



VIA ELECTRONIC SUBMISSION

August 27, 2021

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., N.W.
Washington DC 20210

Re: RIN 1235–AA41, Notice of Proposed Rulemaking on Increasing the Minimum Wage for Federal Contractors

Dear Ms. DeBisschop:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Labor’s Wage and Hour Division in response to the above-referenced proposed rule published in the *Federal Register* on July 22, 2021, at 86 Fed. Reg. 38816.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. This is consistent with the U.S. Census Bureau and Small Business Administration’s Office of Advocacy’s findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)¹ and industry workforce employment (more than 82% of the construction industry is employed by small businesses).²

¹ U.S. Census Bureau 2019 County Business Patterns: <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

² 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

In addition to small businesses that build public works projects, ABC also has large member companies that contract directly with federal, state and local governments to successfully build large-scale projects subject to government acquisition regulations and subcontract work to qualified small businesses that meet federal, state and local government small business contracting goals. For example, ABC members won 57% of the \$118 billion in direct federal construction contracts exceeding \$25 million awarded during fiscal years 2009-2020.³

Many of ABC's members are government contractors, and as such they will be directly affected by the proposed rule. As you are aware, most government construction contracts are covered by the Davis-Bacon Act.⁴ For example, many of ABC's members are required to comply with the DBA's minimum wage provisions when they perform government contracts. Other contractor members of ABC perform work under government contracts that are covered by the minimum wage provisions of the Service Contract Act.⁵ And of course, all government contractors that are large enough to be engaged in commerce are covered by the minimum wage provisions of the Fair Labor Standards Act.⁶

Background

On Oct. 7, 2014, DOL issued a final rule⁷ to implement Executive Order 13658 on Establishing a Minimum Wage for Contractors,⁸ which set an hourly minimum wage of \$10.10 for workers on covered federal construction and service contracts issued on or after Jan. 1, 2015. Additionally, beginning Jan. 1, 2016, the minimum wage was determined annually by the U.S. Secretary of Labor. ABC submitted comments on the proposed rulemaking in July 2014, arguing that the proposal should be withdrawn or modified for a number of reasons.⁹

On April 27, President Biden signed EO 14026,¹⁰ Increasing the Minimum Wage for Federal Contractors, superseding President Obama's EO 13658¹¹ and requiring all agencies to incorporate a \$15 minimum wage for all federal contractors in new contract solicitations beginning Jan. 30, 2022, and implement the minimum wage into new

³ USASpending.gov data (Accessed Dec. 22, 2020) cross-referenced with ABC membership list discussed in greater detail at TheTruthAboutPLAs.com:

<https://thetruthaboutplas.com/2021/02/10/february-2021-update-abcs-fight-against-government-mandated-project-labor-agreements/>.

⁴ See 40 U.S.C. § 3142.

⁵ See 41 U.S.C. § 6702.

⁶ See 29 U.S.C. § 206.

⁷ 79 Fed. Reg. 60633.

⁸ 79 Fed. Reg. 9849.

⁹ <https://www.regulations.gov/comment/WHD-2014-0001-0224>.

¹⁰ 86 Fed. Reg. 22835.

¹¹ 79 Fed. Reg. 9849.

contracts by March 30, 2022. Beginning Jan. 1, 2023, EO 14026 also requires agencies to raise the minimum wage annually by an amount determined by the Secretary of Labor.

On July 22, the WHD issued a notice of proposed rulemaking to implement EO 14026 and is seeking public feedback on the order's minimum wage increase for federal contractors, among other things.¹²

By letter dated July 28, ABC requested extension of the public comment period to Sept. 20, which is 60 days from the date of the published notice, to allow for substantive feedback from ABC's federal contractor members that will be affected by the proposed changes.¹³ In response to ABC's and other comment extension requests, the WHD extended the comment period by four days to Aug. 27, stating that extending the comment period beyond that date would jeopardize the government's ability to ensure that all necessary federal action is completed by Jan. 30, 2022, when the EO is set to take effect.¹⁴

Summary of ABC's Comments in Response to the Proposed Rulemaking

It should be noted that most of ABC's contractor members engaged in private construction and government construction already pay the substantial majority of their employees at wage rates higher than the newly proposed minimum wage of \$15 per hour, because construction is a high-wage industry, and because of the requirements of the DBA—and to a lesser extent the SCA—on government contracts. The primary concern in these comments is not the wage rate itself, but rather the unlawful arrogation of power by the Executive Branch to set a new minimum wage in direct contravention of the above-referenced acts of Congress. The department's proposed rule will cause great confusion among government contractors and will needlessly increase the regulatory burden on contractors in the construction industry. For these reasons, the NPRM should be withdrawn or substantially modified, as further explained below.

