

## Regulatory Studies Program Comments on

Department of Labor, Employment Standards Administration, Wage and Hour Division

### Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts; Proposed Rule<sup>1</sup>

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The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of regulations and their impacts on society. As part of its mission, RSP produces careful and independent analyses of agency rulemaking proposals from the perspective of the public interest. Thus, the program's comments on the Department of Labor's (DOL's) proposed rule regarding the use of "helpers" on projects covered by the Davis-Bacon Act do not represent the views of any particular affected party or interest group, but are designed to protect the interests of American citizens.

RSP appreciates the opportunity to comment on this important rule. Section I of these comments briefly examines the general effect of Davis-Bacon prevailing wage requirements on the economy. Section II provides an overview of the history of the definition of "helpers" under regulations implementing the Davis-Bacon Act. Section III discusses DOL's justification for its proposed definition of helpers and Section IV examines alternative approaches. Section V offers RSP's conclusion and recommendations. Appendix I presents RSP's Checklist for this proposal.

#### **I. The Davis-Bacon Act imposes large costs that fall disproportionately on young and minority Americans.**

The Davis-Bacon Act was enacted in 1931 to require federal government construction contractors to pay workers the "prevailing wage" for similar projects in the locality. It was implemented to prevent contractors from importing cheap labor, mainly from the South, to work on construction projects in northern states. Despite numerous calls over the years to repeal the Act,<sup>2</sup> it still costs taxpayers hundreds of millions of dollars in construction costs each year, with little, if any, commensurate or generalized public benefit.

Davis-Bacon prevailing wage laws have been estimated to increase the cost of public construction by more than 25 percent.<sup>3</sup> Several studies have placed the construction cost associated with paying "prevailing wages" at between \$225 million and over \$500

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<sup>1</sup> Prepared by Regulatory Studies Program Research Associate, John Charles Bradbury, and Senior Research Fellow, Susan E. Dudley.

<sup>2</sup> See, for example, U.S. General Accounting Office, *The Davis-Bacon Act Should Be Repealed*, 1979.

<sup>3</sup> Martha Norby Fraundorf, John P. Farrell, and Robert Mason. *Review of Economics and Statistics*. "The Effect of the Davis-Bacon Act on Construction costs in Rural Areas." February 1984, v. 66 n. 1, pp.142-146.

million each year.<sup>4</sup> In addition, the costs to administer the program amount to another \$200 million annually.<sup>5</sup>

The prevailing wage requirement does not offer net benefits to society, but rather reflects a transfer from low-skilled and low-wage workers to skilled and union workers. Not only are these benefits small in comparison to the taxpayer costs of the program, they are likely to come at the expense of employment opportunities for young and minority workers, who tend to be less represented among skilled union journeyworkers. To become a union journeyworker, one must enroll in union apprenticeship programs, which are restrictive and often have questionable educational requirements. In nonunion firms, workers are often trained on the job without such strict separation of duties. Because Davis-Bacon requires workers to be placed in recognized categories, however, nonunion contractors must exclude categories of workers within which young and minority workers tend to predominate.<sup>6</sup>

Though large taxpayer costs and disproportionate impacts on young and minority workers are inevitable consequences of Davis-Bacon, DOL has opportunities to reduce these effects through its implementation of the Act. The “helper” job classification represents such an opportunity.

## **II. The definition of “helpers” has a long history.**

On April 9, 1999, the Wage and Hour Division of DOL’s Employment Standards Administration (“Wage and Hour”) proposed to redefine the category of “helpers” on Davis-Bacon-covered construction projects. This proposal replaces the definition issued in 1982 with a narrower definition, reflecting a regression to the pre-1982 regulation.

The May 28, 1982 regulations<sup>7</sup> allowed contractors to expand their use of “helpers” on Davis-Bacon-covered projects at wages lower than those paid to skilled journeyworkers through three provisions:

- A new definition of the term “helper,” allowing a helper’s duties to overlap with those of a journeylevel worker.<sup>8</sup>

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<sup>4</sup> A study by Robert S. Goldfarber and John F. Morrall, III estimated the annual cost of paying prevailing wages lies between \$222 million and \$571 million. *Policy Analysis*. “Cost Implications of Changing Davis-Bacon Administration.” Fall 1978, v.4 n.4. pp.439-453. U.S. General Accounting Office, *The Davis-Bacon Act Should Be Repealed*, 1979 made a similar annual estimate of \$228 million to \$513 million on construction costs alone.

