

SUPPORTING STATEMENT
REQUESTS TO APPROVE CONFORMED WAGE CLASSIFICATIONS AND
UNCONVENTIONAL FRINGE BENEFIT PLANS
DAVIS-BACON & RELATED ACTS AND
CONTRACT WORK HOURS & SAFETY STANDARDS ACT
29 C.F.R. PART 5
OMB Control No.: 1215-0140

A. Justification

1. Circumstances Necessitating Information Collection

Regulations 29 C.F.R. part 5 prescribe labor standards for federally financed and assisted construction contracts subject to the Davis-Bacon Act (DBA), 40 U.S.C. § 3141 *et seq.*, the Davis-Bacon Related Acts (DBRA), and labor standards for all contracts subject to the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. § 3701 *et seq.* The DBA and DBRA require payment of locally prevailing wages and fringe benefits, as determined by the Department of Labor (DOL), to laborers and mechanics on most federally financed or assisted construction projects. 40 U.S.C. § 3142(a)-(b) and 29 C.F.R. § 5.5(a)(1). The CWHSSA requires the payment of one and one-half times the basic rate of pay for hours worked over forty in a week on most federal contracts involving the employment of laborers or mechanics. *See* 40 U.S.C. § 3702(a) and 29 C.F.R. § 5.5(b)(1). The requirements of this information collection consist of: (A) reports of conformed classifications and wage rates, and (B) requests for approval of unconventional fringe benefit plans.

- A. Conformance Reports (29 C.F.R. § 5.5(a)(1)(ii)): DBA section 1(a) provides that every contract subject to the DBA must contain a provision (*i.e.*, a wage determination) stating the minimum wages and fringe benefits to be paid the various classes of laborers and mechanics employed on the contract. *See* 40 U.S.C. § 3142(a) and 29 C.F.R. § 5.5(a)(1)(i). This requirement necessitates a method for establishing minimum rates for classes of employees omitted from wage determinations, primarily due to wage data being unavailable; therefore, regulations 29 C.F.R. § 5.5(a)(1)(ii) requires that any class of laborer or mechanic not listed in the wage determination that is to be employed under the contract shall be classified in conformance with the wage determination. A report of the conformance action (or, where there is disagreement among the parties, the questions and views of all parties) shall be submitted through the contracting officer to DOL for review and approval. 29 C.F.R. § 5.5(a)(1)(ii)(B)-(C).
- B. Unconventional Fringe Benefit Plans not Funded Through Third Party (29 C.F.R. § 5.5(a)(1)(iv)): The DBA provides that “wages” may include “costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to

laborers or mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program.” 40 U.S.C. § 3141(2)(B)(ii). Where a benefit plan is not of the conventional type described in the DBA and/or common in the construction industry that is established under a customary fund or program, it is necessary to determine from the circumstances whether the benefit is *bona fide*, as required by the DBA; thus, regulations 29 C.F.R. § 5.5(a)(1)(iv) provides for contractors to request approval of these unconventional fringe benefit plans.

2. Use

- A. Conformance Reports: The Wage and Hour Division (WHD) of the DOL reviews a proposed conformance action report to determine the appropriateness of the request. The WHD considers such factors as: (1) the work of the proposed classification, which cannot be work that is performed by a classification already listed in the wage determination; (2) whether the proposed classification is utilized in the area by the construction industry; and (3) whether the proposed wages and fringe benefits bear a reasonable relationship (*i.e.*, appropriate comparison of skills and duties) to the rates contained in the wage determination. See 29 C.F.R. § 5.5(a)(1)(ii)(A). Upon completion of the review, the WHD approves, modifies, or disapproves the conformance request and issues a determination. See *id.* at § 5.5(a)(1)(ii)(B)-(C).
- B. Unconventional Fringe Benefit Plans: Taking credit for payments to fringe benefit plans that are not *bona fide* violates the DBA and DBRA. See 29 C.F.R. § 5.5(a)(iv). The WHD reviews requests for approval of unconventional fringe benefit plans to determine the propriety of the plans. *Id.*

3. Technology

Information required by the report of a proposed conformance action or a request to review an unconventional fringe benefit plan is acceptable in any format, electronic or otherwise. Pursuant to the Government Paperwork Elimination Act (GPEA), the WHD will accept electronic (fax and email) submissions of requests to approve conformed wage rates and unconventional fringe benefit plans.

