May 17, 2022

Via Federal eRulemaking Portal (http://www.regulations.gov)

The Honorable Martin J. Walsh
Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

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

Re: Updating the Davis-Bacon and Related Acts Regulations, 87 Fed. Reg. 15,698 (Mar. 18, 2022) (RIN 1235-AA40)

Dear Secretary Walsh and Director DeBisschop:

This comment is submitted by Josh Shapiro, Attorney General of the Commonwealth of Pennsylvania and Jennifer Berrier, Secretary of the Pennsylvania Department of Labor and Industry (collectively, "Pennsylvania") in support of the proposal ("NPRM") by the United States Department of Labor ("Department") to amend regulations issued under the Davis-Bacon and Related Acts ("DBRA"). For the reasons identified below, Pennsylvania supports the Department's proposal in general and, in particular, the codification of the principle of annualization, the preauthorization requirement for unfunded plans, the proposed anti-retaliation provisions, and the reintroduction of the thirty percent rule for federally funded construction projects.

I. Introduction

The Department's proposal amounts to the first comprehensive review of the DBRA regulations since 1981-82. Since then, Congress has expanded the reach of the DBRA and the federal contracting process has undergone significant changes. Pennsylvania welcomes the Department's overdue review. First, the proposal would streamline the wage determination process, allowing the most current and accurate information to govern wage rates and align DBRA wages with State and local rates for projects covered by both sets of laws. Pennsylvania generally agrees with those proposed changes. Second, the proposal would add clarity to the amount of DBRA credit that contractors may take for fringe benefit contributions by codifying the annualization principle when workers perform work on both prevailing wage and non-prevailing wage projects. The proposal would provide needed detail for the proper annualization formula. Finally, the proposal would strengthen the Department's enforcement efforts by addressing mistakenly omitted contract clauses, requiring preauthorization for unfunded fringe benefit plans, adding new anti-retaliation provisions, and strengthening cross-withholding to recover back wages.

Pennsylvania generally supports all of the proposed changes and writes to comment specifically on the codification of the annualization principle, the preauthorization of unfunded fringe benefit plans, and the anti-retaliation provisions contained in the proposed changes to section 5. In Pennsylvania's experience in both civil and criminal labor enforcement, those specific changes would prevent and deter a significant number of prevailing wage violations.

Pennsylvania criminal law prohibits "theft by failure to make required disposition of funds received," including funds obtained "subject to a known legal obligation," which includes federal and State prevailing wage law.[1] In our recent enforcement experience pursuing criminal liability where contractors intentionally fail to pay appropriate wages, preauthorization of unfunded plans would prevent a large number of violations and the anti-retaliation provisions would encourage more workers to take an active role in ensuring the contractor pays the full prevailing wage. Thus, Pennsylvania welcomes the clarity provided by the proposed changes to strengthen its own enforcement efforts.

Lastly, Pennsylvania supports returning to the definition of "prevailing wage" that was used from 1935 to 1983, which includes a three-step process – including the 30-percent rule – to identify the prevailing wage.

For the following reasons, Pennsylvania supports the proposed regulatory changes and appreciates the opportunity to comment.

[1] 18 Pa. Cons. Stat. § 3927.

II. Codifying the annualization requirement and providing further guidance on annualization calculations would be a positive step in ensuring broader compliance with the DBRA.

Aside from increasing pay, prevailing wage laws expand health insurance coverage and increase the share of workers with retirement plans.[2] For decades, the Department and courts have taken the position that contributions to most fringe benefit programs must be annualized. *See* NPRM at 15,743. As the NPRM notes, "[a]nnualization is intended to prevent the use of DBRA work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and that constitute compensation for all of the worker's work, both Davis-Bacon covered and private." *Id*. Despite the longstanding nature of this policy, however, the Davis-Bacon regulations do not expressly refer to the concept of annualization. The process of annualization ensures that workers actually receive the full fringe benefit rate when a contractor chooses to claim a credit. This is accomplished by converting the total annual contributions a contractor makes to the fringe benefit plan to an actual hourly cash equivalent, dividing the cost of the fringe benefit by total hours worked. Utilizing this method to determine the amount creditable toward meeting DBRA requirements prevents contractors from using money earned during periods of DBRA-covered work as the sole or disproportionate source of funding for continuously-available benefits.[3] By codifying the annualization requirement and the correct method for annualizing fringe benefit contributions, the Proposed Rule will provide law-abiding contractors with clear guidance as to creditable amounts, and allow enforcement agencies to focus their resources on intentional violators.