<sup>5</sup> Goldfarber and Morrall, *op. cit.* Note that these administrative costs are what economists refer to as “deadweight losses” because they impose social costs for which no one receives benefits.

<sup>6</sup> John P. Gould and George Bittlingmayer. *The Economics of the Davis-Bacon Act*. 1980. American Enterprise Institute for Public Policy Research, Washington, D.C.

<sup>7</sup> 29 CFR Part 1, Procedures for Predetermination of Wage Rates, and 29 CFR Part 5, Subpart A--Davis-Bacon and Related Acts Provisions and Procedures (47 FR 23644 and 23658)

<sup>8</sup> 29 CFR 5.2(n)(4), 47 FR 23667.

- A provision allowing a helper classification to be included in the wage determination if it was an “identifiable” local practice.<sup>9</sup>
- A provision allowing the addition of helper classifications on contracts containing wage determinations without helper classifications.<sup>10</sup>

The 1982 regulations also included a ratio that limited the number of helpers to two for every three journeyworkers.<sup>11</sup>

Since its initial promulgation, the rule has gone through numerous court and legislative battles. Problems that have plagued the regulation most for 17 years include: the vagueness of the definition of “helpers,” the use of a ratio in determining the number of helpers per journeyman, and determining the prevalence of helpers in the locality where the project takes place. As a result, the rule has been held in almost permanent suspension – in force for only a 20-month period, from February 1992 to October 1993.

### **III. The proposed helper definition lacks adequate justification.**

DOL’s proposal seeks “to amend the regulations to reflect the longstanding policy of recognizing helpers as a distinct classification on [Davis-Bacon]-covered work only where Wage and Hour determines that (1) the duties of the helpers are not performed by other classifications in a given area, i.e., the duties of the helper are clearly defined and distinct from those of the journeyworker and laborer; (2) the use of such helpers is an established prevailing practice in the area; and (3) the term ‘helper’ is not synonymous with ‘trainee’ in an informal training program.”

DOL recognizes that the suspended 1982 rule was adopted to (1) reduce the cost of projects falling under Davis-Bacon by mirroring the practice of using helpers in private construction projects and (2) provide employment and training opportunities for unskilled workers, including women and minorities. However, it now justifies the return to a narrow definition of helpers on three grounds: (1) the suspended rule (with its broad definition of helpers) cannot be enforced effectively because of job overlap, (2) past studies on the number of helpers in the private sector overstated their importance in industry, and (3) the rule may have a negative effect on apprenticeship and training. We examine each of these arguments.

#### **A. DOL argues that the definition in the suspended rule “would be difficult to administer and enforce.”**

DOL finds that the suspended rule cannot be enforced properly, largely because it defines a helper, not by tasks performed, but by skill level, covering “semi-skilled worker[s]” who “may use tools of the trade at and under the direction and supervision of the journeyman.” The job of “helper” is the only designation under Davis-Bacon that relies

<sup>9</sup> 29 CFR 1.7(d), 47 FR 23655.

<sup>10</sup> 29 CFR 5.5(a)(1)(ii)(A), 47 FR 23688.

<sup>11</sup> 29 CFR 5.5(a)(4)(iv), 47 FR 23670.

on skill-level and work-site supervision as a determinant of pay classification. DOL also observes that the types of assistance a helper may perform often are not semi-skilled, but rather unskilled, and as such, overlap with tasks performed by workers classified as laborers. Furthermore, the department is concerned that the variety of duties a helper might perform would make the wage determination process under Davis-Bacon more difficult.

