

Supporting Statement for the Paperwork Reduction Act

The U.S. Department of Labor (Department) proposes to revise its information collection request (ICR) associated with the recordkeeping and certified payroll provisions of the Davis-Bacon and Related Acts. This revision is proposed to be consistent with the final rule: Updating the Davis-Bacon and Related Acts Regulations, RIN 1235-AA40. The Department submitted an initial package on March 18, 2022, with the notice of proposed rulemaking (NPRM): Updating the Davis-Bacon and Related Acts Regulations [87 FR 15698]. In the final rule, the Department adopts, as proposed, three new recordkeeping requirements, as well as language clarifying the timeframe within which DBRA-related records must be retained, and other nonsubstantive changes to the recordkeeping provisions in the DBRA contract clauses and related regulatory provisions. The final rule clarifies that none of the information that is newly included in the recordkeeping requirements must be submitted as part of the statutory certified payroll requirements. Accordingly, the final rule enacts no changes to the WH-347 Certified Payroll form. The Department adopts, as proposed, the removal of the table listing the OMB control numbers related to the Paperwork Reduction Act at the end of the regulation in 29 CFR 5.5.

Part 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.**

The Copeland Act requires contractors and subcontractors performing work on federally financed or assisted construction contracts to furnish weekly a statement on the wages paid each employee during the prior week. *See* 40 U.S.C. 3145(a). This Copeland Act provision specifically requires the regulations to “include a provision that each contractor and subcontractor each week must furnish a statement on the wages paid each employee during the prior week.” This requirement is implemented by 29 CFR 3.3 and 3.4 and the standard Davis-Bacon contract clauses set forth at 29 CFR 5.5. The provision at 29 CFR 5.5(a)(3)(ii)(A) requires contractors to submit weekly a copy of all payrolls to the federal agency contracting for or financing the construction project. If the agency is not a party to the contract, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the contracting agency. Under the current rule, this provision at 5.5(a)(3)(ii)(A) also includes language requiring that the payrolls submitted shall set out accurately and completely the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals, and instead, the payrolls will only need to include an individually identifying number for each employee (e.g., the last four digits of the employee’s social security number). The final rule moves this language regarding the content of certified payrolls from paragraph (3)(ii)(A) to (3)(ii)(B). In the final rule, the Department also finalizes, as proposed, the recordkeeping requirement to add a worker’s telephone number and email address to the list in 29 CFR 3.4(b) of records that each contractor and subcontractor is required to preserve. While these additional records, the telephone number and email address, must be preserved, they are not included on the weekly certified payroll form. The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division website at

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<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347.pdf>. There are no changes to WH-347.

The regulations require each certified payroll submitted to be accompanied by a signed “Statement of Compliance” indicating the payrolls are correct and complete and that each laborer or mechanic has been paid not less than the proper Davis-Bacon Act (DBA) prevailing wage rate for the work performed. This requirement has been moved from the contract clause provision at 29 CFR 5.5(a)(3)(ii)(B) under the current regulations to § 5.5(a)(3)(ii)(C) under the final rule. The regulation at 29 CFR 3.3(b) contains a parallel requirement that each contractor furnish such weekly “Statements of Compliance.” The regulations at 29 CFR 3.4(b) and 5.5(a)(3)(i) (now 5.5(a)(3)(ii)(G)) require contractors to maintain these records for three years after completion of the work.

Current 29 CFR 5.5(a)(3)(i) requires contractors performing work on projects subject to the Davis-Bacon and Related Acts (DBRA) to retain the name, address, social security number, correct classifications, hourly rates of wages paid (including rates of number contributions made or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in DBA section 1(b)(2)(B) (now codified at 40 U.S.C. 3141(2)(B))), daily and weekly of hours worked, and deductions made and actual wages paid of each worker on the contract. In the final rule, the Department amends 5.5(a)(3)(i) to adopt the requirement to retain a worker’s telephone number and email address in the same section, as proposed. *See* 29 CFR 5.5(a)(3)(i)(B). In addition, other records must be retained whenever the contractor seeks to satisfy its fringe benefit obligations through the mechanism described in current 29 CFR 5.5(a)(1)(iv) (final rule 29 CFR 5.5(a)(i)(v)), which allows contractors, with approval of the Secretary of Labor, to satisfy fringe benefit obligations by considering as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing benefits under a bona fide fringe benefit plan or program. In these circumstances, the contractor must maintain records showing that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, that the plan or program has been communicated in writing to the laborers or mechanics affected, and the costs anticipated or the actual cost incurred in providing such benefits. *See* 29 CFR 5.5(a)(3)(i)(C) (final rule). Finally, contractors employing apprentices or trainees under approved programs must maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs. *See* 29 CFR 5.5(a)(3)(i)(D) (final rule).

