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Department of Labor

Employment Standards Administration,
Wage and Hour Division

29 CFR Parts 1 and 5

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

DEPARTMENT OF LABOR

Employment Standards
Administration, Wage and Hour
Division

Office of the Secretary

29 CFR Parts 1 and 5

Procedures for Predetermination of
Wage Rates; Labor Standards
Provisions Applicable to Contracts
Covering Federally Financed and
Assisted Construction and to Certain
Nonconstruction Contracts

AGENCY: Wage and Hour Division,
Employment Standards Administration,
Labor.

ACTION: Proposed rule.

SUMMARY: This document is a proposal resulting from the reexamination by the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor (Wage and Hour) of regulations previously issued to govern the employment of "helpers" on federally-financed and assisted construction contracts subject to the prevailing wage standards of the Davis-Bacon and Related Acts (DBRA).

Based on the Department's experience both prior to and during implementation of the suspended regulations, and a reexamination of the reasons and data underlying promulgation of the suspended helper regulations, Wage and Hour proposes to amend the regulations to incorporate its longstanding policy allowing use of helpers only where their duties are clearly defined and distinct from journeymen and laborer classifications in the area.

DATES: Comments are due June 8, 1999.

ADDRESSES: Submit written comments to John Fraser, Deputy Administrator, Wage and Hour Division (ATTN: Government Contracts Team), Employment Standards Administration, U.S. Department of Labor, Room S-3020, 200 Constitution Avenue, N.W., Washington, DC 20210. Any commenters desiring notification of receipt of comments should include a self-addressed, stamped post card.

FOR FURTHER INFORMATION CONTACT: William W. Gross, Director, Office of Wage Determinations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3028, 200 Constitution Avenue, NW, Washington, DC 20210. Telephone (202) 692-0062. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This rule does not contain any new information collection requirements and does not modify any existing requirements. Thus, the rule contains no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1995.

II. Background

The Department's longstanding practice regarding the issuance of helper classifications, apart from the periods, as discussed below, when the suspended "helper" regulations were implemented, has been to allow the use of helpers on construction projects covered by the labor standards provisions of the Davis-Bacon and Related Acts only where (1) the duties of the helper are clearly defined and distinct from those of the journeyman or 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.

On May 28, 1982, Wage and Hour published revised final Regulations, 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, respectively), containing the following four new provisions intended to allow contractors to expand their use of helpers on Davis-Bacon covered projects at wages lower than those paid to skilled journeyworkers:

- A new definition of the term "helper," allowing a helper's duties to overlap with those of a journeylevel worker:

A helper is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice. (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. 29 CFR 1.7(d), 47 FR 23655.

- A provision limiting the number of helpers to two for every three journeyworkers. 29 CFR 5.5(a)(4)(iv), 47 FR 23670.

- A provision allowing the addition of helper classifications on contracts containing wage determinations without helper classifications. 29 CFR 5.5(a)(1)(ii)(A), 47 FR 23688.

These regulations were challenged in a lawsuit brought by the Building and Construction Trades Department, AFL-CIO, and a number of individual unions. On December 23, 1982, the U.S. District Court for the District of Columbia held that the new helper regulations conflicted with the Davis-Bacon Act and enjoined DOL from implementing the regulations. *See Building and Construction Trades Department, AFL-CIO, et al. v. Donovan, et al.*, 553 F. Supp. 352 (D.D.C. 1982). The court held that the regulations improperly defined the helper classification in terms of the level of supervision instead of in the traditional terms of the tasks performed. *Id.* at 355.

On appeal, the U.S. Court of Appeals for the District of Columbia affirmed in part and reversed in part. *Building and Construction Trades Department, AFL-CIO, et al. v. Donovan, et al.*, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1983). The court upheld the Department's authority to allow the increased use of helpers and concluded that the Secretary's regulatory definition of a helper was "not clearly unreasonable." *Id.* at 630. However, the court struck down the regulation allowing for the issuance of a helper wage rate where helpers were only "identifiable." *Id.* at 624.

On remand, the district court lifted the injunction as it applied to the helper definition, but maintained it as to the remaining helper regulations. The district court added that the Secretary "may, however, submit to this Court reissued regulations governing the use of helpers, and if these regulations conform to the decision of the Court of Appeals, they will be approved." 102 CCH Labor Cases ¶134,648, p. 46,702 (D.D.C. 1984).

In accordance with the district court's order, DOL published in the **Federal Register** (52 FR 31366, August 19, 1987) proposed revisions to the helper regulations to add the requirement that helpers must prevail in an area in order to be recognized. After analyzing the comments on this proposal, the Department, on January 27, 1989, published a revised final rule governing the use of semi-skilled helpers on

federal and federally assisted construction contracts subject to the Davis-Bacon and Related Acts (54 FR 4234).

On September 24, 1990, the district court vacated its injunction, and on December 4, 1990, Wage and Hour published a **Federal Register** notice implementing the helper regulations, effective February 4, 1991 (55 FR 50148).

In April 1991, Congress passed the Dire Emergency Supplemental Appropriations Act of 1991, Public Law 102-27 (105 Stat. 130), which was signed into law on April 10, 1991. Section 303 of Public Law 102-27 (105 Stat. 152) prohibited the Department of Labor from spending any funds to implement or administer the helper regulations as published, or to implement or administer any other regulation that would have the same or similar effect. In compliance with this directive, the Department did not implement or administer the helper regulations for the remainder of fiscal year 1991.

After fiscal year 1991 concluded and subsequent continuing resolutions expired, a new appropriations act was passed which did not include a ban restricting the implementation of the helper regulations. On January 29, 1992, Wage and Hour issued All Agency Memorandum No. 161, instructing the contracting agencies to include the helper contract clauses in contracts for which bids were solicited or negotiations were concluded after that date. On April 21, 1992, the U. S. Court of Appeals for the District of Columbia invalidated the regulation that prescribed a ratio of two helpers for every three journeyworkers as being without sufficient support in the record, but upheld the remaining helper provisions. *Building and Construction Trades Department, AFL-CIO v. Martin*, 961 F.2d 269 (D.C. Cir. 1992). To comply with this ruling, on June 26, 1992, Wage and Hour issued a **Federal Register** notice removing 29 CFR 5.5(a)(4)(iv) from the Code of Federal Regulations. 57 FR 28776. Further advice regarding implementation of the helper regulations in light of the lifting of the appropriations ban and the court action was given in All Agency Memorandum No. 163, dated June 22, 1992, and All Agency Memorandum No. 165, dated July 24, 1992.

Subsequently, Section 104 of the Department of Labor Appropriations Act of 1994, Public Law 103-112, enacted on October 21, 1993, prohibited the Department of Labor from expending funds to implement or administer the

helper regulations during fiscal year 1994.

Accordingly, on November 5, 1993, Wage and Hour published a **Federal Register** notice (58 FR 58954) suspending the regulations governing the use of semi-skilled helpers on DBRA-covered contracts, and reinstating the Department's prior policy regarding the use of helpers. The Department of Labor Appropriations Act for fiscal year 1995 again barred the Department from expending funds with respect to the helper regulations. Section 102, Public Law 103-333. That prohibition extended into fiscal 1996 as a result of several continuing resolutions. There was no such prohibition in the Department of Labor's Appropriations Acts for fiscal 1996 and 1997, Public Law 104-134, enacted on April 26, 1996 and Public Law 104-208, enacted on September 30, 1996.

On August 2, 1996, Wage and Hour published in the **Federal Register** (61 FR 40366) a proposal to continue to suspend the implementation of the helper regulations while additional rulemaking procedures are undertaken to determine whether further amendments should be made to those regulations. On December 30, 1996, a final rule was published in the **Federal Register** (61 FR 68641) continuing the suspension. Pursuant to that final rule, the November 5, 1993 suspension of the helper regulations continues in effect until Wage and Hour either (1) issues a final rule amending (and superseding) the suspended helper regulations; or (2) determines that no further rulemaking is appropriate, and issues a final rule reinstating the suspended regulations.

By decision dated July 23, 1997, the U.S. District Court for the District of Columbia upheld the Department's December 30 final rule continuing the suspension of the helper regulations until the completion of rulemaking proceedings. *Associated Builders & Contractors, Inc. v. Herman, C.A. No. 96-1490*, 1997 WL 525268 (D.D.C. July 23, 1997). The Associated Builders and Contractors had filed suit challenging the Department's failure to immediately reinstate the rule when the appropriations ban was lifted. The district court dismissed the suit, ruling that any error in failing to act immediately to issue a new effective date for the rule was mooted by the suspension rulemaking completed in December. The court observed that the Department was not required to ignore changed circumstances in the two-and-a-half years since the rule was last implemented, and went on to hold that the December rule was a valid rule, supported by the record, and consistent

with the requirements of the Davis-Bacon Act.

III. Discussion

During the period following the passage of the appropriations act for fiscal year 1996, Wage and Hour has carefully considered whether the suspended regulations governing the use of helpers should be modified. Seventeen years have passed since Wage and Hour first promulgated the regulations, and more than five years have passed since the Department's last attempt to put a revised version of those regulations in effect was curtailed by legislative action. The final helpers rule, which first became effective on February 4, 1991, was originally proposed and adopted because it was believed that it would result in employment practices on federal construction projects that more closely mirrored the private construction industry's practice of using helpers, which was assumed to be widespread, and would at the same time effect significant savings in federal construction costs. It was also believed that the expanded helper definition would provide additional job and training opportunities to unskilled workers, in particular women and minorities.

Implementation of the suspended helper definition and development of enforcement guidelines proved, however, to be more difficult than was anticipated, particularly in light of the court-ordered abandonment of the ratio provision.

Furthermore, the Department's experience with surveys conducted to implement the regulation and information from the surveys, and other data sources which were previously unavailable or not examined, indicated that the use of helpers was not as widespread as previously thought. Wage and Hour was also concerned about the possible negative impact of the suspended regulation on formal apprenticeship and training programs. These concerns, and the controversy evidenced by the rule's long history of litigation and by Congressional action over the 1989 final rule, led Wage and Hour to reexamine the basis and effect of the semi-skilled helper regulations.

As the Circuit Court of Appeals noted in its 1983 decision upholding the Secretary's authority to adopt a new definition of helper, it is within the Secretary's province to alter or overturn administrative rulings upon reconsideration of relevant facts. See *Building and Construction Trades Department, AFL-CIO v. Donovan*, 712 F.2d 611, 629 (D.C. Cir. 1983). The court

also made clear the authority of the Secretary to choose from among various regulatory programs the one he or she believes will best serve the purpose of the statute. As the Court of Appeals acknowledged, the Secretary is especially entitled to deference when his or her "decision turns on the enforceability of various regulatory schemes." *Donovan*, 712 F.2d at 629. An important factor to consider in making that choice is whether a particular regulatory scheme is sufficiently capable of practical and efficient administration and enforcement to achieve the statutory goal.

Wage and Hour has preliminarily concluded, after a full review of the suspended rule and all available information, that it is likely that the suspended rule cannot be enforced effectively. Furthermore, a key underpinning of the rule, that helper use is widespread, has been seriously undermined by an examination of all available data sources. Wage and Hour also believes that the suspended helper rule, if fully implemented, could have a negative impact on apprenticeship and training.

