

May 17, 2022

Jessica Looman
Acting Assistant Secretary
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Updating the Davis-Bacon and Related Acts Regulations [RIN 1235-AA40]

Submitted via www.regulations.gov

Dear Ms. Looman,

I appreciate this opportunity to provide comment on the proposed rule, “Updating the Davis-Bacon and Related Acts Regulations.”¹

The proposed rule would be a generational change in Davis-Bacon Act (DBA) regulation, including a significant increase in the portion of federal projects covered by DBA, an increase in the frequency of DBA wage level adjustments, an increase in enforcement activity, and a shift towards presuming that DBA applies even where it is not specified beforehand.

The combination of larger DBA wage adjustments and a higher volume of adjustments would almost certainly increase the cost of DBA mandates by billions of dollars per year. The economic and fiscal enormity of this effect is essentially ignored throughout the analysis in the proposed rule.

There is no doubt that the executive branch has an obligation to enforce DBA and related statutes per the direction of Congress. However, the executive branch has no obligation whatsoever to maximize the costs associated with DBA. Doing so when America’s tight labor market has become a significant factor in surging inflation further compounds the error.²

Flawed DBA Wage Determinations

A report published by The Heritage Foundation in 2017 found that the Department of Labor (DOL)’s Wage and Hour Division (WHD) survey methodology for determining wage rates under DBA led to substantially inflated costs:

“The first and largest problem is the WHD’s use of statistically unrepresentative surveys. Professional statistical agencies estimate wages by using representative samples achieved through random sampling. They then statistically extrapolate from these representative samples to the overall economy.

¹ “Updating the Davis-Bacon and Related Acts Regulations,” Proposed Rule, 87 Fed Reg. 15698 (2022), [RIN 1235-AA40].

² Alex Domash and Lawrence H. Summers, “How Tight are U.S. Labor Markets?” National Bureau of Economic Research *Working Paper* No. 29739, February 2022, <https://www.nber.org/papers/w29739>; Sarah Chaney Cambon and Gabriel Rubin, “Worker Pay and Benefits Grow at Record Pace, Pressuring Inflation,” *The Wall Street Journal*, April 29, 2022, <https://www.wsj.com/articles/us-employers-labor-costs-inflation-q1-2022-11651186023>.

“Absent a representative sample a survey indicates nothing about the economy. As Nobel Prize-winning economist James Heckman has noted, “Wage or earnings functions estimated on selected samples do not, in general, estimate population wage functions.” Any introductory statistics text will make the same point. Non-representative samples are not scientifically valid.

“They only provide information about those who respond to the survey—not the overall economy.

...

“The WHD sends surveys to every construction firm in a given region, and then bases Davis–Bacon wages on the responses to this “census.” This method will provide accurate wage figures but only if every business responds.

“However, most construction firms do not return Davis–Bacon surveys. The surveys require considerable time and effort to complete. The surveys also ask for information in a form that many construction companies do not track. For example, asking for wage rates using union job classifications that do not reflect the practices of non-union construction contractors. If a company does not respond to the survey, the WHD sends a follow-up letter. If that letter goes unanswered, the WHD ignores that company.

“This methodology leads to such low response rates that the WHD reduced its minimum data standards to wages for three workers from two companies. Too few employers responded to meet the old standard of data on six workers from at least three employers. Those employers who do respond tend to be those with large staffs. Unions also devote considerable effort to facilitate unionized employers completing and returning the surveys.

“Consequently, Davis–Bacon rates are based on neither a representative sample nor a universal census of construction workers. Instead, the WHD bases its estimates on a self-selected sample of large, unionized businesses. Only 14 percent of construction workers are covered by union contracts. Nonetheless, the GAO reports that 63 percent of Davis–Bacon rates are union rates.

“The Davis–Bacon survey is highly unrepresentative and, as a result, scientifically meaningless. Accurate prevailing-wage estimates cannot be made from non-representative samples. Davis–Bacon rates approximate actual prevailing wages only by chance.

...

The low response rates that make DBA surveys unrepresentative create a second problem. Even with a proper representative sample, WHD surveys too few workers to make statistically reliable estimates.