DBA contract clauses at 29 CFR 5.5(a)(5) and (8) obligate contractors to comply with requirements of 29 CFR part 3 on covered contracts and incorporate into such contracts, by reference, the requirements of 29 CFR parts 1, 3, and 5.

The Department adopts, as proposed, the addition of language to paragraph (a)(3)(i) to 29 CFR 5.5 to clarify that regular payrolls and other basic records must be preserved for a period of at least three years after all the work on the prime contract is completed. The Department also adopts, as proposed, the addition of language to paragraph (a)(3)(iii) requiring contractors and subcontractors to maintain contracts and subcontracts and related documents (such as bids, proposals,

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amendments, modifications, and extensions) for a period of three years after all the work on the prime contract has been completed. In other words, even if a project takes more than three years to complete, contractors and subcontractors must keep payroll and basic records and contract-related documents for at least three years after all the work on the prime contract has been completed. These revisions expressly state the Department's longstanding interpretation and practice concerning the period of time that contractors and subcontractors must keep payroll and basic records required by § 5.5(a)(3). The Department also notes that it is a normal business practice to keep such documents and does not expect an increase in burden associated with these requirements.

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.

The Copeland Act statute requires the submission of certified payroll by contractors. *See* 40 U.S.C. 3145; *Bldg. & Const. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 630–33 (D.C. Cir. 1983) (discussing in depth this statutory requirement). The purpose of the statutory requirement is to aid in enforcement of the DBRA by enabling contracting agencies to check the accuracy of submitted payroll and to incentivize contractors to pay their workers in compliance with the DBRA. *See Bldg. & Const. Trades' Dep't*, 712 F.2d at 631–32 (citations omitted). Contracting officials and Wage and Hour Division (WHD) staff use the certified payrolls discussed in Item 1 of this supporting statement in verifying whether contractors have paid the required rates for the work performed. Certified payroll that has been submitted by an interested party as part of the wage survey process may also be used by WHD in calculating prevailing wages and issuing wage determinations. *See* 29 CFR 1.3(b)(5).

The regulatory recordkeeping provisions also require that contractors and subcontractors retain information that they do not need to submit with the certified payroll, but do need to submit to contracting agencies or WHD upon request. These requirements include social security records and employee addresses. The final rule adds requirements in this category, to retain employee telephone numbers and email addresses and contracts and subcontracts and related documents. This information is generally sought by contracting agencies or the Department in the event a complaint has been filed or an investigation has otherwise been initiated, and its purpose is to increase the efficiency of enforcement and thereby discourage the misclassification of workers. Contact information for employees is necessary because employees often have important factual information regarding the content of their duties, the amount of their pay, and other information relevant to a determination regarding contractor compliance. Contract-related documents are needed for, among other purposes, determining whether the correct wage determinations were included in subcontracts and whether contractors or subcontractors had knowledge of the DBRA requirements.

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

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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.

The Department has developed optional use form WH-347, Certified Payroll form, that contractors may use to meet the payroll reporting requirements and that has not been changed by the final rule. *See* current 29 CFR 5.5(a)(3)(ii)(A) and proposed, now finalized, § 5.5(a)(3)(ii)(B). *See also* 29 CFR 3.3(b). The form contains the basic payroll information that contractors must furnish each week they perform any work subject to DBA labor standards. The contractor also completes, dates, and signs a statement on page 2 of the form to meet the certification requirement. The contractor submits the completed form weekly to the contracting agency, not to WHD. The contractor may substitute copies of its payroll containing all of the required information and provide the required certification. In accordance with the Government Paperwork Elimination Act (GPEA), 44 U.S.C. 3504, the Department has posted optional use form WH-347 on the internet (<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347.pdf>), in a printable and fillable format that automatically performs some mathematical calculations.