The Proposed Rule Exceeds the Executive Branch's Constitutional and Statutory Authority

Federal minimum wages on government contracts in the construction industry have long been established by acts of Congress. The DBA states, "The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be

¹² 86 Fed. Reg. 38816.

¹³ <https://www.regulations.gov/comment/WHD-2021-0004-0016>.

¹⁴ <https://www.regulations.gov/document/WHD-2021-0004-0024>.

performed, or in the District of Columbia if the work is to be performed there.”¹⁵ Pursuant to this statute, the department has created an elaborate regulatory scheme for determining prevailing wage rates in the construction industry.¹⁶

Congress also has established a regime for the calculation of minimum wages on non-construction service contracts covered by the SCA. That law states, “The contract and bid specification shall contain a provision specifying the minimum wage to be paid to each class of service employee engaged in the performance of the contract or any subcontract, as determined by the Secretary or the Secretary’s authorized representative, in accordance with prevailing rates in the locality, or, where a collective-bargaining agreement covers the service employees, in accordance with the rates provided for in the agreement, including prospective wage increases provided for in the agreement as a result of arm’s length negotiations.”¹⁷ Section 6704 of the SCA further incorporates by reference the minimum wage provision of the FLSA, which specifies that the minimum wage currently shall be \$7.25 per hour for every employee engaged in commerce.¹⁸

By the plain language of these statutes, Congress has established as a matter of law the minimum wages that must be paid by federal contractors. The NPRM nevertheless asserts that the minimum wage requirements of EO 14026 are “separate and distinct legal obligations from the prevailing wage requirements of the SCA and the DBA.”¹⁹ This assertion confirms that the president and the department are creating a new minimum wage requirement in derogation of congressional intent. As a result, in a limited but significant number of instances under the DBA and SCA, wage rates that the department has previously found to be the minimum wages “prevailing” in local jurisdictions according to the dictates of Congress will under the proposed rule no longer be deemed to be the minimum wage.²⁰

¹⁵ See 40 U.S.C. § 3142 (b).

¹⁶ See U.S. Department of Labor Prevailing Wage Resource Book, available at www.dol.gov. See also Glassman, et al, *The Federal Davis-Bacon Act: The Prevailing Measure of Wages* (Beacon Hill Institute 2008), available at www.beaconhill.org (describing the four steps of the department’s wage setting procedure under the DBA as follows: “(1) planning and scheduling of surveys, (2) conducting the surveys, (3) clarifying and analyzing the respondents’ data and (4) issuing the wage determinations.” Further see, *Labor Department Can Create Jobs by Calculating Davis-Bacon Rates More Accurately*, James Sherk, Jan. 21, 2017, available at www.heritage.org/jobs-and-labor/report/labor-department-can-create-jobs-calculating-davis-bacon-rates-more.

¹⁷ See 41 U.S. § 6703.

¹⁸ See 29 U.S.C. § 206.

¹⁹ 86 Fed. Reg. 38840.

²⁰ While the DOL maintains updated wage determinations through sam.gov, the department has yet to publish any information regarding the number of wage determinations around the country that will become inoperative as a result of the proposed rule. Even more ominously, the executive order and proposed rule direct the Secretary of Labor to raise the minimum wage in subsequent years without complying with the congressionally mandated process for determining prevailing wages under either the DBA or SCA. See 86 Fed. Reg. 38816.

Neither the president nor the department has any authority to override acts of Congress by setting a new minimum wage that contractors must pay in a manner that is plainly inconsistent with the statutes that already govern this issue.²¹

The sole authority for the executive order or the proposed rule cited by either the president or the NPRM is the Federal Property and Administrative Services Act of 1949,²² which authorizes the president to “prescribe policies and directives” that [he] considers necessary to carry out the statutory purposes of ensuring “economical and efficient” government procurement and administration of government property. No court has previously applied this law as authority for a presidential executive order attempting to establish a minimum wage for government contractors. While the proposed rule here relies on President Obama’s order imposing a \$10.10 minimum wage in 2014, that order was never challenged in court because it affected so few government contractors. In any event, the Procurement Act’s authorization to achieve greater economy or efficiency cannot truthfully be said to authorize the president or the department to increase the government’s costs, as will be the most likely result of increasing the minimum wages that government contractors must pay their employees.