Wage and Hour therefore carefully considered a number of alternative approaches, focusing particularly on consistency with the purposes of the Act, enforceability, administrative feasibility, and ease of compliance. Although not a primary consideration, Wage and Hour also considered the potential impact of the various alternatives on employment and training opportunities for unskilled workers, including women and minorities. A necessary consideration was also consistency with the Department's "reinvention" efforts to revise and improve the Davis-Bacon wage determination process.¹

After a thorough review, Wage and Hour has preliminarily concluded that the current, longstanding practice of recognizing helpers only where they are a separate and distinct class with clearly

defined duties is the sole alternative considered that is both capable of effective enforcement and administration, and at the same time fully consistent with the purposes of the Act.

Comments are invited on the regulation proposed, as well as the other alternatives considered, including the Department's analysis and conclusions thereon.

Problems With the Suspended Helper Definition

1. The Suspended Helper Definition Would Be Difficult To Administer and Enforce

Wage and Hour has preliminarily concluded that the suspended regulation poses significant administrative difficulties, and cannot be effectively enforced in a manner consistent with the goals of the statute. The Department's experience in trying to develop enforcement guidelines to implement the helper regulations during the period they were in effect (from February 4, 1991 to April 10, 1991, and from January 29, 1992 to October 21, 1993) has led Wage and Hour to conclude that a supervisory-based, semi-skilled helper definition would be difficult to administer and enforce consistent with the purpose of the statute, namely to identify and preserve the locally prevailing wage for construction job classifications.

The suspended regulation defines a helper, not by the traditional test of the specific tasks performed by the worker, but as "a semi-skilled worker" who "may use tools of the trade at and under the direction and supervision of the journeyman." The suspended helper definition is the first and only instance of determining a Davis-Bacon classification solely on the basis of the worker's skill level and work-site supervision. Furthermore, the definition is internally inconsistent in that the examples given of the types of assistance the helper might provide to a journeyworker are not semi-skilled but rather are largely unskilled duties commonly performed by laborers.² Thus, the suspended definition specifically allows extensive overlap with duties performed by both journeylevel craft workers and laborers, instead of providing an objective means for distinguishing between helpers and other classifications.

During the period the suspended regulation was in effect, Wage and Hour tried to develop enforcement guidelines to implement the regulation. A fundamental problem that emerged was how to make a meaningful distinction between semi-skilled and skilled workers under the suspended definition. Wage and Hour has traditionally identified and differentiated among job classifications on the basis of the tasks performed by each classification. Among the issues Wage and Hour struggled with in trying to develop enforcement guidelines were: (1) What it means to be semi-skilled; (2) how to identify the line between a semi-skilled and skilled journeyworkers; (3) whether at some point a semi-skilled helper could acquire sufficient skills to qualify as a skilled worker, and how to determine when that had occurred; (4) whether a skilled worker could accept a position as a semi-skilled helper—and therefore be paid the lower helper wage rate—without violating the regulation or the intent of the Act; and (5) whether hiring as a semi-skilled helper a skilled worker who failed to disclose his skill level would violate the regulation or the Act.

The supervision aspect of the suspended helper definition likewise provides little assistance in distinguishing a helper from other classifications of workers. The definition states that a "helper" * * * works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman * * *." Supervision by a journeyworker is not a practical standard for distinguishing semi-skilled helpers from others on the worksite, as even laborers and journeylevel construction workers may work under the "direction and supervision" of other journeyworkers. The definition does not indicate the nature or amount of direction and supervision that helpers must receive to distinguish them from others on the worksite. The definition similarly provides little meaningful guidance for distinguishing between a "semi-skilled helper" who uses the tools of the trade, and a journeyworker with little experience, thus increasing the instances in which journeyworkers may be misclassified as helpers.

In addition, the definition's allowance of significant overlap between the duties of helpers and those of laborers increases the difficulty of identifying helpers as a distinct classification. Although the definition states that a helper must be "semi-skilled," the unskilled tasks listed in the definition as examples of a helper's duties are

¹ Wage and Hour is currently considering two potentially viable options:

(1) Through procedural changes and the application of technology, reengineer the current wage survey system to make it more efficient and to produce more accurate and timely wage determinations.

(2) Use redesigned and expanded BLS survey instruments—the Occupational Employment Statistics (OES) Survey and the National Compensation Survey (NCS, formerly known as "Comp 2000"), when these are available, and modified as may be needed—for Davis-Bacon prevailing wage/fringe benefits determination purposes. (The OES survey would use government-wide Standard Occupational Classification (SOC) definitions, which are currently undergoing review. See 60 FR 10998 (February 28, 1995), 60 FR 52284 (October 5, 1995), and 62 FR 36338 (July 7, 1997).)

² E.g., "preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools. * * *" 47 FR 23667.

commonly performed by unskilled laborers. Thus, it would be difficult to distinguish between a laborer and a helper when a worker is performing only unskilled work. It may theoretically be possible for a helper under this definition to be distinguished from a laborer if the helper directly assists a particular class of journeyworker(s) and uses the tools of the trade. However, based on a further review of the duties of laborers who assist craft workers, together with the Department's experience in conducting conformance surveys during the brief period the suspended regulation was in effect, and the low wages paid helpers in the Current Population Survey (CPS), Wage and Hour now believes—contrary to its earlier assumptions—that many laborers also assist journeylevel workers and that laborers sometimes use tools of the trade to perform certain limited duties (e.g., demolition/removal of materials, building of scaffolding or forms). The overlap of duties therefore increases the likelihood that helpers will displace laborers, or that laborers will be misclassified as helpers. For example, a laborer working under the supervision of a journeyworker could be classified as a lower-paid “helper” simply by adding to his or her duties a few relatively low-skilled tasks.³

Wage and Hour recognized the subjectivity of the suspended definition when it first proposed the helper regulations in 1981, and sought “to protect against possible abuse” by proposing to establish a maximum ratio of helpers to journeyworkers. Wage and Hour originally proposed a 1:5 ratio, then settled on a ratio of 2 helpers for every 3 journeyworkers in the final regulation. (46 FR 41456, August 14, 1981; 47 FR 23658, May 28, 1982). While not a guarantee against misclassification in any particular case, the ratio would at least have decreased the likelihood of widespread misclassification between journeyworkers and helpers and provided one objective measure for compliance and enforcement. As the Court stated in its 1983 decision, the ratio “increased the likelihood that gross violations will be caught, or at least that evasion will not get too far out of line.” 712 F.2d. at 630. In rejecting the 2:3 ratio in its 1992 decision on the ground that the rulemaking record lacked adequate support for that particular numeric ratio, the Court of Appeals deprived Wage and Hour of the

mechanism designed to mitigate the possibility of abuse.

What remains is a vague standard that Wage and Hour has preliminarily concluded is not amenable to effective enforcement. Thus, Wage and Hour believes that the suspended regulation does not define helpers in a manner sufficient to differentiate readily between semi-skilled helpers and journeyworkers or laborers, as a practical matter, in day-to-day compliance and enforcement. Contractors would likely find it difficult to apply the regulation in classifying their workers and could find themselves unwittingly in violation of prevailing wage requirements due to misclassification. It would also be difficult to prevent unscrupulous contractors from taking advantage of the uncertainties created by the definition by intentionally misclassifying large numbers of workers.

The definitional problems discussed above are compounded by evidence that the term “helper” has multiple, quite different meanings within the construction industry. A review of comments received in response to the Department's rulemaking proposal to continue the suspension of the helper rule (61 FR 40366) disclosed that some contractors use the term “helper” to refer to skilled workers who are less experienced, *i.e.*, those who use tools of a trade to perform some tasks, but have not been trained in the full range of journeylevel work. Others use the term to refer to workers who perform unskilled laborer duties that are related to the work of skilled journeyworkers, as a short-term entry level job, or as a longer-term specialized worker to perform a limited range of work duties that somewhat overlaps those of the craft journeylevel worker. Still others use the term helper to refer to employees with little or no experience in the construction industry, *i.e.*, untrained entry level workers. Wage and Hour believes that these variations in the use of the term helper may exist in any given local area where use of helper classifications is prevalent. Direct assistance to, or supervision by, a journeyworker—the central component of the suspended regulatory definition—does not appear to be an important consideration for commenters in distinguishing helpers from other workers. Thus, it appears that the suspended definition, and perhaps any regulatory definition of helpers, does not adequately reflect the actual and varied practice in the construction industry as a whole or even in any particular area. However, Wage and Hour is interested in obtaining further

evidence regarding how helpers are in fact used by contractors, particularly any data regarding whether there is in fact a generally recognized definition of helpers that is capable of being objectively identified.

Wage and Hour also believes it would be difficult for it to conduct a meaningful wage determination process concerning helpers in light of the likelihood that contractors responding to area wage surveys would ascribe very different meanings to the term “helpers.” Thus, contrary to basic principles of the Davis-Bacon Act, it is assumed that workers who perform quite different work would likely be grouped together for purposes of determining prevailing wage rates for a single class of “helpers” within a given area. Moreover, Wage and Hour believes that some contractors may report workers as helpers, whereas other contractors might report the same type of worker as a laborer or craft journeyworker. Such data would not provide a meaningful basis for determining prevailing wage rates for the affected classifications, as required by the statute.

2. Helpers Are Less Widespread Than Previously Believed.

The belief that a distinct class known as “helpers” was in widespread use in the construction industry was a key assumption underlying the Department's development of the helper regulation. Indeed, in the preamble to the proposed rule published in 1987, the Secretary projected that helpers would be determined to be prevailing in two-thirds to 100% of all craft classifications. 52 FR 31366, 31369–370 (August 19, 1987).⁴ The Department's actual experience with the helper regulation reflects a different picture.

During implementation of the suspended regulations, Wage and Hour collected data and determined whether helpers prevailed in various areas, in accord with the Court's ruling and the requirements of the now-suspended rule. Thus, implementation of the suspended regulations, albeit brief, did provide some data and insight into whether the use of helpers is, in fact, widespread in the construction industry.

The data Wage and Hour received in implementing the regulations failed to substantiate the prior assumption that the use of helpers is widespread.

³ As set forth in the economic impact analysis set forth herein, the Current Population Survey (CPS) indicates that average earnings for helpers are less than the average earnings received by laborers.

⁴ This was amended by the statement (without quantification) in the final rule that this would be reduced somewhat to the extent that collectively bargained rates were recognized as prevailing and did not provide for use of a helper classification. 54 FR 4242.

Whether analyzed by individual classifications covered or by surveys completed (each of which would include various classifications), the survey data showed a substantially lower rate of helper use than was anticipated. For example, a review of the wage schedules issued based on the 78 prevailing wage surveys completed during the period the rule was in effect,⁵ revealed that the use of helpers prevailed with respect to only 69, or 3.9 percent, of the 1763 classifications included in wage schedules. Of the 69 classifications in which helpers prevailed, only 48, or 2.7 percent of the 1763 classifications, were in the non-union sector.⁶ This is particularly noteworthy because it had been assumed in the past that helpers would almost always be found to prevail for classifications in the non-union sector.