While DOL's concerns may be justified, they must be balanced against the productivity and cost-saving benefits from the existing definition of helpers. DOL's proposed definition, while easier to administer and enforce, could hinder productivity on a construction project. A broad classification of helper duties is common across low-level jobs in all professions. These jobs exist because firms frequently require a person who can fulfill many unforeseen duties and gaps in responsibility that cannot be specified. Thus, by eliminating this flexibility to work in other job classification duties, the proposed definition would eliminate one of the most important features of the helper position. Without a helper, the contractor may be forced to hire a more expensive journeyworker to do tasks otherwise performed by a low cost employee. This may appear to benefit journeyworkers by raising demand for their work in the short run. However, it also raises the cost of construction in the private sector, as well as the public sector, which will result in less investment in private building projects than would occur if construction crews were allowed to work in the most efficient manner on Davis-Bacon projects. To the extent there is less investment, demand for journeyworkers in the long run may actually decline.<sup>12</sup> DOL does not address this effect of the regulation.

### **B. DOL asserts that “helpers are less widespread than previously believed.”**

The preamble asserts that the suspended rule was based on an overestimate of the use of helpers in the construction industry. However, it bases this assertion on data collected during the admittedly brief period when the suspended definition was in effect.<sup>13</sup> These data are from prevailing wage surveys, the reliability of which have been questioned,<sup>14</sup> and which the preamble recognizes provided incomplete data on helpers during the period in question.<sup>15</sup>

Even without disputing the validity of these data, they do not undermine the fact that helpers are “prevalent” in private industry. DOL now estimates that helpers comprise 3.4

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<sup>12</sup> In other words, journeyworkers may expropriate quasi-rents in the short-run, because they are paid higher wages on existing projects (where some costs are sunk). In the long run, however, new projects will not be undertaken if total costs exceed total revenues.

<sup>13</sup> 64 FR 17445.

<sup>14</sup> See for example, GAO/HEHS-99-97, “Labor’s Actions Have Potential to Improve Wage Determinations” May 1999. “In the past, we and others have raised concerns that wage determinations issued by Labor may not accurately reflect wages paid in the local area. . . . Accuracy problems can be caused, for example, by low participation rates in the surveys or the use of survey wage data that are, on average, 7 years old.”

<sup>15</sup> 64 FR 17446.

percent of total construction employment.<sup>16</sup> While this may not be as large a percentage as estimated by DOL for the suspended rule, it is still significant. In fact, this revised estimate suggests that helpers comprise approximately the same percentage of total employment as apprentices,<sup>17</sup> a job classification that DOL maintains under Davis-Bacon.

Even with the department's adjusted estimate of the number of helpers in the workforce, the cost savings it attributes to the suspended rule range from \$78 million to \$296 million, with a best estimate of \$108.6 million. This implies that the costs of abandoning the broad definition of helper for the proposed narrow definition would cost taxpayers \$108.6 million per year. Though the preamble suggests that this impact is "relatively modest," Executive Order 12866 states otherwise, clearly defining it as a "significant impact" on the economy.

**C. DOL is concerned that the suspended definition of helper "could have a negative impact on formal apprenticeship and training programs."**

Although not a "primary concern in this rulemaking," the preamble suggests that the broad definition of helpers could have a negative impact on apprenticeship and training, which could particularly harm young persons, women, and minorities. DOL is concerned that helpers could displace trainees and apprentices in "formal structured training programs" which, in DOL's view, "are more effective than informal on-the-job training alone."

However, DOL offers no evidence to justify its position other than a Business Roundtable survey in which respondents associated the lack of skilled workers with the lack of non-union training programs.<sup>18</sup> The preamble does not indicate that the survey revealed any failures in on-the-job training programs or helper positions. Nor does the preamble point to any evidence that an additional influx of helpers would result in fewer workers entering formal training programs when necessary and appropriate.

In fact, the proposed requirement that a helper's duties be "clearly defined and distinct from those of the journeyworker and laborer," appear more likely to "[freeze] ... young, minority, and female workers ... into low paying, low skilled jobs," than the suspended rule. The broad definition of helper would allow these entry-level workers to acquire and demonstrate skills necessary for higher paying jobs. As footnote 9 of the preamble admits, "Wage and Hour has no data to support or refute the proposition that employment of helpers leads to an increase in minority and female skilled employment in the non-union sector."

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<sup>16</sup> This estimate was developed for this rulemaking, based on Occupational Employment Statistics adjusted downward using Current Population Survey data.