As the Department is aware, violators often target fringe benefit credits in order to deprive workers of the money they have earned while evading the notice of both workers and regulators. The lack of a codified method for annualizing fringe benefit contributions has led some violators to utilize "alternative" calculations, or eschew annualization calculations completely. These intentional violators even go so far as to incorporate annualization violations into their business models, allowing them to undercut law-abiding businesses in the bidding process and win contacts at the expense of workers' health, welfare, and retirement benefits.

In one case prosecuted by the Office of Attorney General, for example, a contractor's improper annualization scheme cost workers $5.3 million in health and welfare funds in just three years. The contractor created the appearance that it was fulfilling its prevailing wage obligations by providing large contributions to employee health and welfare funds. In reality, these seemingly large contributions were a façade; instead, the contractor was artificially inflating its credit by claiming that it paid for health insurance costs that far exceeded what it actually paid, and claiming credit for non-creditable costs and employee contributions to insurance. In addition to inflating costs and claiming credit for non-creditable expenses, the contractor purported to "annualize" by dividing the average inflated cost per employee per year by the average number of hours worked on prevailing wage projects by construction employees. Instead of funding the benefits of the

[2] David Madland et al., *Prevailing Wages: Frequently Asked Questions*, Center for American Progress (Dec. 22, 2020), https://www.americanprogress.org/article/prevailing-wages-frequently-asked-questions/.

[3] *See Miree Constr. Corp. v. Dole*, 930 F.2d 1536, 1545 (11th Cir. 1991).

workers who earned it, the money received from federal and Commonwealth-funded construction projects went to fund benefits for all of the company's employees—including officers and executives—regardless of whether they worked on prevailing wage projects. Thus, the scheme violated prevailing wage laws and Pennsylvania's criminal theft statutes.

It is important to note, however, that not all errors made by contractors in claiming fringe benefits credits are intentional; rather, the violations may be the result of a lack of clear guidance. With more fulsome regulatory guidance, contractors will have clear direction in calculating their prevailing wage credit and will be better equipped to identify and correct any problems with their existing practices. This clear guidance will also enable enforcement agencies to more readily distinguish between intentional and unintentional violators, and allow them to focus resources on pursuing intentional violators.

III. The proposed preauthorization requirement for unfunded fringe benefit plans will prevent violations from occurring and assist contracting agencies in their compliance functions.

The proposed revisions to § 5.28 are among the most important changes in the Proposed Rule. Although there is no question that unfunded plans may provide workers with meaningful benefits, prevailing wage violators often, in addition to manipulating annualization calculations, claim fringe benefit credits for unfunded plans that do not meet the standards currently outlined at 29 CFR § 5.28.

Requiring contractors to seek preapproval of their unfunded fringe benefit plans in order to claim fringe benefit credits for contributions to those plans will ensure that workers actually receive the money they earn and accomplish the "regulatory clarity" sought by the proposal. NPRM at 15,744. Currently, with contractors essentially left to an honor system, violators have found fertile ground for misappropriating fringe benefit funds and claiming credit to which they are not entitled. For example, in a case prosecuted by the Office of Attorney General, a mechanical contractor claimed fringe benefit credits against its prevailing wage obligations for an unfunded paid time off plan. However, under the employer's policy, all but three of workers' unused vacation days were forfeited every year, and the workers were not compensated for the forfeited vacation time. The scheme allowed the employer to steal thousands of dollars' worth of paid vacation time from workers over the course of eight years. Had the contractor been required to seek preapproval before claiming credit for his paid time off policy, the theft of workers' earned wages could have been avoided altogether.