The D.C. Circuit considered and rejected a similar claim of presidential authority to impose new obligations on government contractors under the FPASA in *Chamber of Commerce v. Reich*, 74 F. 3d at 1333. The court observed that the authority vested in the president under the FPASA is limited:

The Procurement Act was designed to address broad concerns quite different from the more focused question of the [issue before the court]. The text of the Procurement Act and its legislative history indicate that Congress was troubled by the absence of central management that could coordinate the entire government's procurement activities in an efficient and economical manner. The legislative history is replete with references for the need to have an "efficient, businesslike system of property management." S.REP. No. 475, 81st Cong., 1st Sess. 1 (1949); see also H.R.REP. No. 670, 81st Cong. 1st Sess. 2 (1949).

As a result, the *Reich* court found that the FPASA provided no authority for the president to dictate to government contractors as to matters on which Congress has already spoken.²³

²¹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson concurring) (“In instances where presidential action is incompatible with the express or implied will of Congress, the power of the president is at its minimum....”); *Chamber of Commerce v. Reich*, 74 F. 3d 1322 (D.C. Cir. 1996) (striking down executive order conflicting with provisions of the National Labor Relations Act).

²² 86 Fed. Reg. 38819.

²³ The *Reich* court specifically held that the FPASA did not authorize the president to prohibit government contractors from hiring strike replacements in the face of legislation (the National Labor Relations Act)

In the present circumstance, as in *Reich*, Congress has already made the judgment that the government will achieve its greatest economy and efficiency by requiring government contractors to pay only the minimum wages specified by the DBA, SCA and FLSA. Reasonable minds may differ as to whether Congress has set the minimum wage at the most economical or efficient levels for government contractors, but once Congress has made the political judgment necessary to set the minimum wage and has acted upon it in the form of legislation, the president and the DOL are required by the Constitution to faithfully execute the laws so enacted by Congress.²⁴

Finally, whereas the department has sometimes (though not always) declared that legal challenges to the president's authority to issue an executive order are "beyond its purview,"²⁵ such a response is inappropriate here. Section 4 of EO 14026 specifically instructs the department to issue regulations implementing the Order only "to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act" ... "including providing exclusions from the requirements set forth in this order where appropriate."²⁶ Section 4 further instructs the department to "incorporate existing definitions, procedures, remedies, and enforcement processes" under the FLSA, SCA, DBA and EO 13658.²⁷ These instructions confer upon the department all the discretion necessary to decline to enforce the EO in a manner that is inconsistent with congressional authority (i.e., by declining to set a new minimum wage for any employee covered by the DBA, SCA or FLSA that differs from the congressionally mandated minimum wages under the foregoing statutes).

For each of these reasons, the NPRM should be withdrawn or substantially modified to avoid imposing any new minimum wage that is different from the minimum wages dictated by Congress.

that left such an option to private decision-making. *Id.* at 1333. The D.C. Circuit opinion in *Reich* distinguished the only previous case where the Procurement Act had been found to grant authority for an executive order dealing at all with government contractors' wages: *AFL-CIO v. Kahn*, 618 F. 2d 784 (1979). The *Reich* court found that the executive order in *Kahn* was not inconsistent with any federal statute, where the president acted only to restrict employer wage increases as an emergency anti-inflation measure. *Id.* As noted above, no court has applied the FPASA as authority for a presidential EO attempting to establish a minimum wage for government contractors.

²⁴ Neither the president nor the secretary can claim a right to "supplement" the congressional minimum wage mandates with their own independent scheme, as has been permitted for state governments under the DBA, SCA and FLSA. See *Frank Bros., Inc. v. Wisconsin Dept. of Transp.*, 409 F. 3d 880 (7th Cir. 2005) (holding that Davis-Bacon sets a "floor" that state governments are entitled to supplement because the state minimum wage acts are not preempted by the federal laws). Here, both Congress and the Executive Branch are part of the same (federal) "scheme," and it is Congress alone that is entitled to make the decision on behalf of the federal government as to the level of the minimum wage, once it has enacted legislation for this explicit purpose.

²⁵ Compare the department's final rules implementing Executive Orders 13495 (declining to address the issue) and 13496 (extensively discussing the issue).

²⁶ 86 Fed. Reg. 22836.