Furthermore, use of helpers was not prevailing in any classifications in 43 of the 78 surveys conducted, covering 229 of 328 counties surveyed. The 78 surveys included two in which the resulting wage schedules contained only collectively bargained rates, ten surveys in which the schedules contained only open shop rates, and 66 mixed schedules, 51 of which contained 50 percent or more open shop rates. In 13 of the 35 surveys where a helper classification was issued, the only helper classification found to prevail was a union helper. A total of only 48 open shop helper classifications were found to prevail. Thus, in only 20 of the 78 surveys conducted, covering only 52 of 328 counties surveyed, were *any* open shop helper classifications found to prevail. See 61 FR 68644–68645.

The conclusion that helpers are less widespread than had been expected is also supported by the Economic Impact and Flexibility Analysis. The 1996 Current Population Survey (CPS), compiled and published by the Bureau of Labor Statistics (BLS) and the Bureau of the Census, which Wage and Hour believes is most likely to be representative of the distribution of employment of helpers in the construction industry, shows that

helpers account for only 1.2 percent of total construction industry employment. Data from the Occupational Employment Statistics (“OES”) program, which formed the basis for earlier analyses of helper employment, shows that helpers comprise 8.7 percent of the total construction workforce—higher than the CPS data but a much lower incidence than the Department’s economic impact analysis in 1987 and 1989 would suggest. Furthermore, as is discussed more fully in the Economic Impact Analysis, *infra*, the OES figure is based on a helper definition that appears to correspond to what is commonly considered to be laborers’ or tenders’ work and does not appear to envision that helpers use tools of the trade—an important component of the definition in the suspended regulation. For this reason Wage and Hour believes that the OES figure significantly overstates the use of helpers in the construction industry.⁷

3. The Suspended Regulation Could Have a Negative Impact on Formal Apprenticeship and Training Programs

Wage and Hour has long been of the view that formal structured training programs are more effective than informal on-the-job training alone. Workers enrolled in formal apprenticeship training programs are more likely to achieve journeylevel status, and to do so more quickly, than workers trained informally, who may become stuck in low-paying jobs. Apprenticeship programs are also more likely to produce better skilled, more productive and safety-conscious workers.⁸

⁷ As discussed in the Impact Analysis, there are strengths and weaknesses to both the CPS and the OES data sources. For example, CPS is a household survey and it may be that a carpenter’s helper would self-report his or her duties and occupation as a carpenter. The Impact Analysis also contains an alternative estimate of the number of helpers, utilizing the percentage of laborers in the CPS workforce to adjust the OES data. Under that methodology, described further in the Impact Analysis, helpers constitute 3.4% of the total construction workforce.

⁸ Indicative of the lesser efficacy of informal training is the report issued by the Business Roundtable, which found that more than 60 percent of its member respondents said they could not find adequate numbers of skilled workers, and 75 percent said the trend had accelerated in the past ten years. 203 Daily Labor Report (DLR) A–9 (Oct. 21, 1997). 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.” Significantly, the Bureau of Apprenticeship and Training reports almost three times as many union as non-union apprentices (77,163 union apprentices, compared to 28,542 non-union apprentices, out of data reported for 36 states (14 states and the of Columbia do not maintain data by P union affiliation)).

Although not its primary concern in this rulemaking, Wage and Hour is concerned about the potential impact of the suspended regulations on formal apprenticeship and training programs. An acknowledged goal of Wage and Hour when it proposed the suspended helpers definition was to encourage training for unskilled and semi-skilled workers, including in particular, women and minorities,⁹ (47 FR 23647 (May 28, 1982)) and to that end Wage and Hour encourages formal training and work advancement to assure that workers—particularly young, minority, and female workers—are not frozen into low paying, low skilled jobs. Because the Department’s experience suggests that some contractors may establish apprenticeship programs to take advantage of the lower wages which can be paid apprentices and trainees on Davis-Bacon projects,¹⁰ Wage and Hour believes that the suspended helper regulations could undermine effective training in the industry if contractors use helpers, who may never become journeylevel workers, in lieu of apprentices and trainees participating in formal programs.

The Proposed Rule—Helpers as a Separate and Distinct Class with Clearly Defined Duties Which Do Not Overlap With Laborer or Journeyman Classifications

Wage and Hour proposes to amend the regulations to reflect the longstanding policy of recognizing helpers as a distinct classification on DBRA-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;¹¹ (2) the use of such helpers is an established prevailing practice in the area; and (3) the term “helper” is not synonymous

⁹ 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.

¹⁰ Effective training for targeted under-represented or economically disadvantaged workers who are not qualified for apprenticeship programs can be designed under the existing regulations. For example, the Step-Up Program developed by the Department of Housing and Urban Development (HUD) provides disadvantaged workers with training necessary for them to move on to other more skilled jobs or into a formal apprenticeship program.

¹¹ For example, roofing subcontractors, like other specialty subcontractors, often do not hire laborers, and might employ helpers to perform duties such as bringing materials to the roof and removing the old roof.

⁵ Not included in the 69 helper classifications are instances where the number of helpers actually used or the number of contractors using helpers was not enough to provide an adequate basis for determining a prevailing wage rate. (Wage and Hour procedures at the time these surveys were conducted required that there be at least 6 workers employed by at least 3 employers if the contractor-response rate to the survey was less than 50 percent, and at least 3 workers employed by at least 2 employers if the response rate was 50 percent or more.)

⁶ Fifteen of the 21 union-sector helpers classifications were elevator constructor helpers—a classification historically recognized nationwide in the union sector of the constructor trade.

with "trainee" in an informal training program.¹²

This approach retains the duties-based classification distinction that provides an objective basis for administration and enforcement. It provides clear criteria to facilitate compliance. It is also consistent with the intent of the Davis-Bacon Act to assure that workers employed on federal and federally-assisted construction work be paid at least the wages paid to workers doing similar work on similar construction in the area. Lack of overlapping duties should also discourage contractor misclassification and/or abuse. This approach also encourages contractors to establish or participate in structured training programs leading to journeylevel status if they want to pay subminimum rates to entry-level or less skilled workers.

Unlike some of the other alternatives considered, this policy concerning helpers does not require Wage and Hour to make a fact-bound inquiry in each case to assess a worker's skill level and the nature of work-site supervision to determine whether the worker will be recognized as a "helper" for Davis-Bacon prevailing wage compliance and enforcement purposes. The requirement that helpers be separate and distinct from journeylevel workers and laborers should also facilitate collection of wage data to establish the prevailing wage rates to be paid on DBRA-covered construction work.

Although this proposal could be said to disregard local area practices in those instances where there may be a prevailing practice of employing "helpers" who do not meet the regulatory test set forth above, it appears that there is wide variation in how helpers are used, such that change in practices by contractors would be likely under any definition. Wage and Hour has been unable to identify a generally accepted definition of helper that corresponds to industry practices. Similarly, Wage and Hour has been unable to find a practical method of determining prevailing practice regarding how helpers are in fact utilized in an area.

Discussion of Other Alternatives Considered

1. Add a Ratio Requirement to the Suspended Helper Definition

Wage and Hour recognized that the broad scope of the helper rule's definition created the potential for abuse when it originally proposed to amend the regulations to allow the expanded use of helpers. The rule as proposed in 1981, as well as subsequent modifications, sought "to protect against possible abuse" by establishing a maximum ratio of helpers to journeyworkers. In 1992, the Court of Appeals ruling nullified the ratio of two helpers to every three journeyworkers because that specific numeric ratio had not been justified in the rulemaking record. As noted in the foregoing discussion, the inherent definitional problems regarding the suspended "helper" rule were compounded by elimination of the ratio provision, which was intended to ameliorate the possible overuse of helpers.

Since the Court of Appeals ruling does not prevent Wage and Hour from implementing a ratio, provided it has support in the rulemaking record, implementation of a new ratio was the first alternative considered. Implementation of a ratio provision would be essential if the suspended rule were implemented, since it would reduce the potential for abuse. However, adoption of such a provision would not address or resolve the inherent definitional problems discussed above, which make it extremely difficult under the suspended rule for contractors, as well as Wage and Hour and contracting agencies, to identify helpers for Davis-Bacon enforcement and wage determination purposes.

Furthermore, determination of an appropriate ratio standard—either a single nationwide ratio or local ratios—would be difficult. While a nationwide ratio would not accord with local practices, local ratios would present significant administrative and enforcement concerns, and would require substantial resources for implementation.

2. Change the "Helper" Definition To Emphasize the Semi-Skilled Nature of the Classification

The intention of Wage and Hour in promulgating the suspended rule was to allow the expanded employment on Davis-Bacon covered projects of helpers who are "semi-skilled," in other words, they perform some journeylevel duties, but not the entire range of journeylevel work. This attempt to define helpers as similar to but less skilled than a

journeyworker resulted in a helper definition that is internally inconsistent, since the specific tasks listed as within the scope of a helper's duties are commonly performed by unskilled workers. Wage and Hour therefore considered possible modifications to the helper definition to emphasize the semi-skilled nature of helpers, elaborate on the supervisory relationship of the journeyworkers with the helper and the craft-specific assistance provided, and expressly limit the unskilled work the helper may perform.

This approach to the definition would help assure that the "helper" classification would be a true "semi-skilled" classification rather than a broad catch-all classification that can perform everything from laborer duties to an undefined assortment of skilled tasks overlapping the work of the journeyworkers. Such a definition would therefore aid in distinguishing helpers from laborers. However, this alternative would not resolve the administrative and enforcement problems that stem from the overlap of duties between journeyworkers and helpers. Furthermore, Wage and Hour is concerned that this type of definition, with its emphasis on semi-skilled duties, may result in helper classifications being used to replace, rather than supplement, the use of apprentices and trainees registered in bona fide training programs.

3. Define "Helpers" Based on the Bureau of Labor Statistics, Occupational Employment Statistics (OES) Dictionary of Occupations, Which Focuses on Unskilled Duties and the Worker's Interaction With Journeylevel Craft Workers

The Bureau of Labor Statistics Occupational Employment Statistics (OES) Dictionary of Occupations classification scheme includes a broad category titled "Helpers, Laborers, and Material Movers, Hand, Exclud[ing] Agriculture and Forestry Laborers." The work of helpers so defined in the construction industry is currently described generally as follows:

Help workers in the construction trades, such as Bricklayers, Carpenters, Electricians, Painters, Plumbers and Surveyors. Perform duties such as furnishing tools, materials and supplies to other workers; cleaning work areas, machines, and tools; and holding materials or tools for other workers.

Use of this approach would provide for definitional consistency with other uses of the OES data and would take advantage of a standard definition that could be easily followed and understood by contractors from whom data is collected for various purposes,

¹² Where Wage and Hour has determined that this standard is met, the helper classification will be listed on the wage determination. Where no helper is listed on the wage determination, a contractor who believes that use of a helper classification meeting the criteria is prevailing in the locality may request an additional classification in accordance with 29 CFR 5.5(a)(1)(ii). Like other classifications, the particular duties such a helper may perform are determined by area practice.

including Davis-Bacon prevailing wage surveys. The OES definitions would focus on the role of the helper in assisting the journeyworker, in accord with the Department's intention that such a role be a key component of any definition selected.