- A. Conformance Reports: The WHD currently receives about 120 electronic (fax and email) conformance requests annually from contracting officers. Each individual contracting agency must determine any electronic submission option of the information sent by interested parties (contractors and workers) because the interested parties provide the information directly to each contracting agency, not to the DOL.
- B. Unconventional Fringe Benefit Plans: Respondents may submit required information in any format, including fax and email. DOL receives about six requests to approve unconventional benefit plans each year, and the expense to expand electronic submission options (*e.g.*, on-line submission) would not be justified.

4. Duplication

The basic recordkeeping requirements of this regulation (29 C.F.R. §§ 5.5 (a)(3)(i), 5.5(c), and 5.15) are a restatement of requirements cleared under OMB control number 1215-0017 (Records to be Kept by Employers under the Fair Labor Standards Act (FLSA), 29 C.F.R. part 516). Requirements at regulations 29 C.F.R. § 5.5 (a)(3)(ii) for weekly reporting of DBA-required payroll items are approved under OMB number 1215-0149.

Contractors employing apprentices or trainees may pay less than the applicable wage determination rate, provided the apprentices or trainees are employed pursuant to, and individually registered in, approved programs. 29 C.F.R. § 5.5(a)(4). The Employment and Training Administration of the DOL administers these apprenticeship or training programs that involve substantial training obligations and require the maintenance of detailed records on the part of the contractor. *Id.* Thus, the requirement in 29 C.F.R. § 5.5(a)(3)(i) that a contractor employing apprentices or trainees maintain written evidence of the registration of the apprentices and trainees along with documentation of the ratios and wage rates prescribed in the applicable programs does not impose any additional burden on contractors. Please note, examples of the apprenticeship or training program requirements are found in regulations 29 C.F.R. § 29.6, approved under OMB control number 1205-0223.

This submission pertains to the information collection requirements not cleared under OMB control numbers 1215-0017, 1215-0149, or 1205-0223. The information is not available from any other source.

5. Minimizing Small Entity Burden

These information collection requests do not have a significant impact on a substantial number of small entities.

6. Consequence of Failing to Collect and Obstacles to Reducing Burden

A. Conformance Reports: The contractor's report of a proposed conformance action, if its purposes are to be effectively achieved, is to be submitted by the contracting agency to the WHD promptly upon a contractor's discovery that a classification of laborer or mechanic needed on the contract is not listed in a DOL wage determination. 29 C.F.R. § 5.5(a)(1)(ii)(B). Submission less frequently would not be feasible in view of the potential serious compliance problems that could develop.

Failure to collect the information would prevent the WHD from issuing the legally required additional wage rates where a wage determination does not include all job classifications and could result in serious enforcement problems, such as unduly

protracted compliance reviews when it is discovered during investigations that appropriate conformance action was not taken. Moreover, there would be no assurances that employees in the unlisted classification would receive the wage protections the statutes provide. Failure to monitor the conformance requirements also can harm contracting agencies by causing labor unrest and potential work stoppages during contract performance.

B. Unconventional Fringe Benefit Plans: The WHD only expects a contractor to obtain approval once for any given unconventional fringe benefit plan. Failure to collect the information would prevent the WHD from being able to review and grant approval to *bona fide* but unconventional fringe benefit plans. Taking fringe benefit credit for payments to plans that are not *bona fide* violates DBA/DBRA provisions. If such plans are not detected at the outset of their implementation, they can result in an accumulation of substantial back wage liabilities and potentially result in suspension or debarment of the contractor.

7. Special Circumstances

These information collection requests involve no special circumstances.

8. Public Comments

The DOL published a notice in the *Federal Register* inviting public comment on December 2, 2009, and received no comments. (74 Fed. Reg. 63158). DOL contacts with respondents made during the course of regular investigation activities and during general outreach sessions have not indicated any concerns with these information collection requirements.

9. Payment or Gifts to Respondents

The DOL offers no payments or gifts to respondents.

10. Assurances of Confidentiality

The DOL offers no pledge of confidentiality in association with these information collections. As a practical matter, the DOL would only release this information in accordance with the provisions of the Freedom of Information Act (5 U.S.C. § 552); the Privacy Act (5 U.S.C. § 552a); and attendant regulations, 29 C.F.R. parts 70 and 71.

11. Sensitive Questions

These information collections ask no sensitive questions.