In general, averages in representative samples do not exactly match economy-wide averages. The power of statistical inference is that it allows researchers to estimate their margin of error. The sample may not exactly match the overall population, but researchers can determine how far off they are likely to be.

As sample size decreases, surveys become less accurate, and their margin of error increases. For example, a poll using a representative sample of 1,000 Americans has an error margin of ± 3.1 percent. A poll of 100 Americans has an error margin of ± 10.0 percent.

If sample sizes become too small, however, statisticians cannot even estimate the error margin. Statistical inference is based on the central limit theorem. The central limit theorem generally only applies to samples with at least 30 observations. Researchers cannot estimate how inaccurate smaller samples are.

The WHD primarily uses samples of fewer than 30 workers. The GAO reports that the WHD estimates only a quarter of Davis–Bacon rates on data from 29 or more workers. The WHD bases a greater proportion of rates (26 percent) on data from six or fewer workers.

...

“The WHD minimum data standards are observations on three workers from two employers. That minimum standard should be at least 30 randomly selected workers. The WHD’s existing methodology lacks statistical validity.”

...

“The WHD surveys are arguably so flawed that the Labor Department could be violating the law. The Davis–Bacon Act requires that

“every contract in excess of \$2,000, to which the Federal Government or the District of Columbia is a party, for construction...shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics. The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there.”

“The flawed WHD methodology produces DBA rates bearing little relation to prevailing construction wages. Employers paying DBA rates overpay some workers and underpay others—often by considerable amounts.

“Moreover, the WHD bases most DBA rates on surveys of workers in counties far removed from the work site. In many cases, these counties have little economic connection to the county where the work is performed.

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“In most cities, Davis–Bacon rates unnecessarily raise construction costs. In essence, the government hires four construction workers for the price of five. Construction workers fortunate enough to work on a federal project undoubtedly appreciate this premium. However, the Beacon Hill Institute estimates these inaccuracies inflate federally funded construction projects’ costs approximately 10 percent.

“Congress could build more infrastructure projects at no extra cost if the DOL used accurate wage determinations. This would enable the government to provide more public services and create an additional 30,000 jobs on federal construction projects. In addition, more jobs would be created on joint state-federal construction projects.

“The DOL has an obligation to estimate prevailing wages accurately. Overpaying some workers and underpaying others hurts both workers and taxpayers.”³

The report describes why utilizing wage data from the Bureau of Labor Statistics (BLS) would be a better approach:

“The Bureau of Labor Statistics exists to conduct scientific surveys of labor market conditions. Its methodology, accuracy, and data quality are internationally respected. The BLS already conducts two major surveys that estimate occupational wages and avoid the problems plaguing the WHD surveys:

- “The National Compensation Survey (NCS), which estimates benefits at the national level; and
- “The Occupational Employment Statistics (OES) survey, which estimates local occupational wages.

“Both the OES and the NCS have large sample sizes, are conducted in a timely manner, and are updated annually. The OES also surveys wages at the metropolitan (and non-metropolitan) statistical area levels, which means its estimates use only data from economically interrelated counties. Most importantly, the BLS takes several steps that make these surveys statistically representative.

...

“The DOL should calculate Davis–Bacon wages using BLS data. Unlike the WHD, the BLS uses a scientifically rigorous methodology. Furthermore, the WHD currently uses OES data to enforce two other prevailing-wage requirements: the Service Contract Act and the Foreign Labor Certification program. If the DOL wants accuracy, then the WHD should also use BLS data to calculate DBA rates.

“One of the main objections to using BLS data is that no single BLS survey provides all the data required by the Act. Instead, two BLS surveys estimate these statistics separately. The OES estimates MSA-level occupational wages. The NCS estimates pay and benefits at the national level. If DOL wants to use BLS data, it must reliably combine these surveys.