The final rule does not change the content of the certified payroll requirements or the WH-347 form. However, the final rule does adopt new regulatory provisions regarding electronic submission of certified payroll. The final rule adopts, as proposed, language codifying the Department's longstanding policy that individual contracting agencies determine any electronic submission options, because contractors submit the information directly to each contracting agency and not to WHD. 29 CFR 5.5(a)(3)(ii)(A). The final rule clarifies that the submission of photocopies or other automated duplication of the contractor's regular payrolls containing all of the required information pertinent to the government construction project(s) is sufficient to satisfy this payroll submission requirement. *Id.* The final rule also clarifies that legally valid electronic signatures are permissible. *Id.*

In response to comments received on the NPRM, the Department also added language to § 5.5(a)(3)(ii)(A) of the final rule to clarify that a contracting agency may permit or require contractors to submit their certified payroll through an electronic submission system only as long as the system satisfies certain requirements, including in particular that the contracting agency and the Department can access the certified payrolls upon request for at least three years after the work on the prime contract has been completed. The Department proposed and adopts these electronic-submission changes to the regulations in order to reduce burden on contractors and subcontractors by clarifying that they may use electronic submission with appropriate safeguards.

4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.

Requirements at 29 CFR 5.5(a)(3)(ii) for weekly reporting of DBA required payroll items are approved under OMB control number 1235-0008. The final rule does not change the content of certified payroll requirements.

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The recordkeeping requirements of this regulation largely mirror other existing requirements to which contractors and subcontractors are already subject. For example, the basic recordkeeping requirements of this regulation (current and now finalized 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).

Similarly, contractors are already required to retain apprenticeship related documents. Contractors employing apprentices may pay less than the applicable wage determination rate, provided the apprentices 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 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 maintain written evidence of the registration of the apprentices along with documentation of the ratios and wage rates prescribed in the applicable programs does not impose any additional burden on contractors.

Contractors are also already required by the Federal Acquisition Regulation to retain contract-related documents. *See, e.g.,* 48 CFR 4.705-2(a) (contractors must retain certain pay administration records for 4 years); 48 CFR 4.703(a)(1).

As a practical matter, the fact that these requirements parallel other existing document-retention requirements does not require any duplication in recordkeeping for contractors. While the employers are required to retain this information under other authorities, the information is not already in the government's possession unless it has been provided during a separate inquiry, investigation, or enforcement action. The information thus 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.

This information collection does not have a significant impact on a substantial number of small entities. To minimize burden, the information collection requests only information necessary for WHD and contracting agencies to assess whether contractors have paid the required rates for the work performed. Any burdens on small businesses (and others) also are mitigated to the extent that (as is the case with the new requirement that contractors and subcontractors keep payroll and basic records and contract-related documents for at least three years after all the work on the prime contract has been completed) the requirements comport with normal business practices. Burdens are also minimized because contractors can incorporate the cost of recordkeeping and certified payroll into the bids that they submit to seek DBRA-covered contracting opportunities.

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

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WHD and contracting agencies have a statutory obligation to determine and ensure that contractors performing work on DBRA covered construction projects comply with the requirements discussed in Item 1 of this supporting statement. Beyond the statutory requirements, certified payrolls are an essential tool used to determine compliance.

Contractors must submit the information each week in which their employees perform any work on covered construction projects because Copeland Act provisions preclude less frequent submission. In addition, a court injunction requires the Department to maintain the weekly submission of payroll information for each worker. The Department published revised final regulations in the Federal Register on May 28, 1982 (29 CFR part 5, 47 Fed. Reg. 23658; 29 CFR part 3, 47 Fed. Reg. 23678) to require only a weekly submission certifying compliance with the DBA and Copeland Act provisions, instead of the requirement for contractors to submit weekly a copy of the actual payroll information for each worker performing DBRA covered work. On December 23, 1982, the U.S. District Court for the District of Columbia permanently enjoined the Secretary of Labor from implementing those provisions. *See Bldg. & Const. Trades' Dep't, AFL-CIO v. Donovan*, 553 F. Supp. 352, 356 (D.D.C. 1982). On July 5, 1983, the U.S. Court of Appeals for the District of Columbia Circuit held the regulatory change to allow the submission of statements of compliance, in lieu of actual payroll information on each employee, to be invalid. *See Bldg. & Const. Trades' Dep't, AFL-CIO v. Donovan*, 712 F. 2d 611, 630–33 (D.C. Cir. 1983). On January 16, 1984, the U.S. Supreme Court declined to review the decision, allowing the appellate decision to become final and precluding the Department from eliminating this aspect of the information collection. *See* 464 U.S. 1069.