<sup>17</sup> Preamble, Table 3. Note that the unadjusted OES database indicates that helpers represent a larger fraction of the workforce than either apprentices or laborers. (Table 2)

<sup>18</sup> The report was issued by the Business Roundtable, *203 Daily Labor Report* (DLR). The report associated the problem with the "lack of a unified approach to training nonunion trades workers," which surfaced 14 years ago, and "the lack of a consistent delivery method and commitment to training by other than a small minority of major contractors."

Furthermore, it is inappropriate for DOL to substitute its own judgment regarding the relative merits of certain job classifications for that of the private sector. The fact that the helper category exists in the private sector reveals that helpers increase overall productivity. Otherwise, private industries would not use helpers to the extent observed.

#### **IV. Alternatives to the proposed definition are not adequately examined.**

The preamble presents viable alternatives to its proposed definition of helpers, but it does not assess these quantitatively. Nor does it examine the incremental benefits (only the costs) of its proposed definition over the baseline of the suspended rule. This lack of information on the net benefits of alternatives represents a serious deficiency in the rulemaking record. Without better information on the costs and benefits of alternative definitions, DOL places inordinate weight on such factors as ease of administration and enforcement, rather than on net social benefits.

Included in the definition of helper in the suspended regulation was a maximum ratio of journeyworkers to helpers. The Court of Appeals nullified this ratio because it was not adequately justified in the rulemaking record. The preamble discusses, as an alternative to the proposed definition, implementing a ratio that is better supported in the rulemaking record; however, DOL dismisses this alternative as being subject to definition ambiguities. This concern is legitimate. Ratios appropriate for productive construction efforts are subject to change with changes in production methods, materials, technology, and population. The regulatory time lag impedes productivity by locking in a binding ratio that may be obsolete in a few years. On the other hand, DOL should evaluate the original rationale for including a ratio in the suspended rule. Was it to set a ceiling on the use of helpers? To prevent what kind of abuse? If such a rationale could be articulated, then perhaps a ceiling that is generally non-binding, but that would prevent any feared abuse of the helper category, would be workable. To take advantage of gains in production in the private sector, the ratio should be non-binding, and flexible enough to adapt to changes in private practices.

The preamble also offers three alternative definitions of helper, all of which would allow a greater number of helpers on Davis-Bacon projects than the proposed regulation, though less than the suspended regulation. DOL should quantify the relative cost savings and examine the distributional impacts of each of these definitions before selecting its preferred approach. Definitions that allow the number of helpers to mirror the number in the private sector should be given a strong preference.

#### **V. Conclusions and Recommendations**

The Davis-Bacon Act, which requires federal contractors to pay workers the locally prevailing wage rates for construction projects, costs taxpayers hundreds of millions of dollars each year in higher construction and administrative costs. It also disproportionately affects young, minority and female workers because they are less likely to fit the job classifications recognized under the proposed regulations. By the Department of Labor's own conservative figures, the 17 year history of the failure to implement the helper classification has cost the government a total of \$1.6 billion in lost

savings in public construction projects. A more expansive definition of the helper job classification, along the lines of that in the suspended rule, would serve to alleviate some of these costs, resulting in greater cost-reduction benefits to taxpayers, and greater employment opportunities for young, minority and female workers.

The empirical evidence on the operation of the Davis-Bacon Act indicates that it is an extremely costly statute and particularly harmful to young and minority members of the workforce. Davis-Bacon adds between \$225 million and \$570 million each year to the cost of public construction projects. DOL estimates that the definition of helper in the suspended regulation would have relieved \$108.6 million of these costs. The economic impact analysis suggests that these cost savings will be lost with the promulgation of the proposed definition.

The proposed helper definition significantly hampers the use of this class of worker. Helpers exist in the private market in part because they perform multiple tasks at a site under the supervision of more experienced workers, and this offers valuable productivity benefits. By limiting the helpers' role to duties "not performed by other classifications in a given area," DOL's proposal dramatically reduces this flexibility.

DOL justifies its narrow definition on three grounds: (1) ease of enforcement, (2) less widespread use of helpers than previously estimated, and (3) its preference for formal training programs and apprenticeships over on-the-job training that might be more characteristic of helpers. However, DOL does not adequately support these arguments.

