

## SUPPORTING STATEMENT

### **Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act Reporting Requirements - 29 CFR Part 5 OMB Control Number 1235-0023**

This ICR is being submitted for revision associated with the Notice of Proposed Rulemaking: Modernizing the Davis-Bacon and Related Acts Regulations, RIN 1235-AA40. The Department proposes to remove the table listing the OMB control numbers related to the Paperwork Reduction Act at the end of the regulation in 29 CFR 5.5. The burden estimates are not changing due to the NPRM. However, some regulations are shifting location in the proposal. The Department adds reference to 29 CFR 5.28 in response to the proposal.

#### **A. Justification**

- 1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.**

Regulations at 29 CFR 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 (Department), to laborers and mechanics on most federally financed or assisted construction projects. See 40 U.S.C. § 3142(a) and 29 CFR § 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(c) and 29 CFR § 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 unfunded fringe benefit plans.

- A. Conformance Reports (Current 29 CFR § 5.5(a)(1)(ii) and proposed 29 CFR § 5.5(a)(1)(iii)):** DBA section 1(a) provides that every contract subject to the DBA must contain a provision (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. § 3141(c)(1) and 29 CFR § 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. 29 CFR § 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 Department for review and approval. 29 CFR § 5.5(a)(3)(i) and proposed 29 CFR § 5.5(a)(1)(iii). The Department adds the citation for 29 CFR 5.28 as part of the proposal.

- B. Unfunded Fringe Benefit Plans (Current 29 CFR § 5.5(a)(1)(iv) and proposed 29 CFR § 5.28): 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 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, regulation current 29 CFR § 5.5(a)(1)(iv) and proposed 29 CFR § 5.28 provides for contractors to request approval of unfunded fringe benefit plans.

**2. Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.**

- A. Conformance Reports: The Wage and Hour Division (WHD) of the Department 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. Upon completion of the review, the WHD approves, modifies, or disapproves the conformance request and issues a determination.
- B. Unfunded Fringe Benefit Plans: Taking credit for payments to fringe benefit plans that are not bona fide violates the DBA and DBRA. WHD reviews requests for approval of unfunded fringe benefit plans to determine the propriety of the plans.

**3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration of using information technology to reduce burden.**

Information required by the report of a proposed conformance action or a request to review an unfunded fringe benefit plan is acceptable in any format, electronic or otherwise. Pursuant to the

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Government Paperwork Elimination Act (GPEA), the WHD will accept electronic (fax and email) submissions of requests to approve conformed wage rates and unfunded fringe benefit plans.

- A. Conformance Reports: The WHD currently receives about 150 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 they provide the information directly to each contracting agency (not the Department).
  - B. Unfunded Fringe Benefit Plans: Respondents may submit required information in any format, including fax and email. Department receives few requests to approve unfunded benefit plans each year, and the expense to expand electronic submission options (e.g., on-line submission) would not be justified.
- 4. Describe efforts to identify duplication. Show especially why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.**

The basic recordkeeping requirements of this regulation (current and proposed 29 CFR §§ 5.5(a)(3)(i), 5.5(c), and 5.15) are a restatement of requirements cleared under OMB control number 1235-0018 (Records to be Kept by Employers under the Fair Labor Standards Act (FLSA), 29 CFR part 516). Requirements at regulations 29 CFR § 5.5(a)(3)(ii) for weekly reporting of DBA required payroll items are approved under OMB control number 1235-0008.

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. The Employment and Training Administration of the Department administers these apprenticeship or training programs that involve substantial training obligations and require the maintenance of detailed records on the part of the contractor. (For an example of these requirements, see regulations 29 CFR § 29.6, approved under OMB control number 1205-0223. Thus the requirement in 29 CFR § 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.

The information is not available from any other source.

- 5. If the collection of information impacts small businesses or other small entities, describe any methods used to minimize burden.**

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This information collection does not have a significant impact on a substantial number of small entities.

**6. Describe the consequence to federal program or policy activities if collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.**

- A. Conformance Reports: The report of a proposed conformance action, if its purposes are to be effectively achieved, is to be submitted by the contracting agency promptly upon discovery that a classification of laborer or mechanic on the contract is not listed in a Department wage determination. 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 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. Unfunded Fringe Benefit Plans: The WHD expects a contractor only to obtain approval for any given unfunded fringe benefit plan one time. Failure to collect the information would prevent the WHD from being able to review and grant approval to bona fide unfunded fringe benefit plans. Taking fringe benefit credit for payments to plans that are not bona fide violates the 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. Explain any special circumstances that would cause the information collection to be conducted in a manner:**

- **Requiring respondents to report information to the agency more often than quarterly;**
- **Requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;**
- **Requiring respondents to submit more than an original and two copies of any document;**
- **Requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;**
- **In connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;**

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- **Requiring the use of a statistical data classification that has not been reviewed and approved by OMB;**
- **That includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or**
- **Requiring respondents to submit proprietary trade secrets, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.**

This information collection involves no special circumstances.