These definitions, which would eliminate the "semi-skilled" characterization from the definition and highlight unskilled duties, could provide a more practical basis for distinguishing helpers from journeyworkers. On the other hand, laborers may often perform the same work encompassed within the OES helper definition, thereby raising significant problems in conducting wage and area practice surveys and in enforcement. It may be difficult for contractors to determine whether workers performing similar or identical duties are "laborers" or "helpers" when submitting Davis-Bacon survey data and in classifying workers on Davis-Bacon projects. In turn, Wage and Hour believes it would likely be difficult for it to determine whether contractors have properly classified workers paid as helpers as distinguished from laborers on Davis-Bacon projects, and therefore whether contractors have submitted accurate wage data in regard to helpers.

4. Explicitly Delineate the Semi-Skilled Tasks Performed by Each Helper Classification

The "job family" concept is currently employed for certain occupations under the McNamara-O'Hara Service Contract Act. An employee who performs only lower level duties that are associated with a particular job family may be classified and paid at the lower level helper rate; however, an employee who performs some lower level duties and some higher level duties must be paid the higher level journeylevel rate for all of the employee's work time.

In effect, this approach would allow for the expanded use of helpers, with differentiation based on the skill and knowledge required to perform particular duties. Once the duties or tasks that the helpers could perform were clearly defined, wage data could be collected on that basis, and contractors could reasonably be expected to comply with the wage requirements for the various classifications employed on their contracts, thereby facilitating administration and enforcement.

However, developing clear definitions of the duties or tasks that helpers to each journeylevel craft worker would be allowed to perform would be very difficult. It would require extensive occupational analyses and further

rulemaking to promulgate helpers duties descriptions. Furthermore, this alternative—like other alternatives considered—presumably would result in uniform, nationwide definitions, departing from the principle that classifications are determined based on local area practice.

IV. Executive Order 12866; § 202 of the Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act

Wage and Hour has determined that this proposed rule should be treated as "economically significant" within the meaning of Executive Order 12866 and as a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act. This proposed rule would continue the status quo which has been in effect since November 1993, and therefore it would have no economic impact compared to current practices. However, various alternatives considered would result in potential savings which could be in excess of \$100 million per year. Therefore a full economic impact analysis has been prepared.

However, for purposes of the Unfunded Mandates Reform Act of 1995, this rule does not include any federal mandate that may result in increased annual expenditures in excess of \$100 million by state, local and tribal governments in the aggregate, or by the private sector. The requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1532, do not apply here because the proposed rule does not include a "Federal mandate." The term "Federal mandate" is defined to include either a "Federal intergovernmental mandate" or a "Federal private sector mandate." 2 U.S.C. 658(6). Except in limited circumstances not applicable here, those terms do *not* include an enforceable duty which is "a condition of Federal assistance" or "a duty arising from participation in a voluntary program." 2 U.S.C. 658(5)(A)(I) and (7)(A). A decision by contractors to bid on Federal or Federally-assisted construction contracts is purely voluntary in nature, and their duty to meet Davis-Bacon requirements are "conditions of Federal assistance" which arise "from participation in a voluntary Federal program."

Similarly, the proposed rule is not an "unfunded mandate" within the meaning of Executive Order 12875 since it does not create any unfunded mandate not currently required by the Davis-Bacon and Related Acts and regulations thereunder. Furthermore, most of the funds necessary to pay the direct costs incurred by State, local and

tribal governments under projects subject to the Davis-Bacon and related Acts are provided by the Federal Government.¹³ Thus, any additional savings to States if the proposed rule increased use of helpers allowed on Davis-Bacon projects would not be significant.

V. Economic Impact and Flexibility Analysis on Davis-Bacon Helper Regulations

Summary

This document presents an Economic Impact Analysis comparing the proposed rule governing the use of helpers under the Davis-Bacon and Related Acts to the suspended rule. The basic process utilized to estimate the potential savings impact of the suspended regulation is to compare the occupational distribution of workers with, and without helpers. The alternative occupational employment patterns are then assessed in terms of their costs, based upon the annual earnings of the workers in the occupations affected by the suspended regulation: journeyworkers, apprentices, laborers, and helpers. The total wage bill with the suspended regulation in force is then subtracted from the wage bill estimated without the regulation. The difference, then, is the estimated savings.

The principal finding of the analysis is that any impact which would result from the increased use of helpers under the suspended rule, or any of the other alternatives considered, would be relatively modest. Potential savings are estimated to be from \$72.8 million (utilizing Current Population Survey—CPS data) to \$296.0 million (utilizing Occupational Employment Statistics—OES data). A methodology that is OES-based, but utilizes CPS data to estimate the number of laborers and helpers in the OES, provides an estimate of \$108.6 million in possible savings. This alternative OES estimate was developed to compensate for the likelihood that OES data overestimate the number of helpers.¹⁴ In any case, for reasons discussed below, Wage and Hour believes that the potential savings are likely to be closer to \$72.8 million than to \$296.0 million.

Relative to total construction expenditures covered by the Davis-

¹³ It is significant that no such entities commented on the proposed rule published in August 1996.

¹⁴ As explained in detail below, OES has no distinct classification for laborer. This characteristic of the OES program, in combination with the helper OES definition that includes workers who would normally be classified as construction laborers, inflates the OES helper total.

Bacon and Related Acts, these potential cost savings are very small, ranging from 0.2 percent to 1.0 percent. As discussed below, the estimated savings are far less than previously believed. For the most part, changes in the savings potential resulted from the use of improved data, including information derived from experience administering the suspended regulations, which temporarily expanded the use of helpers.

A. Introduction

Over the years, Wage and Hour has prepared and updated regulatory impact and flexibility analyses in connection with proposed and final regulations governing the use of semi-skilled helpers under the Davis-Bacon and Related Acts. Specifically, cost savings derived from the increased use of helpers were estimated in the August 14, 1981 proposed rule (46 FR 41456); the May 28, 1982 final rule (47 FR 23644); the August 19, 1987 proposed rule (52 FR 31366); and the January 27, 1989 final rule (54 FR 4234). Wage and Hour is now updating its cost estimates in connection with the proposed rule being published today, as set forth above.

This latest economic impact analysis has the advantage of utilizing information not previously available. For example, for the first time, survey data are available from a limited period when the regulations expanding the use of helpers were actually being implemented. Other data sources, utilized for the first time in such an analysis, include:

- Estimates of apprentice employment, based upon information provided by the Bureau of Apprenticeship and Training (BAT) from its Apprentice Information System (AIMS).
- F.W. Dodge construction reports.
- Detailed published occupational information and unpublished Bureau of Labor Statistics (BLS) tabulations from the Current Population Survey (CPS).
- National Occupational Employment Statistics (OES) Program data.

B. Assumptions and Data Sources

1. Assumptions

a. There is a strong positive correlation between the value of construction and the level of construction employment. This assumption is derived from the fact that labor costs generally are considered to constitute a significant proportion of total construction expenditures.

b. Under the suspended rule, helpers would replace laborers, apprentices, and journeymen in proportion to the

number of workers in each of these occupations. The previous helper impact analysis assumed that helpers would only replace journeymen, and measured only the wage differentials from this replacement effect. This exaggerated the estimates of possible cost savings from the expanded use of helpers. Since wage rates generally reflect skill levels, the relative closeness of average annual earnings for helpers, laborers, and apprentices, compared to journeymen, strongly suggests that this assumption was incorrect. These wage data suggested that helpers (at \$9,008 per year) are more likely to assume the duties of laborers (at \$15,907 per year) and apprentices (at \$12,564 per year) than journeymen (at \$23,007 per year).¹⁵ In fact, had the redistribution of employment been strictly in accordance with occupational wages, savings estimates would have been reduced significantly (see Estimating Process, Step 2).

The assumption that helpers would perform tasks previously performed by laborers and apprentices, as well as journeymen, is also based upon comments made by general contractors surveyed during the processing of helper conformance requests during the period February 1992 to October 1993. These comments indicated that the job title "laborer" was often applied to those performing the work of a "helper" (as defined in the suspended regulations). In order to take the middle ground for this analysis, it is assumed that when a helper classification is added, the jobs which would be performed by helpers were previously those of laborers, apprentices, and journeymen, in the same proportion as their relative occupational employment.

c. Utilizing the decision rules specified in Section 1.7(d), 29 CFR of the suspended regulations (see Section C, Part 2, Estimating Process, Step 3, below), helpers would be likely to "prevail" for a limited number of classes in areas that represent about half the construction employment covered by the Davis-Bacon and Related Acts. This estimate is based on the findings of prevailing wage surveys conducted during the period from February 1992 to October 1993. This is generally consistent with the small number of helpers relative to total construction employment found in the CPS, OES, and adjusted OES databases, only 1.3 percent, 8.7 percent, and 3.4 percent of

construction employment, respectively.¹⁶

d. The proportion of employment by occupation would be consistent in all areas, and therefore the average national proportion of helpers, apprentices, laborers, and journeymen would be the same in areas where helpers prevail and where they do not. One could, of course, contend that a proportion higher than the national average should be used for helpers in the half of Davis-Bacon construction in which it is assumed that some helpers would prevail. However, some helpers would also be employed in the much larger group of classifications in which helpers would not be determined to prevail. Furthermore, an analysis of helper employment from Davis-Bacon surveys during the period when the suspended Regulation was in effect, found that in areas where helpers prevailed for one or more classifications, versus those where no helpers prevailed, the percent helpers were of total employment was almost identical (1.8 percent vs. 1.7 percent). Therefore, it is reasonable to assume that, on average, the level of helpers employed in areas where helpers prevail would be consistent with the level of helper employment overall.

e. Approximately one-third of public, non-Federal construction projects receive Federal assistance. This estimate is based upon the extensive experience of the Office of Federal Contract Compliance Programs (OFCCP) with F.W. Dodge data (which classifies public projects into Federal and public non-Federal classifications) to select construction sites for compliance inspections (only Federal and Federally-assisted projects are inspected by OFCCP). However, since not all types of Federal assistance trigger Davis-Bacon and Related Acts coverage, recent prevailing wage surveys were used to determine the average proportion of public, non-Federal construction covered by the Davis-Bacon and Related Acts. Based upon a study of 34 prevailing wage surveys, approximately 23 percent of the value of public non-Federal construction is covered by Davis-Bacon.

f. Except for the specific requirements of Davis-Bacon, such as those concerning helpers, primary characteristics of the labor force, i.e., occupational distribution, work assignments, etc. under Davis-Bacon are

¹⁶ Based upon the results of the methodology utilized, if the suspended regulations were in effect, the proportion of helpers to total employment would increase from 1.3 to 1.4 percent (CPS), 8.7 to 9.2 percent (OES) and 3.4 to 3.5 percent (Adjusted OES, hereafter "AdjOES").