²⁷ *Id.*

At a Minimum, the Department Should Conform the Proposed New Minimum Wage to the Existing Requirements of the DBA and SCA in Order to Avoid Confusion and Unnecessary Burdens on Government Contractors

Aside from the questions surrounding the department's legal authority to implement the proposed rule, it would be administratively prudent for the department and entirely consistent with Section 4 of EO 14026, to modify the proposal to achieve greater conformity with the DBA and SCA. As written, the department's proposed new minimum wage overlaps with, but differs significantly from, the extensive regulations implementing the DBA and SCA in ways that will cause considerable confusion among government contractors.

Issues likely to cause particular confusion to contractors are highlighted below.

Type and Location of Covered Employee Classifications

The NPRM interprets the EO as extending to laborers and mechanics on DBA-covered contracts.²⁸ However, the NPRM also interprets the EO "as extending coverage to workers performing on DBA-covered contracts for construction who are not laborers or mechanics but whose wages are governed by the FLSA."²⁹ Furthermore, according to the NPRM, FLSA-covered employees working on DBA-covered contracts are not required to be physically present on the DBA-covered worksite to be covered by the minimum wage requirements of the EO.³⁰

Construction contractors that have spent decades complying with the department's regulations implementing the DBA have long become accustomed to looking at the department's published wage determinations to determine what their laborers and mechanics will be paid at the site of the work. The department's own regulations make clear that prevailing wages must only be paid for such laborers and mechanics and only for those who perform at the site of the construction work.³¹

The NPRM creates unnecessary confusion and imposes administrative burdens on contractors by substantially increasing the wage requirements for workers on DBA-covered jobsites at rates that in some instances may exceed those in the published wage determinations. At the same time, and despite additional potential confusion and burdens on contractors, the NPRM maintains the 2014 interpretation and expands the covered types of workers beyond the categories of laborers and mechanics.³²

²⁸ 86 Fed. Reg. 38829.

²⁹ *Id.*

³⁰ *Id.*

³¹ See 29 C.F.R. Part 5.

³² 86 Fed. Reg. 38830.

By way of example, DOL would apparently view an administrative employee working at the home office of a contractor on plans for a DBA-covered contract or a security guard patrolling a construction worksite where DBA-covered work is being performed as covered workers entitled to the new minimum wage established by the EO. On the other hand, if a contractor working on a DBA-covered contract hires a FLSA-covered technician to repair its electronic time system, the technician would not be entitled to the minimum wage established by the EO because he/she is not engaged in working on or in connection with the contract.³³ Given the substantially increased wage rate will affect a higher number of contractors than the rulemaking to implement EO 13658, contractors will inevitably be confused by this new regulatory regime, and absent a withdrawal or reconsideration of the proposal, ABC urges the agency to offer clear, concise guidance on the employer obligations under this rulemaking and the DBA and SCA.

Fringe Benefits

A similar form of mitigation is needed to address the confusing proposal requiring contractors to change their treatment of fringe benefits for many workers covered by the DBA. The department has consistently ruled over many decades that contractors can satisfy their minimum wage obligations under the DBA by paying any combination of wages and bona fide fringe benefits, so long as the wage component matches or exceeds the statutorily required minimum wage of the FLSA.³⁴ The NPRM acknowledges that this principle is statutorily mandated by Congress in the DBA,³⁵ but the NPRM nevertheless declares that DBA-covered contractors would be precluded from discharging their minimum wage obligations by furnishing fringe benefits.³⁶ Given the substantial increase from the current minimum wage and the interpretation of EO 14026 to pay the full wage rate in monetary wages, this change in contractors' minimum wage requirements will be confusing to administer and will lead to needless burdens on contractors. This proposal should be modified, both on the statutory grounds discussed above, but also in order to reconcile the new rule with the existing regulation of the DBA wherever possible in accordance with Section 4 of EO 14026.

Apprentices

The NPRM's treatment of apprentice wages is particularly confusing and impactful on contractors. Under past regulations, apprentices in a registered DOL apprenticeship program can be paid a percentage of the wage for the skill they are acquiring, in

³³ *Id.*

³⁴ See Chapter 15f07, *Discharging minimum wage and fringe benefit obligations under DBRA*, U.S. Department of Labor Field Operations Handbook, March 31, 2016, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch15.pdf.

³⁵ See 40 U.S.C. 3141(2).