“Economists at the BLS have already developed a methodology doing this. The Federal Employee Pay Comparability Act (FEPCA) requires that the Office of Personnel Management (OPM) set federal pay using BLS data. As with the DBA, no single BLS survey provides the data needed to comply with the FEPCA’s mandates. The OES provides detailed data on local occupational wages. The NCS provides national data on how occupational pay varies according to “levels of work” that the OPM needs to calculate pay for different General Schedule (GS) grades.

“BLS staff economists developed a regression model combining OES local wage data with NCS data on how pay varies according to work levels. Their validation analysis showed the model works well and produces reasonably reliable estimates. The federal government currently sets its own employees’ pay by combining OES and NCS data with this model.

³ James Sherk, “Labor Department Can Create Jobs by Calculating Davis–Bacon Rates More Accurately,” Heritage Foundation *Backgrounder* No. 3185, January 21, 2017, https://www.heritage.org/sites/default/files/2017-01/BG3185_0.pdf.

“The DOL could use a similar model to estimate DBA prevailing wages much more accurately.”⁴

A report published by the Beacon Hill Institute in May 2022 reaches the same conclusions for the same reasons, and finds that these flaws inflate construction costs by 7.21%.⁵

We urge DOL to adopt the use of BLS data rather than DBA wage survey data for all wage determinations under the proposal.

An aspect of the proposed regulatory change would indeed involve utilizing BLS data to supplement DBA wage surveys. Yet this is done in a selective manner rather than using BLS data broadly to ensure a greater degree of accuracy:

To revise § 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on the Bureau of Labor Statistics Employment Cost Index. The mechanism is intended to keep such rates more current between surveys so that they do not become out-of-date and fall behind prevailing wage rates in the area.⁶

This selectivity is essentially explained as a fallback in case some wage rates are not updated for more than 3 years,⁷ and DBA wage surveys would remain the default in all other instances.

However, the DOL makes no attempt to explain why it uses BLS data for some purposes but not for others. The failure to give a reason for using BLS data sometimes and DBA wage surveys at other times is arbitrary and capricious. Further, because BLS data is more accurate than the data rendered by DBA wage surveys,⁸ DOL must provide justification for why the DBA wage surveys deserve continued primacy over BLS data. Without such an explanation, the choice to use DBA wage surveys over the more accurate BLS data is arbitrary and capricious, in violation of the Administrative Procedure Act.

Increasing Costs and Inflationary Pressures

There is a general consensus that the administration’s proposed changes would increase the cost of labor for infrastructure projects that receive federal funding and more closely mirror compensation rates at unionized firms.⁹ Indeed, the DOL itself estimates that updating DBA rates alone would lead to a significant average compensation increase across most of the classification rates:

⁴ Ibid.

⁵ William Burke and David Tuerck, “The Federal Davis-Bacon Act: Mismeasuring the Prevailing Wage,” The Beacon Hill Institute, May 16, 2022, <https://www.beaconhill.org/BHIStudies/2022/FINAL-BHI-DBA-2022-05-16.pdf>.

⁶ 87 Fed Reg. at 15764.

⁷ 87 Fed Reg. at 15717.

⁸ James Sherk, “Labor Department Can Create Jobs by Calculating Davis–Bacon Rates More Accurately”; and Government Accountability Office, “Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey,” GAO-11-152, March 2011, <https://www.gao.gov/products/gao-11-152>. While several of GAO’s recommendations were eventually implemented, Sherk’s subsequent analysis suggests there were still flaws with DOL’s DBA surveys and that BLS data was superior.

⁹ See Leslie Stout-Tabackman, “Significant Changes to Davis-Bacon and Related Acts Regulations Proposed,” *The National Law Review*, March 26, 2022, <https://www.natlawreview.com/article/significant-changes-to-davis-bacon-and-related-acts-regulations-proposed>; and AFL-CIO, “Biden Rule Will Raise Construction Workers’ Wages,” Press Release, March 11, 2022, <https://aflcio.org/press/releases/biden-rule-will-raise-construction-workers-wages>.

“Of the 172,088 pre-2019 SU key classification wage and fringe benefit rates, 75,495 were non-zero, and thus would be updated, possibly resulting in some transfers to workers (Table 8). On average, these non-zero fringe benefits would increase by \$1.43 per hour.