7. Explain any special circumstances that would cause an 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;**
- **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**

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- **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.**

But for the statutory requirement to submit the information weekly, 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.

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and record-keeping, disclosure, or reporting format (of any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years – even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

On March 18, 2022, the Department published a notice in the *Federal Register* inviting public comment about this information collection (87 FR 15698). Of the 40,942 comments received, several touched on the recordkeeping requirements related to this paperwork package, many of which were in support of the Department's proposal.

A number of commenters wrote in support of the Department's proposal in 29 CFR 5.5(a)(3)(iii) to require all contractors, subcontractors, and recipients of federal assistance to maintain and preserve Davis-Bacon contracts, subcontracts, and related documents for three years after all the work on the prime contract is completed. The Foundation for Fair Contracting in Connecticut¹ indicated their support for an update to the Department's recordkeeping requirements, expressing the view that accurate records are critical to transparency and accountability in the construction industry. This was seconded by the Construction Employers of America², the Sheet Metal & Air Conditioning Contractors' National Association³, and the Foundation for Fair Contracting⁴, the latter of which wrote, "The modernization of the recordkeeping requirements and the requirements to maintain records after a project is completed would make it easier for the FFC to audit unscrupulous contractors and ensure that they do not continue to take advantage of workers and

¹ WHD-2022-0001-30344

² WHD-2022-0001-40954

³ WHD-2022-0001-40940

⁴ WHD-2022-0001-36781

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unfairly compete against high-road contractors.” McKanna, Bishop, Joffe, LLP⁵, and Roblee Detwiler, on behalf of the Washington State Building and Construction Trades Council⁶, also expressed that they fully support strengthened recordkeeping requirements. Weinberg, Roger, and Rosenfeld, on behalf of the Northern California District Council of Laborers⁷, concurred, stating the recordkeeping requirements in the proposed rule were “vast improvements” that would “increase transparency and allow the District Council and other organizations to ensure that contractors are complying with the law.” The comment also stated that the proposed rule’s “clarifications and supplemental requirements modernize the DBRA’s recordkeeping requirements and ensure that contractors maintain their records for years after projects are completed.” The United Brotherhood of Carpenters⁸ suggested that additional recordkeeping requirements should be added, including timesheets, job site orientation records, contact information for subcontractors, and records of payments to subcontractors.

Alternatively, a comment submitted by fourteen members of the United States Senate⁹ expressed the view that adding to recordkeeping requirements places an impermissible administrative burden on small to mid-size contractors, many of whom lack the administrative resources to keep up with paperwork burdens. Associated Builders and Contractors¹⁰ also opposed proposed 29 CFR 5.5(a) (3)(iii), writing, “No adequate justification for this burdensome new requirement is provided in the NPRM other than being a ‘good business practice’—not DOL’s concern. This additional burden is not reflected in the DOL’s regulatory cost analysis.”

In response to these comments, the Department notes that this requirement is not novel, and the time period for DBRA record retention is consistent with other such regulatory requirements for contractors. For example, the SCA requires that contractors and subcontractors maintain many pay and time records “for 3 years from the completion of the work.” 29 CFR 4.6(g)(1). The Federal Acquisition Regulation requires contractors to retain certain records for 3 or 4 years. *See, e.g.,* 48 CFR 4.705-2(a) (contractors must retain certain pay administration records for 4 years); 48 CFR 4.703(a)(1) (requiring contractor retention for 3 years after final payment of “records, which includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form, and other supporting evidence to satisfy contract negotiation, administration, and audit requirements of the contracting agencies and the Comptroller General”).

Moreover, maintaining copies of contracts to which you are a party is a sound business practice to document the parties’ obligations under the contracts, among other reasons. Not only are DBRA-covered construction contracts needed for reference during performance and completion about scope of work, specifications, pricing, etc., but if there is any dispute about the contract provisions, performance, etc., contract documents are the starting point for resolving contractual disputes. In addition, contract payment terms may be supporting documents for a contractor’s business tax

⁵ WHD-2022-0001-35883

⁶ WHD-2022-0001-40949

⁷ WHD-2022-0001-40971

⁸ WHD-2022-0001-33510

⁹ WHD-2022-0001-40599

¹⁰ WHD-2022-0001-40849

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filings. The Department is not requiring that contractors maintain originals or even paper copies of contracts and related documents; electronic copies are acceptable so long as they contain a valid electronic signature.