¹⁵ Source: 1996 BLS/CPS.

comparable to those of the labor force not covered by prevailing wages.

2. Data Sources

Databases from which estimates were developed include:

- The BAT AIMS Reporting System (number of apprentices).
- The BLS/Bureau of the Census CPS (total construction industry employment, distribution of employment by selected occupation, and total annual earnings by occupation).
- The BLS OES Program (total construction industry employment and distribution of employment for selected occupational combinations).
- F.W. Dodge Construction Reports (construction value by ownership).
- Wage and Hour Division Regional Survey Planning Reports (RSPR) (public construction value by wage determinations reflecting union, open shop, and mixed wage rates).
- Information gained through conduct of Wage and Hour Division wage surveys.

There are significant differences in the CPS and OES data, some of which are due to the way the data are collected. The CPS is a household survey and relies on information provided by residents, whereas the OES is an establishment survey, with data usually provided by employers' personnel offices. The most apparent difference is in the total number of construction workers. In the CPS survey, the total number is much higher than in the OES, in part because the OES does not count the self-employed. (See tables in Section C.1.b., below.)

Although they constitute the best available data on occupational employment and wages in the construction industry, neither the CPS nor the OES is ideal for the purpose of this analysis. In fact, there are a number of differences between the two surveys that are of particular importance to this analysis. Specifically, each has strengths and weaknesses that impact the helper savings derived from database use.

For the purpose of estimating the impact of the proposed helper regulation, the Current Population Survey has the following strengths:

- The CPS survey includes those workers not covered by State unemployment insurance—primarily self-employed workers. This latter group is particularly important since the construction industry includes a significant number of workers (e.g., painters, carpenters, and plumbers) who are independent contractors, and therefore self-employed. Davis-Bacon prevailing wage requirements extend to

every laborer and mechanic working on a covered project, regardless of contractual relationship, including the self-employed (independent contractors). Thus, the CPS number of construction workers, particularly the skilled workers who are more likely to be self-employed, reflects the universe of construction employment that is relevant to this analysis.

- The CPS provides separate employment totals for helper, apprentice, laborer, and journeyworker classes, all of which are needed to conduct this impact analysis.
- The CPS provides annual average earnings for the above classes. These data are also essential to estimating the impact of implementing the suspended rule.

For purposes of this analysis, the CPS survey program also has the following weaknesses:

- CPS is a household survey, rather than an establishment survey. In general, household surveys are likely to produce less accurate and consistent wage and classification information than establishment surveys. Self-reporting can result in some workers exaggerating their level of responsibility or wages. For example, a carpenter's helper may self-report his or her duties and occupation as carpenter.¹⁷
- The CPS data on annual earnings include wages earned outside construction, although construction is the industry of longest employment for each worker.
- Apprentice data, other than four separately identified classes, are combined with data for the associated journeyworkers. This has the effect of inflating journeyworker employment totals and lowering journeyworker wages.
- CPS responses can be provided by the worker's spouse or adult child if the worker is unavailable.

For the purpose of estimating potential savings, the OES Program exhibits three particular strengths:

- The OES Program utilizes standard occupational definitions, describing those workers who should be reported in each.
- Establishment (i.e., employer) personnel staff usually provides the survey data requested. This, together with the standard definitions, is likely to result in more accurate and consistent assignment of occupational classes, and

more accurate wage reporting than that characteristic of surveys with self-reporting of workers, such as the CPS.

- The OES sample size (1.2 million employers) is larger than the CPS sample size (50,000), with one-third of the 1.2 million establishments surveyed each year. This large sample increases the number of participating establishments and reduces sampling error.

Weaknesses of the OES survey program, for purposes of this analysis, include:

- The OES does not provide a specific employment total for "laborer." Instead, laborers appear to be combined with craft helpers, as well as in an OES occupational category titled "All Other Helpers, Laborers, and Material Movers, Hand." Since it is assumed that some helpers would replace laborers under the suspended regulation, separate laborers and helpers totals are required for development of an accurate savings estimate.

- The OES definitions of the various helper classifications are very similar to unskilled laborers who provide assistance to journeyworkers. (Helpers "perform duties such as furnishing tools, materials and supplies to other workers; cleaning work areas, machines, and tools; and holding materials or tools for other workers.") Thus, the OES craft helper may often be an unskilled worker (and thus a laborer) rather than the semi-skilled worker required in the suspended regulation. As a result, laborer employment in the OES likely is, to a great extent, included with helper employment, thereby overstating the number of helpers.

- The OES survey collects only hourly wage data and does not collect annual hours worked data. At the same time, OES counts jobs rather than employees. As a result, if one person holds a job at more than one establishment, each one of those jobs will be counted, providing a total that exceeds the number of employees. Since labor costs are computed by multiplying the number of employees times annual CPS wages, the OES jobs count acts to overestimate costs.

- The OES excludes those who are self-employed (independent contractors) and those not covered by State unemployment insurance, thus significantly understating the total number of construction workers and the number of construction workers in the Davis-Bacon workforce.

- All apprentice data are combined with the journeyworker data, thus overstating the number of journeyworkers.

¹⁷ A 1973 comparison of CPS earnings reported by those surveyed versus corresponding IRS records indicated that exaggeration is minimal. See Herriot, Roger A., and Spiers, Emmet F., "Measuring the Impact on Income Statistics of Reporting Differences between the Current Population Survey and Administrative Sources," Unpublished, 1973.

Based principally on the fact that at this time the OES does not have a separate classification for laborer, together with the fact that OES does not collect data on self-employed individuals, Wage and Hour believes that the CPS data are more likely than the OES data to be representative of the distribution of employment in construction by occupation for helpers and laborers. However, given that neither database is ideal for this purpose, and the fact that OES data are also relevant, both CPS and OES will be used to develop a range of possible savings estimates.

3. Measuring Helpers and Laborers

The major difficulty in developing an impact analysis to estimate potential savings from the expanded use of Davis-Bacon helpers is the dearth of data that reasonably represent the employment of helpers as defined by the suspended regulations, and of laborers. As noted in the Data Sources section, above, the Current Population Survey (CPS) does have separate categories for helper and laborer. However, the survey does not contain standard occupational definitions. Therefore, there can be no assurance that the number of those reported as helpers truly corresponds to the definition in the suspended regulation. For example, it is believed that some helpers—defined by the regulation as semi-skilled workers who may use tools of the trade—may actually be reported in the CPS as journeyworkers. On the other hand, many laborers may be reported as helpers.

Also, as noted above, although the Occupational Employment Statistics (OES) program includes the use of standard occupational definitions, it has no distinct category for laborers and the helper definitions used in the survey are quite different than the definitions in

the suspended regulations. In fact, the OES helper definition likely includes many laborers who primarily work with or assist journeyworkers. Also, many of those reported as helpers under OES may not be semi-skilled at all, but unskilled workers who perform “duties of lesser skill” and do not have the knowledge and abilities necessary to use tools of the trade. Therefore, Wage and Hour believes that the OES employment totals for helpers likely include many laborers and unskilled helpers.

Since the OES database has no distinct class for laborer, the methodology to estimate potential savings using OES data requires development of a methodology for separating laborers from helpers. Therefore, OES classes were identified that by their terms appeared to primarily include laborers. The classes selected for that purpose included Helpers, Mechanic and Repairer; Helpers, Extractive Workers; Freight, Stock, and Material Movers, Hand; Vehicle Washers and Equipment Cleaners; and Other Helpers, Laborers, & Material Movers, Hand. On the one hand, given these job titles, some workers other than laborers would be included in these totals. On the other hand, the total number of laborers derived from this process (262,310) is well below what would be expected, leading one to believe that many laborers are included in the OES craft helper employment totals.

Corroborating evidence that this approach to the OES data without further adjustment overestimates the number of helpers, underestimates the number of laborers, and therefore overestimates potential savings, when utilized in a helpers impact analysis, may be found in both Decennial Census and CPS data. The Decennial Census estimates 949,000 construction laborers (a ratio of 1 laborer for every 5

journeymen), the CPS estimates 988,000 (1 laborer for every 4 journeymen), and OES estimates just 262,310 (1 laborer for every 10 journeymen).¹⁸

One way to compensate for this likely undercount of laborers and overestimate of helpers is to determine what percent laborers constitute in the CPS universe, and apply that to the OES data. The laborer category is chosen for this purpose because it is the least likely to suffer from error due to the reporting workers exaggerating their duties. In the CPS, the laborers constitute 18.8 percent of the total for journeymen, apprentices, laborers, and helpers. Multiplying that percent times the comparable OES total provides an adjusted number of OES laborers. Subtracting the adjusted laborer total from the laborer-helper combination (called helper) in OES yields an adjusted number for helpers. While this figure (and therefore the potential savings estimate) is probably an improvement over the unadjusted OES helper total, one cannot be certain of problems that may have inappropriately affected the resulting estimates, since two dissimilar databases have been combined.¹⁹

In light of these problems, it is advised that the estimates included in this impact analysis be considered with caution. All the figures provided should be treated as very rough measures that provide a general range within which possible savings could fall.

C. Key Data Elements, Estimating Process and Computations

1. Key Data Elements

a. Value of total construction starts, 1996:

Total: \$321,736,705,000

Federally owned: \$10,799,923,000

Public-Non-Fed: \$87,122,347,000

b. Construction industry employment, and average annual earnings, 1996:

TABLE 1.—CONSTRUCTION INDUSTRY EMPLOYMENT AND AVERAGE TOTAL EARNINGS, TOTAL AND SELECTED OCCUPATIONS, CPS DATABASE, 1996

Data source and occupation	Total employment*	Percent of total	Average total annual earnings**
CPS	9,333,000	100.000	N.A.
Construction Trades, Except Supervisors and Apprentices***	3,958,000	42.409	\$23,007
Apprentices	192,000	2.057	12,564
Helpers	124,000	1.329	9,008
Laborers	988,000	10.586	15,907
Other Occupations****	4,071,000	43.619	N.A.

* CPS data include the incorporated self-employed.

** Total average annual earnings data are for workers who reported their longest job during the year to be in the construction industry. The data are for 1996. Compensation for non-construction work by these workers is included.

¹⁸ Since the OES universe is 60.7 percent of the CPS universe, one would expect the OES laborers total to be about 600,000.

¹⁹ As discussed below, it is also necessary to utilize CPS wage data, thereby combining dissimilar data bases with attendant problems.

*** The CPS figure for four classes of apprentices is 48,000, while the BAT/AIMS total for all occupations is 192,000. For this purpose, the BAT apprentice figure was utilized, with the 144,000 "additional" apprentices subtracted from the CPS construction trades total, based on the assumption that a number of apprentices self-reported their occupation to be journeyworkers. AIMS data are generated as part of the national apprenticeship program and represent active apprentices at the end of the year. Since several states do not report these data, BAT staff estimated the U.S. total based upon the percent of construction employment represented by the missing States.

**** Other occupations include Executive, Administrative, and Managerial positions; Technical, Sales, and Administrative Support; etc., and others, such as those in Service occupations.