“Adding the required Davis-Bacon wage and fringe benefit rates together measures the required total compensation rate on DBRA projects. Due to updating old rates, 94,547 Davis-Bacon total compensation hourly rates would increase by \$3.65 on average.”¹⁰

One of the largest factors behind the expected DBA wage increase is the administration’s misguided choice to re-instate the so-called “30 percent rule” for determining whether a wage is considered prevailing,¹¹ making it much more likely that DBA rates will be based on those found at unionized work sites rather than a broader average for the area.¹²

The proposal asserts that the text of the DBA demands revival of the 30 percent rule. But this assertion does not hold up. The operative term at issue is “prevailing.” Based on ordinary usage of the word, it is improper to say that a wage applied to only 30 percent of people in a given area is “prevailing.”

The statutory language of DBA does not provide for a lower threshold of “prevailing.” Congress has had ample time to add lower thresholds for “prevailing” over the four decades since the 30 percent test was eliminated, either in general or as applied to specific legislation, and has consistently chosen not to do so. Thus, the lower 30 percent standard *contravenes*, rather than is required by, the statutory text. At an absolute minimum there is nothing within the DBA’s statutory language to demand that the DOL determine a lower threshold for “prevailing” in order to increase the reach of the DBA statute, which means that the invocation of the statutory text as a reason for reviving the 30 percent rule is arbitrary, in violation of the Administrative Procedure Act.

Nor does the 30 percent rule promote the DBA’s purpose, as the proposal asserts. The DBA does not create a general policy of subsidization for construction workers on federal projects, but rather serves to ensure that prevailing wages in a particular area are not lowered by federal projects in the area. Where there is no prevailing wage, the purpose of the DBA simply does not come into play.

The DOL’s analysis justifying the overturning of the 1982 rulemaking that eliminated the 30 percent rule is also flawed, and in a way that is especially problematic now. Part of the 1982 justification for eliminating the 30 percent rule was to rein in inflation, which was high at the time. The DOL states that utilizing the 30 percent rule would not have “any noticeable impact on overall national inflation,” disregarding the potential for runaway inflation in the affected sector or affected localities. The DOL analysis references 1.2 million workers as covered by the DBA, yet believes that wage inflation among so large a cohort is not significant enough to warrant consideration when crafting DBA rules.

But even if we accept DOL’s assertion that wage hikes among this large cohort are not *alone* enough to exacerbate inflation, nevertheless DOL must consider whether its proposal, in combination with other regulatory and spending measures, would have an effect on inflation, and what that effect would be. After all, agencies sometimes must take actions step by step to address the compelling problems of the day; an agency’s refusal to consider a pressing issue because that agency cannot *alone* fix the problem is arbitrary and capricious. At a time when the nation faces economic turmoil as a result of the most severe

¹⁰ 87 Fed Reg. at 15776.

¹¹ 87 Fed Reg. at 15703.

¹² Dan Bosch, “DOL Proposes Updates to Davis-Bacon Act Regulations,” American Action Forum *Insight*, March 23, 2022, <https://www.americanactionforum.org/insight/dol-proposes-updates-to-davis-bacon-act-regulations/>.

bout of inflation in decades, the DOL's dismissal of inflation as a legitimate concern in the context of DBA administration is utterly irresponsible.

The Department asserts that it need not consider inflationary impacts because the point of the DBA is to raise wages. But Congress does not pursue one goal to the exclusion of all others; that Congress elected in the DBA to raise federal construction worker wages in some contexts does not mean it supports doing so always and everywhere, and especially it does not mean that Congress would support raising wages when doing so would exacerbate massive inflation. DOL cannot escape its responsibility to consider all relevant factors, including inflationary impacts, by pointing to one (and only one) of the considerations Congress had in mind when it enacted the DBA.