The Indiana, Illinois, Iowa Foundation for Contracting¹¹ wrote in support of the Department’s proposal to add a recordkeeping requirement to retain telephone worker numbers and email addresses, writing that “[t]he proposed requirements, including maintaining relevant bid and contract information, as well as payroll record information like contact information and correct classifications, help further the purpose of the Act. Indiana, Illinois, Iowa Foundation for Contracting added that such requirements are “particularly necessary where DOL must contact a worker as part of an investigation or audit purposes and will further reduce the incentive to misclassify workers and commit wage theft.” Some individual commenters supported recordkeeping requirements generally, indicating that they effectively deter misclassification.

However, Associated Builders and Contractors¹² opposed this requirement, writing that a requirement to disclose worker telephone numbers and email addresses “constitutes an invasion of employee privacy and exposes employees to the increased possibility of identity theft.” At a minimum, Associated Builders and Contractors stated, “such information should be redacted and not publicly disclosed under any circumstances.” After consideration of the comments on this topic, the final rule adopts the changes to § 5.5(a)(3)(i) as proposed. As the various comments in support indicate, the proposed changes will clarify the recordkeeping requirements for contractors, discourage misclassification of workers, and increase the efficiency of the Department’s enforcement. While the Department appreciates Associated Builders and Contractors’ concerns for workers’ privacy and the need to protect workers from the danger of identity theft, the final rule does not require contractors to provide workers’ telephone numbers or emails on certified payrolls or post them on a publicly available database, but rather requires contractors to maintain this, like other worker contact information, in contractors’ internal records, and make this information available to the Department and contracting agencies upon request.

The Department believes that emails and telephone numbers are minimal additional recordkeeping requirements, and the Department does not require in this final rule that such data be added to the weekly certified payroll, thereby minimizing burden. The Department is finalizing these additional recordkeeping requirements as proposed.

Jackson Lewis, on behalf of the Florida Transportation Builders’ Association¹³, expressed the view that the Department’s proposal that contractors and subcontractors must make available “any other documents deemed necessary to determine compliance with the labor standards provisions of any of the statutes referenced by § 5.1” is too broad and vague and expressed concern that such a requirement would have the effect of subjecting contractors to “burdensome, varied, unreasonable requests” left to the discretion of enforcement staff. Alternatively, the Laborers’ International

¹¹ WHD-2022-0001-40888

¹² WHD-2022-0001-40849

¹³ WHD-2022-0001-40851

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Union of North America¹⁴ supported the proposed recordkeeping requirements as “clarifying DOL’s ‘longstanding’ approach to requiring contractors to maintain basic records and certified payrolls, including regular payroll and additional records relating to fringe benefit and apprenticeship and training.”

Smith, Summerset, and Associates, LLC¹⁵, suggested that the WH-347 collection instrument used to collect data for the Davis-Bacon Certified Payroll (under OMB control number 1235-0008) is difficult to understand and indicated that the form needs simplification and rearrangement. The commenter added that “[t]he same changes – replacing ‘employee’ references with ‘worker’ references –should also be made asap to the WH-347 payroll reporting form. The WH-347 is the primary customer-facing document in the DBRA universe. It is used by thousands of contractors who still submit paper CPRs and, via operation of the computer programs, by other thousands of contractors who submit e-CPRs. It is frequently their main source of information about DBRA. WH-347 page 2, the signature page, still uses the terms ‘employees’ and ‘employed by.’ Those references need to be changed asap.” Smith, Summerset & Associates also suggested additional changes to WH-347 to expand the universe of authorized persons who may sign the WH-347 and to simplify the tool for users. As we note below, changes to the WH-347 are beyond the scope of this rulemaking, but the Department will consider comments submitted as part of the form’s revision process.

The Minnesota Department of Transportation¹⁶, commenting on the requirement to retain workers’ social security numbers and last known addresses in payroll records, added that this information should also be included in the certified payroll. They suggested that excluding such data on the certified payroll would make it more difficult to track workers between contractors. With respect to comments about the WH-347, the Department reiterates that it proposed no changes to the form in the NPRM. However, the form is currently under review and the Department is considering such comments in the revision process. The Department appreciates this feedback and invites commenters to provide feedback and suggestions when the notice for revision is published in the Federal Register.