TABLE 2.—CONSTRUCTION INDUSTRY EMPLOYMENT AND AVERAGE TOTAL EARNINGS, TOTAL AND SELECTED OCCUPATIONS, OES DATABASE, 1996

Data source and occupation	Total employment*	Percent of total	Average total annual earnings**
OES	5,666,150	100.000	N.A.
Construction Trades Except Supervisors and Apprentices ***	2,064,900	36.443	N.A.
Apprentices	192,000	3.389	N.A.
Helpers ****	495,600	8.747	N.A.
Laborers *****	262,310	4.629	N.A.
Other Occupations	2,651,340	46.793	N.A.

* Excludes self-employed and those not covered by UI.

** Data on wages provided in hourly rates only.

*** Since all apprentices are combined with OES journeyworkers, the BAT apprentice total of 192,000 was subtracted from the OES journeyworker total.

**** Likely includes significant numbers of unskilled helpers and laborers who primarily work with or assist journeyworkers.

***** Figure taken from a catchall classification that includes "All Other Helpers, Laborers, And Material Movers, Hand," plus the OES classifications of Helpers, Mechanic and Repairer; Helpers, Extractive Workers; Freight, Stock, and Material Movers, Hand; and Vehicle Washers and Equipment Cleaners.

TABLE 3.—CONSTRUCTION INDUSTRY EMPLOYMENT AND AVERAGE TOTAL EARNINGS, TOTAL AND SELECTED OCCUPATIONS, ADJUSTED OES DATABASE, 1996

Data source and occupation	Total employment*	Percent of total	Average total annual earnings**
Adjusted OES	5,666,150	100.000	N.A.
Construction Trades Except Supervisors and Apprentices ***	2,064,900	36.443	N.A.
Apprentices	192,000	3.389	N.A.
Helpers ****	191,126	3.373	N.A.
Laborers	566,784	10.003	N.A.
Other Occupations	2,651,340	46.793	N.A.

* Excludes self-employed and those not covered by UI.

** Hourly rates only.

*** BAT figure subtracted from journeyworker total.

**** The OES reports a laborer/helper combination employment of 757,910 (Helpers, Laborers, & Material Movers, Hand). To separate laborer from helper, the percent that CPS laborers (988,000) are of the CPS employment sum (5,262,000) for journeyman, apprentices, laborers, and helpers (18.8 %) was multiplied by the comparable OES employment total (3,014,810). That product (566,784) then was adopted as the OES laborer total, and subtracted from the laborer/helper combination to yield the OES helper figure (191,126).

2. Estimating Process and Computations

A 5-step estimating process was developed and utilized to approximate annual savings that might have been realized in 1996 from the increased use of helpers, if the suspended regulations had been implemented:

Step 1: *Davis-Bacon Employment*. Determine the value of construction covered by the Davis-Bacon and Related Acts. This is achieved by adding 100 percent of Federal construction starts value to 23 percent of the value of public, non-Federal construction starts. Divide that sum by the total value of construction starts to obtain the proportion that Davis-Bacon covered construction is of total construction value. Multiply the Davis-Bacon proportion times total construction employment to estimate the share of

total construction employment allocated to Davis-Bacon construction.

Value of DB Construction =
 $(\$10,799,923,000) + (0.23 \times \$87,122,347,000) = \$30,838,062,810$
 Proportion DB is of Total =
 $\$30,838,062,810 / \$321,736,705,000 = 9.585\%$

DB Employment =
 CPS: $9,333,000 \times 0.09585 = 894,568$
 OES: $5,666,150 \times 0.09585 = 543,100$
 AdjOES: $5,666,150 \times 0.09585 = 543,100$

Step 2: *Occupational Employment, 1996*. First, the number of additional apprentices, estimated by BAT and above the CPS apprentice's estimate, was added into the CPS construction apprentices total, and subtracted from the journeyworkers total. The BAT apprentice total was similarly subtracted from the OES journeyman/

apprentice combination, and established as the OES apprentice total, both unadjusted and adjusted.

Then, 1996 Davis-Bacon employment for the number of journeyworkers, laborers, apprentices, and helpers is obtained. (Note that these on-site construction workers are the only occupations likely to be impacted by any helper regulation.) This is accomplished for each occupational group by multiplying their corresponding adjusted CPS/OES proportions times total Davis-Bacon construction employment. However, since procedures in effect in 1996 prohibited the use of helpers on Davis-Bacon work, the number of helpers computed must be allocated (added) to the number of Davis-Bacon journeyworkers, laborers, and apprentices. This allocation is made in

proportion to each occupational group's composition of covered employment, in order to obtain final estimates of total Davis-Bacon employment for the selected occupational groups. (As indicated under Assumption 2, had this employment been distributed based upon closeness of occupational wage, helper savings would have been significantly reduced.)

DB Journeyworker Employment =
 CPS: $894,568 \times 0.42409 = 379,377$
 OES: $543,100 \times 0.36443 = 197,922$
 AdjOES: $543,100 \times 0.36443 = 197,922$
 DB Laborer Employment =
 CPS: $894,568 \times 0.10586 = 94,699$
 OES: $543,100 \times 0.04629 = 25,140$
 AdjOES: $543,100 \times 0.10003 = 54,326$
 DB Apprentice Employment =
 CPS: $894,568 \times 0.02057 = 18,401$
 OES: $543,100 \times 0.03389 = 18,406$

AdjOES: $543,100 \times 0.03389 = 18,406$
 DB Helper Employment =
 CPS: $894,568 \times 0.01329 = 11,889$
 OES: $543,100 \times 0.08747 = 47,505$
 AdjOES: $543,100 \times 0.03373 = 18,319$
 Subtotals:
 CPS: 504,366
 OES: 288,973
 AdjOES: 288,973

TABLE 4.—DATA FOR "NO HELPER" HELPER ADJUSTMENT

Occupation	CPS No.	CPS %	OES No.	OES %	AdjOES No.	AdjOES %
Journeyworker	379,377	0.77034	197,922	0.81966	197,922	0.73127
Laborer	94,699	0.19229	25,140	0.10411	54,326	0.20072
Apprentice	18,401	0.03736	18,406	0.07623	18,406	0.06801
Total	492,477	0.99999	241,468	1.00000	270,654	1.00000

Helper Adjustment

DB Journeyworkers =
 CPS: $379,377 + (11,889 \times 0.77034 = 388,536$
 OES: $197,922 + (47,505 \times 0.81966) = 236,860$
 AdjOES: $197,922 + (18,319 \times 0.73127) = 211,318$
 DB Laborers =
 CPS: $94,699 + (11,889 \times 0.19229) = 96,985$
 OES: $25,140 + (47,505 \times 0.10411) = 30,086$
 AdjOES: $54,326 + (18,319 \times 0.20072) = 58,003$
 DB Apprentices =
 CPS: $18,401 + (11,889 \times 0.03736) = 18,845$
 OES: $18,406 + (47,505 \times 0.07623) = 22,027$
 AdjOES: $18,406 + (18,319 \times 0.06801) = 19,652$

Step 3: *Occupational Employment (52 FR 31368)*. Determine Davis-Bacon employment for the number of journeyworkers, laborers, apprentices, and helpers likely to be employed if the Regulations published in 52 FR 31368 were in effect throughout 1996. For the employment half in which helpers do not prevail for any classes, Step 2 proportions are utilized; for the half in which helpers do prevail for a limited number of classes, proportions reflect average national employment of helpers.
 Employment of DB Journeyworkers (CPS: 0.77034; OES: 0.81966; AdjOES: .73127) + Laborers (CPS: 0.19229; OES: 0.10411; AdjOES: .20072) + Apprentices (CPS: 0.03736; OES: 0.07623; AdjOES: .06801) =
 CPS: 504,366
 OES: 288,973
 AdjOES: 288,973

Half DB Selected Occupation Employment (CPS: 252,183; OES: 144,487; AdjOES: 144,487)

Where Helpers Are *Not* Likely To Prevail:

Journeyworkers =
 CPS: $252,183 \times 0.77034 = 194,267$
 OES: $144,487 \times 0.81966 = 118,430$
 AdjOES: $144,487 \times 0.73127 = 105,659$
 Laborers =
 CPS: $252,183 \times 0.19229 = 48,492$
 OES: $144,487 \times 0.10411 = 15,043$
 AdjOES: $144,487 \times 0.20072 = 29,001$
 Apprentices =
 CPS: $252,183 \times 0.03736 = 9,422$
 OES: $144,487 \times 0.07623 = 11,014$
 AdjOES: $144,487 \times 0.06801 = 9,827$

Half DB Selected Employment (CPS: 252,183; OES: 144,487; AdjOES: 144,487) Where Helpers Are Likely To Prevail for Some Occupations

TABLE 5.—DATA FOR HELPER ADJUSTMENT, INCLUDING HELPERS

Occupation	CPS No.	CPS %	OES No.	OES %	AdjOES No.	AdjOES %
Journey-worker	379,377	0.75219	197,922	0.68492	197,922	0.68492
Laborer	94,699	0.18776	25,140	0.08700	54,326	0.18800
Apprentice	18,401	0.03648	18,406	0.06369	18,406	0.06369
Helper	11,889	0.02357	47,505	0.16439	18,319	0.06339
Total	504,366	1.00000	288,973	1.00000	288,973	1.00000

Journeyworkers =
 CPS: $252,183 \times 0.75219 = 189,690$
 OES: $144,487 \times 0.68492 = 98,962$
 AdjOES: $144,487 \times 0.68492 = 98,962$
 Laborers =
 CPS: $252,183 \times 0.18776 = 47,350$
 OES: $144,487 \times 0.08700 = 12,570$
 AdjOES: $144,487 \times 0.18800 = 27,164$
 Apprentices =
 CPS: $252,183 \times 0.03648 = 9,200$
 OES: $144,487 \times 0.06369 = 9,202$

AdjOES: $144,487 \times 0.06369 = 9,202$
 Helpers =
 CPS: $252,183 \times 0.02357 = 5,944$
 OES: $144,487 \times 0.16439 = 23,752$
 AdjOES: $144,487 \times 0.06339 = 9,159$
 Total:
 Journeyworkers =
 CPS: $194,267 + 189,690 = 383,957$
 OES: $118,430 + 98,962 = 217,392$
 AdjOES: $105,659 + 98,962 = 204,621$

Laborers =
 CPS: $48,492 + 47,350 = 95,842$
 OES: $15,043 + 12,570 = 27,613$
 AdjOES: $29,001 + 27,164 = 56,165$
 Apprentices =
 CPS: $9,422 + 9,200 = 18,622$
 OES: $11,014 + 9,202 = 20,216$
 AdjOES: $9,827 + 9,202 = 19,029$
 Helpers =
 CPS: 5,944
 OES: 23,752

AdjOES: 9,159

Step 4: *Alternative Wage Bills*. Since half of Davis-Bacon employment is estimated to be in areas in which helpers would *not* be found to prevail for any classification, such employment would not have been affected by the proposed regulation change. For the remaining half, the occupational group totals—both before and after a possible regulation change—are multiplied by the corresponding annual salaries.²⁰