- 8. If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.**

The Notice of Proposed Rulemaking (NPRM) that is associated with the revision to this ICR solicits public comment on the paperwork burden of the information collection request. The NPRM published on March 18, 2022. The Federal Register Citation is 87 FR 15698.

- 9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.**

No payment or gift of any kind is provided by Department to respondents.

- 10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation or agency policy. If the collection requires a system of records notice (SORN) or privacy impact assessment (PIA), those should be cited and described here.**

The Department offers no pledge of confidentiality in association with this information collection. As a practical matter, the Department would only release this information in accordance with the provisions of the Freedom of Information Act (5 U.S.C. § 552) and its attendant regulations (29 CFR part 70) and with the Privacy Act (5 U.S.C. § 552a).

- 11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be**

**given the persons from whom the information is requested, and any steps to be taken to obtain their consent.**

This information collection asks no sensitive questions.

**12. Provide estimates of the hour burden of the collection of information. The statement should:**

- **Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.**
- **If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens.**
- **Provide estimates of annualized cost to respondents for hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included under ‘Annual Cost to Federal Government’.**

The Department bases the following estimates on agency experience and workload data.

- A. **Conformance Reports:** Several government agencies (e.g., Department of Defense, General Services Administration, Department of Transportation) that account for a 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 Department estimates respondents spend approximately 15 minutes providing information to a contracting agency regarding each conformance request, and further estimates that 8,500 conformance reports are submitted annually.

Therefore, the annual reporting and recordkeeping burden for conformance reports is 2,125 hours ( $8,500 \times 15 \text{ minutes} \div 60 \text{ minutes per hour}$ ).

- B. **Unfunded Fringe Benefit Plans:** The Department annually receives about 18 requests to approve unfunded fringe benefit plans and estimates it takes approximately 1 hour to assemble the plan data, prepare, and transmit each request for approval of an unfunded fringe benefit plan.

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Therefore, the annual reporting and recordkeeping burden for unfunded fringe benefit plans is 18 hours (18 plans × 1 hour).

Total responses: 8,500 conformance reports + 18 unfunded fringe benefit plans = 8,518 responses.

Total hours: 2,125 hours for conformance reports + 18 hours for unfunded fringe benefit plans = 2,143 hours.

### **Total Annual Reporting and Recordkeeping Burden: 8,518 responses and 2,143 hours**

Absent specific data on salaries of employees in the construction industry who deal with conformances and unfunded fringe benefit plans, the Department has used the seasonally adjusted October 2021 Table B-3, Average hourly and weekly earnings of all employees on private nonfarm payrolls by industry sector, seasonally adjusted average hourly rate for production or nonsupervisory workers on construction industry payrolls to determine respondent costs. This rate is \$33.38. See the Employment Situation, October 2021, DOL, Bureau of Labor Statistics, Table B-3. To this amount, the Department adds 46% benefits cost (\$15.35) plus 17% overhead cost (\$5.67) for a total loaded wage rate of \$54.40.

[2,143 hours × \\$54.40 = \\$116,579. \(rounded\).](#)

Accordingly, the Department estimates annual respondent costs will be \$116,579. (rounded) (2,143 annual reporting and recordkeeping hours × \$54.40 staff wages per hour).

### **13. Provide an estimate for the total annual cost burden to respondents or record keepers resulting from the collection of information. (Do not include the cost of any hour burden already reflected on the burden worksheet).**

Employers who are contractors on DBA/DBRA-covered construction contracts typically provide information to procuring agencies in support of the submission of conformance reports and unfunded fringe benefit plans to the Department. The following burden estimate represents the cost of such employers mailing such information to procuring agencies. The Department anticipates that this is an over-estimate, as many employers provide this information electronically, instead of through the postal system.

The Department estimates the annual mailing and postage cost of providing information for each conformance report response to be \$4,931 (8,500 conformance reports × \$0.61 (\$0.58 + \$0.03 envelope per response)). The Department estimates the annual mailing and postage cost of providing information for each unfunded fringe benefit plan response to be \$10.44 (18 unfunded fringe benefit plans × (\$0.55+ \$0.03 envelope per response), rounded).

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Therefore, the Department estimates the total annual mailing and postage cost of providing information for each response submission to be \$4,941 (\$4,931 for conformance reports + \$10.44 for unfunded fringe benefit plans).