³⁶ 86 Fed. Reg. 38841.

recognition of the fact that they are trainees.³⁷ The NPRM states that the new minimum wage will apply to “any individual who is employed on a DBA-covered contract and individually registered in a bona fide apprenticeship program registered with the department’s Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.”³⁸ However, under coverage exclusions, the rule states, “this part does not apply to learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a).”³⁹ Apprentices performing work on DBA or SCA contracts should be excluded from the new rule in any event. Their wages are tied to the journeyman rate on government contracts and there is no need for their wages to be affected by a new minimum wage.

Multi-Year Contracts

It is well settled that the DBA wage determinations in effect at the time of contract award generally remain in effect for the duration of the contract, regardless of whether new wage determinations are issued while the contract is being performed. Additionally, the proposal clearly states the higher wage set by EO 14026 supersedes the wage under EO 13658 only when a new contract is entered into, or a contract is renewed or extended, on or after Jan. 30, 2022. However, the wording of the NPRM regarding multi-year contracts covered under EO 14026 does not clearly state whether the wage rate remains in effect at the time of contract award or is subject to the annual increase determined by the secretary. The department should clarify this aspect of the NPRM to adopt the existing DBA regulations on multi-year contracts.

Coverage of Suppliers

The NPRM states that contracts for suppliers that are covered by the Public Contracts Act are not covered by the proposed rule.⁴⁰ However, another section of the NPRM indicates that the proposed rule does apply to subcontractors performing work for a prime contractor covered by the DBA or SCA, at whatever tier.⁴¹ Additional clarification of these potentially conflicting requirements is called for.

Safe Harbor Provision or Grace Period

As discussed above, as did the rule implementing EO 13658, the proposed rule would fundamentally alter decades of understandings and regulatory policies implementing multiple laws. The result will be a confusing morass of overlapping and conflicting

³⁷ See 29 C.F.R. part 5 and part 29.

³⁸ 86 Fed. Reg. 38829.

³⁹ 86 Fed. Reg. 38830.

⁴⁰ 86 Fed. Reg. 38828.

⁴¹ 86 Fed. Reg. 38821.

regulations that will require considerable time for absorption and implementation by government contractors of all types and sizes. The department should therefore act within the discretion allowed to it under the EO to exempt, delay or otherwise mitigate the draconian effects of the proposed rule on contractors in one or more of the following ways:

- Rather than threatening contractors with debarment for actions taken by them in good-faith compliance with decades of existing laws such as the DBA, SCA and FLSA, the department should provide a safe harbor for those contractors that can demonstrate their wages are in compliance with those statutes.
- Alternatively, the department should allow a multi-year grace period prior to implementation of the new rule, particularly since it is entirely possible that the EO and the final rule will be subject to a valid legal challenge.

Regulatory Impact

The department's Initial Regulatory Flexibility Analysis wrongly states that the department lacks authority to implement alternatives that would violate the text of EO 14026.⁴² To the contrary, section 4 of the EO vests full discretion of the department to provide "exclusions from the requirements of this order" where appropriate.⁴³

The regulatory impact statement contained in the NPRM found roughly 1.5 million total employees on SCA and DBA contracts would be potentially affected on SCA and DBA contracts.⁴⁴ More importantly, the analysis found fewer than 200,000 employees under NAICS code 23 (Construction) will be affected by the proposed minimum wage rate.⁴⁵ However, given the previously discussed unclear interpretation of the treatment of suppliers covered under the PCA, and given DOL's lack of data from U.S. territories to incorporate in the analysis,⁴⁶ ABC believes the agency provided numbers much lower than the actual numbers affected by the proposed rate requirements. Until a clear definition to the supplier issue is given and another analysis is performed, it is not possible to accurately estimate the adverse impact of the final rule on small businesses.

Conclusion

For each of the reasons set forth above, the NPRM should be withdrawn or substantially modified. ABC would welcome the opportunity to discuss this issue further and collaborate with DOL on a wage standard that helps employees and allows federal

⁴² 86 Fed. Reg. 38876.

⁴³ 86 Fed. Reg. 22836.

⁴⁴ 86 Fed. Reg. 38862.

⁴⁵ 86 Fed. Reg. 38861.

⁴⁶ 86 Fed. Reg. 38862.

contractors within the construction industry to easily comply along with the various current wage requirements.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is fluid and cursive, with the first name "Ben" and last name "Brubeck" clearly distinguishable.

Ben Brubeck
Vice President of Regulatory, Labor and State Affairs

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