Alternative Wage Bills (1996)

CPS: $(388,536 \times 23,007) + (96,985 \times 15,907) + (18,845 \times 12,564) = 8,939,047,752 + 1,542,740,395 + 236,768,580 = 10,718,556,727$

OES: $(236,860 \times 23,007) + (30,086 \times 15,907) + (22,027 \times 12,564) = 5,449,438,020 + 478,578,002 + 276,747,228 = 6,204,763,250$

AdjOES: $(211,318 \times 23,007) + (58,003 \times 15,907) + (19,652 \times 12,564) = 4,861,793,226 + 922,653,721 + 246,907,728 = 6,031,354,675$

Suspended Regulation

CPS: $(383,957 \times 23,007) + (95,842 \times 15,907) + (18,622 \times 12,564) + (5,944 \times 9,008) = 8,833,698,699 + 1,524,558,694 + 233,966,808 + 53,543,552 = 10,645,767,753$

OES: $(217,392 \times 23,007) + (27,613 \times 15,907) + (20,216 \times 12,564) + (23,752 \times 9,008) = 5,001,537,744 + 439,239,991 + 253,993,824 + 213,958,016 = 5,908,729,575$

AdjOES: $(204,621 \times 23,007) + (56,165 \times 15,907) + (19,029 \times 12,564) + (9,159 \times 9,008) = 4,707,715,347 + 893,416,655 + 239,080,356 + 82,504,272 = 5,922,716,630$

Step 5: *Estimated Annual Savings*. Subtract the Davis-Bacon wage bill computed assuming helper employment from the comparable wage bill with no helpers employed. The difference is an estimate of potential 1996 savings. Divide that total by the value of Davis-Bacon construction to obtain savings as a percent of 1996 Davis-Bacon-covered construction starts.

Short-term Annual Savings:

CPS: $10,718,556,727 - 10,645,767,753 = \$72,788,974$
 OES: $6,204,763,250 - 5,908,729,575 = \$296,033,675$
 AdjOES: $6,031,354,675 - 5,922,716,630 = \$108,638,045$

Savings as a Proportion of the Value of 1996 Davis-Bacon Construction Starts =

CPS: $\$72,788,974 / \$30,838,062,810 = 0.00236$ or 0.236 percent;
 OES: $296,033,675 / \$30,838,062,810 = 0.00960$ or 0.960 percent;
 AdjOES: $\$108,638,045 / \$30,838,062,810 = 0.00352$ or 0.352 percent.

D. Findings

Given the above assumptions, data, process, and computations, several key findings are established concerning the economic impact of the suspended regulation:

1. *Davis-Bacon Employment*. The workforce on construction projects covered by the Davis-Bacon and Related Acts is estimated to be under 1 million workers (CPS: 894,568; OES: 543,100; AdjOES: 543,100).

Occupational Employment (No Helpers). Davis-Bacon employment for relevant occupations was estimated without the employment of helpers. Under this scenario, employment for those occupations impacted directly by the helper regulation was as follows:

Journeyworkers—CPS: 388,536; OES: 236,860; AdjOES: 211,318; Laborers—CPS: 96,985; OES: 30,086; AdjOES: 58,003; and Apprentices—CPS: 18,845; OES: 22,027; AdjOES: 19,652.

Occupational Employment (Helpers). In this case, Davis-Bacon occupational employment in areas where it is assumed helpers would prevail for at least one classification was as follows:

Journeyworkers:
 CPS: 383,957
 OES: 217,392
 AdjOES: 204,621

Laborers:
 CPS: 95,842
 OES: 27,613
 AdjOES: 56,165

Apprentices:
 CPS: 18,622
 OES: 20,216
 AdjOES: 19,029

Helpers:
 CPS: 5,944
 OES: 23,752
 AdjOES: 9,159

Wage Bills and Savings. Total earnings for each of the two employment patterns described above were estimated as follows:

Without helpers:
 CPS: $\$10,718,556,727$
 OES: $\$6,204,763,250$
 AdjOES: $\$6,031,354,675$

With helpers:
 CPS: $\$10,645,767,753$
 OES: $\$5,908,729,575$
 AdjOES: $\$5,922,716,630$

Therefore, possible savings are estimated to range from \$72.8 million

(CPS) or 0.236 percent of the value of 1996 Davis-Bacon construction starts, to \$108.6 million (AdjOES) or 0.352 percent, to 296.0 million (OES) or .960 percent. However, it should be noted that these short-term savings realized through increased use of helpers could be partially offset in the long run by higher journeyworkers' wage rates.

This follows from the fact that helper use has been most extensive among contractors who traditionally do not sponsor formal apprenticeship and training programs. As increased helper use on Davis-Bacon contracts might lead to contract gains for such employers, reduced use of apprenticeship programs might lead to a somewhat smaller supply of journeyworkers. This could cause a modest increase in journeyworkers' wage rates, in the long run.

These findings indicate that previous Department of Labor estimates of savings that could be attributed to the expanded use of helpers have been greatly overstated. For example, while the current analysis places possible annual savings from \$72.8 to \$108.6 to \$296.0 million, earlier estimates (1982 and 1989) placed such savings at \$687.1 million and \$760.5 million (all 1996 dollars). While the current estimates' ratios of savings to the value of Davis-Bacon construction starts are only 0.00236 to 0.00352 to 0.00960, estimates of the comparable 1982 and 1989 savings ratios would have been over twice what today's data indicate. In addition, some State laws restrict the use of helpers on public construction, thereby further reducing potential savings from those estimated for Federal regulations that expand the use of helpers.

Several factors appear to be responsible for the wide variation in savings estimates:

- The value of construction covered by the Davis-Bacon and Related Acts, as a proportion of total construction value, about 9.6 percent, is significantly less than was previously assumed. Earlier estimates of 18 percent and higher appear to have been based upon the assumption that all non-Federal public construction is covered. However, examination of available information does *not* confirm that assumption. For example, experience working with F.W. Dodge information indicates that the majority of city, county, and State-owned construction has no Federal assistance. Specifically, by identifying non-Federal public construction projects through F.W. Dodge reports, and then determining their Davis-Bacon coverage through completed wage survey forms for those projects, it

²⁰ Note that this methodology counts each additional helper towards potential cost savings. However, results of relevant Davis-Bacon wage surveys indicate that only a small proportion of helpers would be in classifications in which helpers prevail, thereby substantially reducing savings realized.

becomes clear that the majority of such construction is not covered.

- The previously utilized assumption that helpers would prevail for 67 percent to 100 percent of the trades (and on projects representing 67 to 100 percent of the Davis-Bacon employment) is not confirmed by survey experience under the previously proposed regulations or by other relevant information. For the 78 wage surveys conducted under the new regulations, rates were recommended for helpers in one or more classifications in just 35 of these data collection efforts. Although all 12 open shop areas surveyed found one or more helper classifications to prevail, they prevailed for only 20 percent of the classes represented. For the 64 mixed area surveys, helpers were found to prevail in 30 surveys, but for only 6 percent of the classes. No helpers were found to prevail in the two area surveys that found all prevailing rates to be union. Furthermore, 30 percent of the helper classifications that were found to prevail were union helpers—especially elevator constructor helpers, a classification negotiated nationwide in that trade. Therefore, the assumption in this analysis that one or more helper classifications prevail in areas that represent half of Davis-Bacon covered employment is probably inflated in terms of estimating the actual prevalence of helpers.

- Previous estimates of the proportion that helper employment is of total construction employment appears to have overstated that classification's workforce standing. For example, the 1976–77 compensation study, upon which many of the early helper savings estimates were based, found that helpers comprised just 3.2 percent of the survey universe. Because of the survey's concentration in metropolitan/union areas and the fact that enough helper data were found to publish for only four construction trades, that proportion was doubled and tripled when developing alternative savings estimates. Later estimates of helper employment proportions assumed that 15 percent of total construction employment fell into that classification. As noted above, CPS, AdjOES, and OES estimates are approximately 1.3, 3.4, and 8.7 percent, respectively.

- The assumption that helpers will replace journeymen exclusively was not supported by experience during implementation of the suspended regulation. For example, personnel who processed helper conformance actions have indicated that often construction contractors surveyed reported that workers meeting the definition of helper

in the regulations were classified by the contractors as laborers. Similarly, the low wage rates paid helpers are indicative of their lower skill level, increasing the likelihood of substitution for laborers. Recognizing helpers may perform work of laborers and apprentices, as well as journeymen, narrows the differential between the wage bills incurred before and after helper expansion. In fact, in the short run, helpers may disproportionately assume work of laborers and apprentices. In the longer run, supply problems in obtaining quality skilled journeymen may well appear, as helpers displace apprentices, and subsequently, apprentice-trained journeymen.

E. Possible Economic Impact of Helper Alternatives

A number of different approaches were considered in developing the proposed regulation to define the circumstances in which helpers may be used on Davis-Bacon projects. In addition to the proposal that helpers only be permitted where the prevailing practice is to use helpers with duties that do not overlap with those of a journeyman or laborer, Wage and Hour considered four other alternatives: (1) Add a ratio requirement to the suspended helper definition; (2) change the helper definition to emphasize the semi-skilled nature of the classification; (3) define helpers in accordance with the OES definition which focuses on unskilled duties; and (4) delineate the semi-skilled tasks performed by each helper classification.

Section D of this Impact Analysis estimated helper use under the suspended rule in areas where helpers would prevail. Alternatives 1–4 involved changing the helpers definition or their use. Each alternative would likely result in greater use of helpers than under the proposed rule, but less than under the suspended rule. Similarly, the economic impact of the alternatives would presumably yield some portion but not all, of the savings anticipated under the suspended rule.

Given that each alternative encompassed many possible variations and outcomes, and that there is no data source that would provide appropriate information on these variations and outcomes, it is not possible to provide detailed estimates of the economic impacts of the four alternatives. However, discussed below are the factors likely to affect the economic impact of the alternatives.

Proposed Rule—Helpers Used in Accordance With Current Practice

The proposed rule would reflect the longstanding, and current, practice of recognizing helpers only where helper duties are separate and distinct from those of journeymen and laborers. As it would continue a practice that has been in effect for many years, the proposed rule is expected to have no economic impact.

Alternative 1—Add a Helper to Journeyman Ratio Requirement to the Suspended Rule

Adding a ratio, whether one ratio that applies nationally or a number of local ratios, to the suspended rule would have the effect of limiting the number of helpers allowed on Davis-Bacon sites, as compared to the number that could be utilized under the suspended rule alone. Where the practice of employers under the suspended rule without a ratio would result in the use of more helpers than allowed under a ratio cap, the economic impact would be lower savings with the cap than without it. On the other hand, allowing helpers to be used under a rule that combined the suspended rule with a ratio would allow greater helper use than exists currently and would likely result in savings. The amount of savings to be achieved would depend on the ratio chosen.