1. While a more flexible definition might be more difficult to administer and enforce, this concern must be balanced against the productivity and cost-saving benefits the broader definition of helpers offers.
2. DOL supports the notion that helpers may be less widespread than previously thought with data that it admits are limited, but, more importantly, how "widespread" helpers are says little about how helpers should be defined. DOL estimates that the benefits of a broader definition would be significant (over \$108.6 million each year).
3. Finally, it is inappropriate for DOL to substitute its own judgment regarding the relative merits of certain job classifications (i.e., a preference for formal vs. informal training) for that of the private sector. DOL offers no evidence that the suspended definition of helpers would reduce opportunities for young, minority, and female workers. Indeed, the narrower definition is more likely to have that impact.

**DOL should attempt to maximize net social benefits.** Under the constraints of the Davis-Bacon Act, this implies an objective of constructing public projects in the most cost-effective manner. Ease of administration and enforcement, while reasonable to consider, should not override consideration of social costs and benefits.

**DOL should attempt to conform regulations to private sector practices, rather than impose its views of optimal practices on the private sector.** Specifically, a definition that allows the number of helpers to mirror the number in the private sector should be given a strong preference over definitions that constrain private practices and innovation.

## Appendix I

### RSP Checklist

#### DOL’s Permissible Use of Helpers on Davis-Bacon Act Projects

Element	Agency Approach	RSP Comments
1. Has the agency identified a significant market failure?	<p>DOL does not attempt to identify a market failure in the private market use of helpers. Rather, it bases its proposal to narrow the use of helpers on ease of administration and enforcement.</p> <p><b>Unsatisfactory</b></p>	<p>Since DOL has not identified any market failure in how helpers are used in private sector construction, it should endeavor to conform its regulations to private sector practices, rather than impose its views of optimal practices on private contractors.</p>
2. Has the agency identified an appropriate federal role?	<p>The agency’s actions are consistent with the Davis-Bacon Act.</p> <p><b>Fair</b></p>	<p>There is no economic justification for a federal role in defining construction practices and determining wages, as required by the Davis-Bacon Act.</p> <p>A broader definition of helpers would also be consistent with Davis-Bacon, and would offer additional benefits by allowing private markets to operate more efficiently.</p>
3. Has the agency examined alternative approaches?	<p>The agency has examined four alternatives. Three involve changing the legal definition of “helpers.” The other alternative requires a ratio of helpers to other workers.</p> <p><b>Fair</b></p>	<p>DOL presents viable alternatives, all of which could lead to greater cost savings than the proposal, though less than the suspended definition of “helper.” DOL does not attempt to quantify the relative costs and benefits of these alternatives, however, relying instead on a qualitative discussion of relative merits.</p>

Element	Agency Approach	RSP Comments
4. Does the agency attempt to maximize net benefits?	<p>The agency estimates the costs associated with abandoning the suspended definition of helper, but justifies it on ease of enforcement rather than net social benefits.</p> <p><b>Unsatisfactory</b></p>	<p>The lack of quantitative information on the incremental benefits of the proposal over the suspended rule is a serious deficiency in the rulemaking record. Though it recognizes that the proposal will cost taxpayers over \$100 million per year, DOL places much greater emphasis on administrative ease than on social impacts.</p>
5. Does the proposal have a strong scientific or technical basis?	<p>DOL justifies the narrower definition on surveys that suggest helpers are less widespread than previously believed.</p> <p><b>Unsatisfactory</b></p>	<p>These surveys covered a brief period and were flawed in several respects. Furthermore, since they do not indicate that helpers are not “prevalent”, these surveys do not support abandonment of the suspended rule.</p>
6. Are distributional effects clearly understood?	<p>DOL is concerned that the suspended definition of “helper” would discourage apprenticeships and formal training programs for low-skilled workers.</p> <p><b>Unsatisfactory</b></p>	<p>DOL does not support this concern. The amended definition, which would prevent a helper from gaining skills and experience, is more likely to freeze young and minority workers into low-paying and low-skilled jobs than the suspended definition.</p>
7. Are individual choices and property impacts understood?	<p>The preamble does not address these issues.</p> <p><b>Unsatisfactory</b></p>	<p>Prevailing wage standards in general, and the revised definition of helper in particular, limit individual choices regarding employment, workplace activity, and wages.</p>