengthening enforcement, and reaffirming up-the-chain liability within contracting chains. It will enhance the quality of construction jobs and ensure workers, responsible contractors, taxpayers, and local communities benefit from public construction. These regulations are important for all blue-collar construction workers, including women and workers of color. Combined with other Labor Department initiatives, particularly with respect to expanding apprenticeship opportunities for underrepresented communities,⁵⁴ the proposed updates will help ensure that blue collar construction work provides high quality jobs and builds thriving communities for all.

Thank you for your consideration of our views. Please contact Josh Boxerman, policy analyst, at boxerman@civilrights.org with any questions.

Sincerely,

The Leadership Conference on Civil and Human Rights
A Better Balance
Asian Pacific American Labor Alliance, AFL-CIO
Equal Rights Advocates
National Employment Law Project
National Employment Lawyers Association

⁵² Manzo IV et al., “The Economic, Fiscal, and Social Impacts of State Prevailing Wage Laws: Choosing Between the High Road and the Low Road in the Construction Industry.” Pg. 24.

⁵³ Nick Wertsch, “Prevailing Wage Laws and Bringing Back Accountability to the Contracting Chain,” *OnLabor*. June 3, 2021. <https://onlabor.org/prevailing-wage-laws-and-bringing-back-accountability-to-the-contracting-chain>.

⁵⁴ See, for example, the Department’s online dialogue with stakeholders to expand access to registered apprenticeship opportunities among underrepresented communities (<https://www.dol.gov/newsroom/releases/eta/eta20211116>), new funds to provide apprenticeship opportunities in non-traditional industries (<https://www.dol.gov/newsroom/releases/eta/eta20210910>) and new funding for states to expand and diversity registered apprenticeship programs (<https://www.dol.gov/newsroom/releases/eta/eta20210318-0>).

May 17, 2022
Page 12 of 12



National Taskforce on Tradeswomen Issues
National Women's Law Center
Oxfam America
Texas RioGrande Legal Aid
Workplace Fairness