Alternative 2—Emphasize Semi-Skilled Nature of the Helper Classification

Changing the suspended rule to emphasize the “semi-skilled” nature of the helper classification would likely result in less use of helpers than there would be under the suspended rule, but more than under the rule currently in effect. The extent of helper use would depend on the scope of duties allowed under such a helper classification. Thus, some savings would be achieved, but less than would be expected under the suspended rule. The amount of savings would also be impacted by how such a definition affected the relative substitution of helpers for laborers and journeymen. As it could be expected that emphasizing the semi-skilled nature of the helper classification would result in little or no substitution for laborers, the decrease in savings as compared to the suspended rule would be less dramatic.

Alternative 3—Emphasize Unskilled Duties

As with Alternative 2, defining helpers by limiting their duties to unskilled duties would also result in less use of helpers than there would be under the suspended rule, but more than under the rule currently in effect.

While some savings would be achieved, this amount would be less than expected under the suspended rule. Again, the effect of the rule on the substitution of helpers for laborers versus journeyworkers would impact the degree of savings. Under this alternative, it could be expected that few, if any, helpers would replace journeyworkers, resulting in greater savings than would be expected under Alternative 2.

Alternative 4—Delineate Semi-Skilled Tasks for Each Helper Classification

The extent of savings, as compared to current practice, under this alternative would depend on the scope of the tasks allowed to be performed by helpers assisting in each craft. Again, savings would be expected relative to current practice, but in an amount less than would be achieved under the suspended rule. As in Alternative 2, limiting helpers to semi-skilled duties would likely result in less substitution for laborers, and the decrease in savings as compared to the suspended rule would be less dramatic.

F. Benefits

Wage and Hour originally believed that the primary benefits to be gained from promulgation of the suspended helper regulation would be a construction workforce on Federal construction projects that more closely mirrored the private construction workforce's widespread use of helpers, and significant cost savings in Federal construction costs. As is more fully explained previously in this document, Wage and Hour now believes that the use of helpers is less widespread than originally thought and that the cost savings would be a small fraction of the amount originally computed.

On the other hand, this proposal would allow Wage and Hour to arrive at a definition of helper that would be capable of effective administration and enforcement consistent with the purpose of the Davis-Bacon Act. The alternatives considered would lessen the overlap with other classifications, and would also provide a more objective means by which both government agencies and contractors can distinguish between helpers and other classifications, consistent with the underlying purpose of the Davis-Bacon Act. All of the alternatives would to varying degrees ameliorate the potential for misclassification and abuse of helper classifications, thereby providing fairer competitive bidding on Federal and federally-assisted construction projects. Finally, Wage and Hour believes that this proposal could help preserve

effective training in the construction industry. A discussion of the possible benefits provided by each of the specific proposed alternatives immediately follows.

The proposed rule would continue the current practice which requires that helper duties be separate and distinct from those of the journeyworker and laborer. By retaining the traditional duties-based classification distinction, it would provide clear criteria that can be objectively administered and enforced, and that facilitate contractor compliance. Because classifications would not have overlapping duties under this alternative, there would be less opportunity for contractor misclassification and abuse. Wage and Hour also believes that this approach would encourage contractors to establish or participate in structured training programs that would aid workers in achieving journeylevel status.

Alternative 1, which would provide use of a national ratio, or a number of local ratios, would reduce to some extent the potential for abuse of the helper classification by contractors seeking to gain an unfair competitive advantage, whether implemented in conjunction with the suspended helper definition or with one of the other proposed alternatives.

Alternative 2 would change the helper definition to emphasize the semi-skilled nature of the classification by modifying the suspended definition to emphasize semi-skilled duties. The modified definition under this alternative might possibly aid in differentiating the helper from journeyworker and laborer classifications by emphasizing the "semi-skilled" nature of the work performed by helpers, the supervisory relationship between journeyworkers and helpers, and the craft-specific assistance provided by the helper. This definition would also expressly limit the unskilled work the helper may perform in an attempt to distinguish helpers from laborers.

Alternative 3, which would utilize the OES definition of helper, would provide a more objective definition of helper than the suspended definition. By focusing on unskilled duties and the helper's interaction with journeylevel craft workers, this alternative could provide a more practical basis for distinguishing helpers from journeyworkers.

Alternative 4, which would in essence adopt the "job family" concept currently utilized under the McNamara-O'Hara Service Contract Act, would allow for the expanded use of helpers, with differentiation based on the skill

and knowledge required to perform various duties. This would result in clearer definitions of helper classifications on a craft-by-craft basis, which would facilitate administration and enforcement.

VI. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, Public Law 96-354 (94 Stat. 1164; 5 U.S.C. 601 *et seq.*), Federal agencies are required to prepare and make available for public comment an initial regulatory flexibility analysis that describes the anticipated impact of proposed rules that would have a significant economic impact on small entities. Wage and Hour is of the view that a Regulatory Flexibility Analysis is not necessary for the proposed rule because the proposed regulation would not result in any changes in requirements for small businesses. Furthermore, if Wage and Hour were to propose implementing the suspended rule or any of the alternatives considered, it would not be more costly than current regulatory requirements and therefore would not have a significant economic impact on a substantial number of small entities. Furthermore, Wage and Hour is of the view, as discussed in the preamble, that neither the suspended rule nor any of the alternatives considered would accomplish the objectives of the statute. Notwithstanding, because of widespread interest in the rule, Wage and Hour has prepared the following Regulatory Flexibility Analysis, which compares the proposed rule to the suspended rule and should be considered in conjunction with the analysis set forth in the preamble and the analysis under Executive Order 12866.

(1) Reasons Why Action Is Being Considered

In 1982, over fifteen years ago, Wage and Hour published final regulations which, among other things, would have allowed contractors to use "semi-skilled" helpers on Davis-Bacon covered projects at wages lower than those paid to skilled journeyworkers. These rules represented a sharp departure from Wage and Hour's longstanding practice of not allowing overlap of duties between job classifications. To protect against possible abuse, a provision was included limiting the number of helpers which could be used on a covered project to a maximum of two helpers for every three journeyworkers. This ratio provision was subsequently invalidated by the U.S. Court of Appeals for the District of Columbia.

As discussed in greater detail above, during its existence, the helper rule has been the subject of considerable

litigation and Congressional attention. The rule has been enjoined by the district court and modified on two occasions as a result of court of appeals decisions. It has twice been implemented for short periods of time. It has also been suspended on two occasions as the result of Congressional action prohibiting Wage and Hour from spending any funds to implement or administer the helper rule. On December 30, 1996, the suspension was continued pending completion of this rulemaking.

The helper rule was originally proposed and adopted because it was believed that it would result in a construction workforce on Federal construction projects that more closely mirrored the private construction's "widespread" use of helpers and, at the same time, effect significant cost savings in federal construction costs. It was also believed that the expanded definition would provide additional job and training opportunities for unskilled workers, in particular women and minorities. The Department's subsequent efforts to develop enforcement guidelines led it to conclude that administration of the revised helper rule would be much more difficult than anticipated, especially in light of the court's invalidation of the ratio provision. Moreover, new data, including the Department's experience implementing the helper regulations, indicated that the use of helpers is not as widespread as previously thought. Wage and Hour is also concerned about the possible negative effect of the helper regulations on formal apprenticeship and training programs. These factors, and the obvious controversy evidenced by the rule's long history of litigation and by Congressional actions prohibiting implementation of the rule, led Wage and Hour to reexamine the helper rule and consider several alternative approaches to govern employment of helpers on DBRA-covered projects.

(2) Objectives of and Legal Basis for Rule

These regulations are issued under the authority of the Davis-Bacon Act, 40 U.S.C. 276a, *et seq.*, Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix, and the Copeland Act, 40 U.S.C. 276c. The objective of these regulations is to establish the most appropriate approach to governing employment of helpers on DBRA-covered projects. Wage and Hour believes the proposed rule is the only alternative considered that is both consistent with the purposes of the Davis-Bacon Act and capable of

practical and efficient administration, enforcement, and compliance.

(3) Number of Small Entities Covered Under the Rule

Size standards for the construction industry are established by the Small Business Administration (SBA), and are expressed in millions of dollars of annual receipts for affected entities, *i.e.*, Major Group 15, Building Construction—General Contractors and Operative Builders, \$17 million; Major Group 16, Heavy Construction (non-building), \$17 million; and Major Group 17, Special Trade Contractors, \$7 million. The overwhelming majority of construction establishments would have annual receipts under these levels. According to the Census, 98.7 percent of these establishments have annual receipts under \$10 million. Therefore, for the purpose of this analysis, it is assumed that virtually all establishments potentially affected by this rule would meet the applicable criteria used by the SBA to define small businesses in the construction industry.

As explained above, however, the proposed rule would cause no impact on small entities since it does not propose to make any changes in requirements applicable to small businesses. Implementation of the suspended rule or any of the alternatives considered would expand the use of helpers and could result in some savings. The impact would depend upon the specifications of the alternative relative to current practice. Even relative to unlimited use, however, possible savings would be very modest, ranging from 0.239 percent of the value of Davis-Bacon annual construction starts (CPS), to 0.359 (adjusted OES), and 0.958 (unadjusted OES) percent.

(4) Reporting, Recordkeeping and Other Compliance Requirements of the Rule

There are no reporting or recording requirements for contractors under the proposed rule. Nor would there be any such requirements under the suspended rule or any of the alternatives considered. The compliance requirements under any rule regarding helpers would merely require contractors who use helpers to do so in accordance with a chosen definition and pay helpers at least the appropriate prevailing wages for helpers as set by the Department.

(5) Relevant Federal Rules Duplicating, Overlapping or Conflicting With the Rule

There are currently no Federal rules that duplicate, overlap or conflict with this proposed rule.

(6) Differing Compliance or Reporting Requirements for Small Entities

The proposed rule contains no reporting, recordkeeping, or other compliance requirements specifically applicable to small businesses or that differ from such requirements applicable to the Davis-Bacon contracting industry as a whole. Such different treatment would not seem feasible since virtually all employers in the industry are small businesses.

(7) Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements

The compliance and reporting requirements of the proposed rule, the suspended rule, and each of the alternatives considered, as well as the advantages and disadvantages of each, are described in the preamble above, which discusses issues such as ease of compliance for contractors.

(8) Use of Other Standards

The Davis-Bacon Act requires the Secretary to determine the prevailing wages and fringe benefits to be paid to the classes of workers to be employed on a project. Therefore compliance by contractors can only be achieved through design standards. The proposed rule, the suspended rule, and the alternative approaches to employing helpers on DBRA-covered projects are discussed in the preamble above and are not repeated here.

(9) Exemption From Coverage for Small Entities

Exemption from coverage under this rule for small entities would not be appropriate given the statutory mandate of the Davis-Bacon Act that all contractors (large and small) performing on DBRA-covered contracts must pay its workers prevailing wages and fringe benefits as determined by the Secretary of Labor. Further, exclusion of such small businesses from data collected to determine prevailing wages and fringe benefits for helpers would be impractical and would distort such determinations, possibly to the detriment of small businesses.

VII. Document Preparation

This document was prepared under the direction and control of John R. Fraser, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

Signed at Washington, D.C., this 1st day of
April, 1999.

Bernard E. Anderson,

*Assistant Secretary for Employment
Standards.*

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