The inflationary potential of the proposal is all the more concerning in light of inflationary pressures that already have been brought to bear in the construction sector. The infusion of federal infrastructure spending from IIJA would likely have led to substantial compensation premiums for workers even in the absence of broader economic factors or the proposed changes to DBA. This is because a sudden increase in federal infrastructure spending does not necessarily lead to a commensurate increase in construction sector employment. A report published by The Heritage Foundation in 2013 explained that a significant factor in this phenomenon is the level of skill required for modern construction work, which is much higher than it was a century ago:

“Infrastructure construction requires significant human capital as well as physical capital. Many workers on these jobs need advanced skills to effectively and safely use construction equipment. An unemployed residential drywall installer cannot simply start building bridges or highways.

...

“A grade and paving equipment operator, for example, needs three years and between 4,000 and 6,000 hours of on-the-job-training. A structural ironworker requires four years and 6,400 hours of on-the-job training.”¹³

This means that the typical unemployed person cannot be easily hired and put to work by a construction contractor, as it takes years of training to reach proficiency in many key roles. Thus, the increase in federal infrastructure spending passed under President Obama primarily served to increase demand for the existing pool of capable workers:

“Stimulus funds did not go primarily to unemployed workers. Instead, the government hired workers and firms with the necessary skills for their construction projects. Surveys found that more workers on stimulus projects were hired away from other companies than were previously unemployed.”¹⁴

Given the historically tight labor market in 2022,¹⁵ we can expect a similar result from the IIJA infrastructure spending spree, which will mean a potentially unprecedented level of inflationary pressure on construction wages. As such, the timing of the proposed DBA rule is exceptionally inapt, and contrary

¹³ James Sherk, “Additional Infrastructure Spending Would Employ Few New Workers,” Heritage Foundation *Issue Brief* No. 4081, November 7, 2013, <https://www.heritage.org/transportation/report/additional-infrastructure-spending-would-employ-few-new-workers>.

¹⁴ Ibid.

¹⁵ Rachel Greszler, “Why Has Employment Been So Slow To Recover?,” Heritage Foundation *Commentary*, March 11, 2022, <https://www.heritage.org/jobs-and-labor/commentary/why-has-employment-been-so-slow-recover>.

to the Department's stated goal in this rulemaking of enhancing the DBA's "usefulness in the modern economy."¹⁶

The proposed DBA changes would further undermine the expected number of projects facilitated by IIJA spending due to the higher labor costs flowing from the rule.¹⁷ Thus, the federal government would have added hundreds of billions of dollars to the national debt for negligible public benefit.¹⁸

The proposed changes would incur tremendous nationwide costs, while only benefiting a selected class of workers. Indeed, the rule's analysis of costs to contractors only examines compliance-related costs,¹⁹ which are trivial in comparison to the compensation-related costs, and there is no meaningful attempt to analyze the rule's supposed benefits. To provide a sufficient amount of information for proper public consideration of the rule, especially when providing only 60 days for public comment on a rule so voluminous and important, the DOL should have provided an estimate of:

- The number of workers (not merely the number of discrete wage and benefit rates) likely to be affected by the rule.
- The expected changes in wages and benefits per worker per year, whether increases or decreases, along with averages.
- The expected total direct compensation cost change for contractors and governments as a result of the rule, both annually and over the duration of the IIJA.
- The expected indirect compensation cost change for private firms that will have to compete with government contracts that would suddenly provide higher compensation rates due to the rule.

If such analysis was generated but not provided in the proposal, that would be grossly misleading and in violation of the Administrative Procedure Act. If the proposal was made without the DOL attempting to produce analysis of the rule's central economic effect, that would make the rule arbitrary and capricious and in violation of the Administrative Procedure Act.

The Department of Labor has failed to recognize the lopsided nature of the effects and should reject the rule on this basis and those described above.

¹⁶ 87 Fed Reg. at 15698.

¹⁷ Dan Bosch, "DOL Proposes Updates to Davis-Bacon Act Regulations."

¹⁸ David Ditch, "Congress' Wasteful Spending Spree Must End With Infrastructure Bill," Heritage Foundation *Commentary*, November 12, 2021, <https://www.heritage.org/budget-and-spending/commentary/congress-wasteful-spending-spree-must-end-infrastructure-bill>.

¹⁹ 87 Fed Reg. at 15769.