12. Estimated Annual Respondent Burden Hours

- A. Conformance Reports: Several government agencies (*e.g.*, the Department of Defense, the General Services Administration, the Department of Transportation, and the Federal Highway Administration) that account for a very large portion of federally financed or assisted construction contracts subject to the DBA and DBRA have developed standardized procedures for submitting requests for conformed wage rate approval. The DOL estimates respondents spend approximately 15 minutes providing information to a contracting agency regarding each conformance request. Based on an estimated 2960 reports submitted annually, the total annual burden is 740 hours. 2960 responses x 15 minutes = 740 hours.
- B. Unconventional Fringe Benefit Plans: The DOL annually receives about six requests to approve unconventional fringe benefit plans and estimates it takes approximately 1 hour to assemble the plan data, prepare, and transmit each request for approval of an unconventional fringe benefit plan, for an annual burden of 6 hours. 6 plans x 1 hour = 6 hours.

The DOL bases these estimates on agency experience and workload data.

TOTAL ANNUAL BURDEN ESTIMATE FOR CONFORMANCE REPORTS AND UNCONVENTIONAL FRINGE BENEFIT PLANS—746 HOURS.

The DOL has used the annual average hourly earnings for a production or non-supervisory worker in the construction industry for June 2009 of \$22.47 to estimate respondent costs. See Bureau of Labor Statistics, *The Employment Situation, August 2009*, p. 25, Table B-3, http://www.bls.gov/news.release/archives/empsit_09042009.pdf. Estimated annual respondent costs are \$16,763 (rounded). \$22.47 x 746 hours.

13. Estimated Annual Respondent Capital/Start-Up/Operation/Maintenance Costs

The DOL estimates the annual mailing cost for respondents to be \$1391 (rounded). 2960 responses x (\$.44 postage + \$.03 per envelope).

14. Estimated Annual Federal Costs

- A. Conformance Reports: The DOL estimates it annually receives approximately 2960 requests for conformed wage rates. The DOL estimates annualized federal costs associated with these reports, exclusive of fringe benefits and overhead, as follows:

- (1). Procuring agencies:

Clerical costs for processing reports to and from DOL:
5 minutes x 2960 x 2 clerks x \$12.91/hr (GS 3/step 4, rest of U.S.)
\$6369 (rounded).

Agency professional processing:

10 minutes x 2960 x \$29.73/hr (GS 11/step 4, rest of U.S.) \$14,667 (rounded)

Mailing charges from agencies to DOL:
2960 x (\$.44 postage + \$.03 per envelope) \$1391 (rounded)

(2). DOL:

Processing:
25 minutes x 2960 x \$32.14/hr (GS 11/step 4, Washington, DC) \$39,639 (rounded)

Mailing charges:
2960 x (\$.44 postage + \$.03 per envelope) \$1391 (rounded)

Total Federal costs for Conformance Reports \$63,457 (rounded)

B. Unconventional Fringe Benefit Plans: The DOL annually receives approximately six requests to approval unconventional fringe benefit plans and estimates annualized federal costs associated with such requests as follows:

Review and Analysis of Plans:
5 hours x 6 requests x \$45.82/hr (GS 13/step 4, Washington, DC) \$1375 (rounded)

Mailing charges: 6 x (\$.44 postage + \$.03 per envelope) \$3 (rounded)

Total Federal Costs for Unconventional Fringe Benefit Plans \$1378

TOTAL ANNUAL FEDERAL COSTS FOR CONFORMANCE REPORTS AND UNCONVENTIONAL FRINGE BENEFIT PLANS \$64,835 (rounded)

15. Reasons for Program Changes or Adjustments Affecting Public Burdens

The DOL has decreased the total estimated burden hours from 756 to 746 based on more current agency statistics that reflect a slight decline in the average number of conformance requests received annually during the past three years (from 3000 to 2960). Enhanced tracking systems allow the DOL to more accurately track and report data on incoming conformance reports and provide more accurate data than was previously available.

Although the number of conformances received has decreased, the estimated operation and maintenance costs have increased \$128 (from \$1263 to \$1391), due to an increase in postage costs.

16. Publishing Data From Information Collection

The DOL does not publish the results of these information collections.

17. Display of OMB Approval Expiration

The DOL does not seek an exemption to the requirement to display the expiration date on these information collections.

18. Exceptions to Certification Statement

The DOL is not requesting an exception to any of the certification requirements for these information collections. This request complies with 5 C.F.R. § 1320.9.

B. Employing Statistical Methods

Not applicable.