In addition to assisting enforcement agencies and preventing violations, the preapproval requirement will provide invaluable assistance to contracting agencies. The DBRA requires public agencies that contract for covered construction projects to, among other things, collect certified payroll records from contractors each week. This responsibility turns contracting agencies into the first line of defense against violations. However, contracting agencies—especially small, local agencies—often lack both the information and expertise necessary to determine whether or not an unfunded plan is creditable under the DBRA. Even if an agency suspects that a contractor may be taking fringe benefit credits to which it is not entitled, the only viable way for many to check whether an unfunded plan meets the required standards would be to refer a case for investigation.

Requiring prequalification, on the other hand, would allow agencies simply to request proof of authorization to resolve the matter.

By preventing violations from occurring and assisting contracting agencies in their compliance efforts, the proposed amendments to § 5.28 will protect workers and increase enforcement efficiency. Therefore, Pennsylvania strongly supports the proposed provision.

IV. Proposed Anti-Retaliation Provisions

Pennsylvania also supports the proposed anti-retaliation contract clauses at §§ 5.5(a)(11), 5.5(b)(5), and 5.18, as well as the clarification of restitution for an underpayment of wages at § 5.10. As the NPRM notes, effective enforcement requires worker cooperation. Having received feedback from many workers that fear of retaliation stopped them from coming forward and reporting prevailing wage violations, Pennsylvania fully supports the addition of the proposed anti-retaliation provisions.

The proposal correctly notes that "effective enforcement requires worker cooperation" because "[i]nformation from workers about their actual hours worked and their pay is often essential to uncover violations," especially when contractors keep inaccurate or incomplete records. NPRM at 15,746. Our experience in enforcement track with that of the Department's — workers often fear losing their jobs or facing other consequences and, as a result, do not come forward to report wage violations or even ask their employer for clarification. And when a contractor does retaliate against a worker—even when the worker is eventually awarded back wages, sometimes years later—other workers are often unaware of the ultimate resolution of the matter and their reporting is chilled. Because the Department "currently may not order reinstatement of workers fired for their cooperation with investigators or as a result of an internal complaint" or "award back pay for the period after a worker is fired," the present remedies are insufficient to combat retaliation. In addition to providing the Department with the necessary authority, consistent with the DBRA, case law, and regulation, the inclusion of broad anti-retaliation provisions in federal contracts will provide needed clarity to contractors and their subcontractors.

The proposal correctly notes that the assessment of interest on back wages "will ensure that the workers Congress intended to protect from substandard wages will receive the full compensation that they were owed under the contract." NPRM at 15,742 (footnote omitted). Thus, Pennsylvania also supports the calculation of interest from the date of the underpayment or loss, and its compounding daily.

Pennsylvania suggests one addition to the anti-retaliation provisions. The Final Rule should require posting of the anti-retaliation provisions of the contract with other mandatory postings. Requiring prominent display of workers' rights will further deter violations and avoid chilling of reporting.

V. Reinstating the 30 Percent Rule

Pennsylvania supports returning to the definition of "prevailing wage" that was used from 1935 to 1983 which includes a three-step process to identify the prevailing wage. This method will better reflect the predominant wage that is paid to workers instead of using the weighted average. We commend the Department in reverting back to this method of defining prevailing wage as it is more worker-friendly and aligns with the underlying interpretation of the word "prevailing" as the "most widely paid rate."

VI. Conclusion

For these reasons, Pennsylvania supports the Department's proposed changes to the DRBA regulations, and suggests the additional requirement of posting of the anti-retaliation provisions.

Respectfully submitted,

Josh Shapiro
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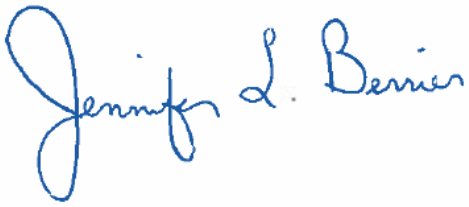

Jennifer Berrier
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