



May 17, 2022

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

RE: 87 FR 15968, Updating the Davis-Bacon and Related Acts Regulations

To Whom It May Concern:

The National Council of State Housing Agencies (NCSHA)¹, on behalf of the nation's state housing finance agencies (HFAs), appreciates the opportunity to respond to the Department of Labor's March 18 proposed rule updating the Davis-Bacon and Related Acts Regulations. State housing finance agencies play a central role in the nation's housing affordable housing system and administer the Low-Income Housing Tax Credit program and many of the U.S. Department of Housing and Urban Development (HUD) programs to which Davis-Bacon applies.

NCSHA recognizes the Davis-Bacon Act's applicability to several HFA-administered programs and supports efforts to implement it efficiently and effectively. However, HFAs experience varying challenges in applying Davis-Bacon, so we recommend the following improvements to reduce the complexity, time, and cost of compliance to ensure HFAs and our partners continue to deliver high-quality affordable housing as efficiently as possible, while also supporting the workforce that delivers that housing.

Multiple Wage Rates for a Single Project ("Split-Wage Decisions")

While the proposed rule does not address "split-wage" decisions, we recommend the Wage and Hour Division (WHD), through rulemaking, create a policy and practice favoring a single residential wage decision for multifamily housing construction or substantial rehabilitation projects, including incidental items, based on the overall residential character of the project.

¹ NCSHA is a nonprofit, nonpartisan organization. None of NCSHA's activities related to federal legislation or regulation are funded by organizations that are prohibited by law from engaging in lobbying or related activities.

Split-wage decisions on multifamily projects arise from WHD’s current practice of “bucketing,” which HUD must apply to these projects. The practice consists of identifying subcomponents of residential construction and combining (or bucketing) them into different types of construction, including building, heavy, and/or highway. Any buckets of items of work with a total cost of \$2.5 million or more are assigned separate wage rates, which results in frequent multiple wage rate decisions (“split-wage” decisions).

In some multifamily projects, developers may have to pay the same worker at different rates to install drywall in an accessory club house and in the main apartment building, perhaps on the same day, because the accessory club house and main apartment building have been categorized as different types of construction. This introduces substantial operational and compliance complexity and risk. It may also make it harder to find contractors willing to work on affordable housing projects and to take on the additional administrative burden and potential liability for incorrectly applying wage rates.

Until recent years, long-standing policy and practice reflected in HUD documentation prepared with the cooperation and advice of DOL was to generally apply only a residential wage decision to FHA-financed construction and rehabilitation projects, including incidental items of work – based on the overall residential character of the project.²

We recommend that WHD, by rulemaking, replace its current “bucketing” practice with a policy and practice favoring a single residential wage decision for affordable housing projects, including incidental items, based on the overall residential character of the project. For consistency, we recommend that this policy also apply across all projects that fall under any of the federal housing Acts.³

Effective Dates of Davis-Bacon Wage Rate Updates

We urge WHD to revise the proposed regulations to maintain wage rates as those in effect on the date an application for a firm loan commitment is submitted.

Any wage rate update after the application is submitted for a construction or substantial rehabilitation project is disruptive. For example, a rate change can trigger a need to revise and repeat already completed procedural steps, both for the developer and HUD, creating an unwarranted regulatory barrier to the successful completion of a housing project. Because the initial endorsement (or the start of construction) occurs relatively far along in the financing process, the current and proposed provisions create a high risk that an updated wage rate will result in disruption. There are developers who go through the HUD application process to build

² The practice was documented in in HUD’s Labor Relations Letter No. 96-03, which was prepared with the cooperation and advice of DOL and HUD’s Handbook 1344

³ See § 212(a) of the National Housing Act (12 U.S.C. § 1715c(a)), § 104(b)(1) of the Native American Housing Assistance and Self Determination Act of 1996 (25 U.S.C. § 4114(b)(1)), § 12(a) of the United States Housing Act of 1937 (42 U.S.C. § 1437j(a)), and § 811[(j)(5)] of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. § 8013(j)(5)).

affordable housing and secure Housing Credit equity and subordinate debt, only to get to the closing table to find that the Davis-Bacon wage rates have been increased so substantially that the deals cannot close.

To reduce risk of the risk of disruption to affordable housing development, we recommend WHD revise proposed § 1.6(c)(ii)(C) to preserve and apply the wage rates in effect on the date a project sponsor applies for a firm commitment. While a rate change just prior to submitting an application would still be disruptive, creating certainty as to the applicable wage rates at the time of application would substantially reduce the risk that updates would pose to successful completion of housing developments.

Determining Prevailing Wage Rates

The proposed rule would amend §1.3 of the regulations and outlines a new methodology to expressly give the WHD Administrator authority and discretion to adopt State or local wage determinations as the Davis-Bacon prevailing wage where certain specified criteria are satisfied, and in §1.7 proposes to expand the scope or data considered to identify the prevailing wage in a given area.

We support DOL's intent to improve data collection on wages per role and industry to obtain a more complete representation of a market's prevailing wages and speed up the determination process. A greater emphasis on surveying would be particularly helpful in rural areas where wage classifications are often difficult to secure. As the WHD seeks to facilitate the process of determining prevailing wages, the use of state and local wages offers a good proxy, as many states conduct their own survey processes.

Davis-Bacon \$2,000 Threshold

While acknowledging this recommendation would require a statutory change that is beyond the scope of the NPRM, we encourage the Department of Labor to work with Congress to adjust the \$2,000 threshold set by the Davis-Bacon Fair Labor Standards Act of 1931. Increasing the threshold would preserve the original legislative intent of providing relief for small residential projects from burdensome reporting requirements, and a new threshold could be set to appropriately ensure that larger scale projects targeted by the original 1931 Act are covered.

Streamline Reporting and Compliance

We recommend DOL adopt the following additional regulatory and sub-regulatory reforms to streamline Davis-Bacon reporting and compliance:

- **Provide flexibility in wage reporting timelines to ease administrative burdens.** Davis-Bacon requires weekly wage reporting. Many employers operate on different schedules, with compensation often handled bi-monthly. As a result, additional time is required and costs incurred to comply. DOL should consider flexibilities that allow administrators to verify that employee wage rates are equal to or exceed the prevailing wage without monitoring every paycheck.
- **Revise on-site interview requirements.** Conducting in-person interviews to test the accuracy of payroll reports and assess employer performance with respect to labor standards requires considerable time and travel costs. Direct interviews with employees can be facilitated instead through modern communications that allow a more efficient means to capture the same level of information.
- **Improve interagency coordination.** Affordable housing developments are often funded through various federal affordable housing programs administered by different agencies at the state and/or local level. Despite meeting the same or near-same requirements, and demonstrating prevailing wages, separate compliance and monitoring processes must be carried out for each funding entity. DOL should consider developing a process and practice which determines prevailing wages through the lead funding source to streamline reporting and avoid duplication of effort and information collected.

Thank you for the opportunity to submit comments on the proposed rule. We urge you to accept the above recommendations to better align the Davis-Bacon regulations with current labor and market conditions, better protect workers, and ease implementation of and compliance with their requirements.

Sincerely,

A handwritten signature in black ink, appearing to read "Garth Rieman", with a long horizontal flourish extending to the right.

Garth Rieman

Director of Housing Advocacy and Strategic Initiatives