**14. Provide estimates of annualized costs to the federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies may also aggregate cost estimates from Items 12, 13, and 14 into a single table.**

A. Conformance Reports: The Department estimates it receives 8,500 conformance reports per year, and that processing each report will take approximately 10 minutes of procuring agency analyst time, 5 minutes of procuring agency clerical time for 2 separate full-time employees, and 25 minutes of Department analyst time. To estimate the cost of procuring agency analyst time, the Department has used the 2019 General Schedule for the rest of United States area, Grade 11- Step 4, which lists an hourly rate of \$32.27 (see [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2019/RUS\\_h.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2019/RUS_h.pdf)). To estimate the cost of procuring agency clerical time, the Department has used the aforementioned schedule, Grade 3- Step 4, which lists an hourly rate of \$14.01. To estimate the cost of Department analyst time, the Department has used the 2019 General Schedule for the Washington, D.C. area, Grade 11- Step 4, which lists an hourly rate of \$35.86(see [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2019/DCB\\_h.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2019/DCB_h.pdf)). The Department here estimates annualized federal costs associated with these reports, exclusive of fringe benefits and overhead:

1) Procuring agencies:

Analyzing-processing:  $8,500 \text{ conformance reports} \times 10 \text{ minutes} \div 60 \text{ minutes per hour} \times \$32.27 \text{ per hour} = \$45,716 \text{ (rounded)}$

Clerical:  $8,500 \text{ conformance reports} \times 5 \text{ minutes} \div 60 \text{ minutes per hour} \times 2 \text{ employees} \times \$14.01 \text{ per hour} = \$19,848 \text{ (rounded)}$

Mailing charges for mailing conformance reports to the Department:  $8,500 \text{ conformance reports} \times (\$0.55 \text{ postage} + \$0.03 \text{ envelope for each report}) = \$4,930$

Total costs to procuring agencies for conformance reports:  $\$70,494 (\$45,716 + \$19,848 + \$4,930)$

2) DEPARTMENT:



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Analyzing-processing:  $8,500 \text{ conformance reports} \times 25 \text{ minutes} \div 60 \text{ minutes per hour} \times \$35.86 \text{ per hour processing} = \$127,004 \text{ (rounded)}$

Mailing charges for mailing conformance report replies to procuring agencies:  $8,500 \text{ conformance reports} \times (\$0.55 \text{ postage} + \$0.03 \text{ envelope for each report}) = \$4,930$

Total costs to Department for conformance reports:  $\$131,934 (\$127,004 + \$4,930)$

**Total federal costs for conformance reports = \$202,428 (\$70,494 cost to procuring agencies + 131,934 cost to Department)**

- B. Unfunded Fringe Benefit Plans: The Department receives approximately 18 requests to approve unfunded fringe benefit plans per year and estimates that analyzing and processing each submission will take 5 hours of analyst time. To estimate the cost of analyst time, the Department has used the 2019 General Schedule for the Washington, D.C. area, Grade 12-Step 4, which lists an hourly rate of \$42.98 (see [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2019/DCB\\_h.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2019/DCB_h.pdf)). The Department here estimates annualized federal costs associated with these plans, exclusive of fringe benefits and overhead:

Analyzing-processing:  $18 \text{ unfunded fringe benefit plans} \times 5 \text{ hours} \times \$42.98 \text{ per hour} = \$3,868 \text{ (rounded)}$

Mailing charges for mailing unfunded fringe benefit plan replies to procuring agencies:  $18 \text{ unfunded fringe benefit plans} \times (\$0.55 \text{ postage} + \$0.03 \text{ envelope for each submission}) = \$10.44 \text{ (rounded)}$

**Total federal costs for unfunded fringe benefit plans = \$3,878.44 (\$3,868 + \$10.44)**

**TOTAL ESTIMATED ANNUAL FEDERAL COST: \$206,306.44 (\$202,428 + \$3,878.44)**

**15. Explain the reasons for any program changes or adjustments reported on the burden worksheet.**

The Department proposes to remove the table listing the OMB control numbers related to the Paperwork Reduction Act at the end of the regulation in 29 CFR 5.5. The burden estimates are not changing due to the NPRM. However, some regulations are shifting location in the proposal. The Department adds reference to 29 CFR 5.28 in response to the proposal.

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- 16. For collections of information whose results will be published, outline plans for tabulation and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.**

The Department does not publish this information.

- 17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.**

The Department has no forms associated with this information collection.

- 18. Explain each exception to the topics of the certification statement identified in “Certification for Paperwork Reduction Act Submissions.”**

The Department is not seeking any exceptions to the certification requirements.