The Department received various comments related to its proposal to clarify that electronic submission of certified payroll and electronic signatures are permissible. United Brotherhood of Carpenters and Joiners of America¹⁷ supported the Department’s proposal in § 3.4(a) of the NPRM that permits certified payrolls to be filed by mail or by any other means normally assuring delivery. They noted that this “would allow electronic filing by email or similar means. Delivery of documents has changed much since 1982. Electronic distribution is common. Delivery of certified payrolls would thus be accelerated and would take advantage of the increased storage capacity modern technology provides.” The Minnesota Department of Transportation¹⁸ echoed the United Brothers of Carpenters and Joiners in support for electronic filing, stating that “MnDOT

¹⁴ WHD-2022-0001-40868

¹⁵ WHD-2022-0001-33508

¹⁶ WHD-2022-0001-40897

¹⁷ WHD-2022-0001-33510

¹⁸ WHD-2022-0001-40897

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supports an electronic payroll process and additionally suggests a process by which to download wage determination data to be incorporated into an electronic payroll system to more effectively ensure compliance with prevailing wage requirements.” REBOUND¹⁹ also expressed support for the proposal but asked that the Department “allow the use of some identification information with respect to the worker. We are not asking for any actual identification information, but if workers could be identified with a random number or letter that is consistent throughout their work on a project, it would provide a far better opportunity for the those outside of the government, in reviewing these public records, to determine whether there have been wage violations when monitoring public payroll records.”

Smith, Summerset, and Associates²⁰ commented with respect to § 5.5(a)(3) that “[c]ontractors who submit e-CPRs entirely in good faith while a project is active would not be able to produce CPRs upon demand after the project is closed as the regulations contemplate. A contractor caught in this situation would be non-compliant at least technically, and WHD would be hindered in its investigation by lack of ready access to CPRs.”

The Department agrees that where a contracting agency encourages or requires contractors to submit their certified payroll through a particular electronic submission system, it is important that the contracting agency, the Department, and the contractors are easily able to access the certified payrolls in that system for the entire time period that such records must be maintained. The Department has therefore added language to § 5.5(a)(3)(ii)(A) of the final rule clarifying that where a contracting agency permits or requires contractors to submit their certified payroll through an electronic submission system, the contracting agency must ensure that the system allows the contractor, the contracting agency, and the Department to access the certified payrolls upon request for at least three years after the work on the prime contract has been completed.

Furthermore, although the Department acknowledges that electronic certified payroll submission systems will generally use secure online portals, the Department’s experience has shown that the potential risk of unauthorized disclosure of workers’ personally identifiable information outweighs any additional benefit that might be incurred by requiring the addition of an address and full Social Security number, instead of the current requirement for an individual identifying number, on certified payrolls.

The National Association of Homebuilders²¹ also opposed the fact that the Department’s proposal did not relax the weekly certified payroll reporting requirements, commenting that “submitting Form WHD-347 for weekly payroll certifications poses a great burden on multifamily builders and their subcontractors – especially those who cannot meet the standards set by the contracting agency without incurring significant costs.” The National Council of State Housing Agencies²² asked for flexibility in reporting weekly reporting, writing, “Many employers operate on different schedules, with compensation often handled bi-monthly. As a result, additional time is required

¹⁹ WHD-2022-0001-40907

²⁰ WHD-2022-0001-33508

²¹ WHD-2022-0001-40967

²² WHD-2022-0001-40944

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and costs incurred to comply. DOL should consider flexibilities that allow administrators to verify that employee wage rates are equal to or exceed the prevailing wage without monitoring every paycheck.”

Both the DBA and the Copeland Act require that contracts stipulate payment once a week, therefore, the Department cannot promulgate regulations allowing contractors to pay required prevailing wages or submit certified payrolls on any basis less frequent than weekly.

Lastly, Smith, Summerset & Associates²³ commented that the language at 29 CFR 5.5(a)(3)(ii)(A) stating that “[t]he prime contractor is responsible for the submission of copies of certified payrolls by all subcontractors” is unnecessarily confusing, as prime contractors are responsible for ensuring that subcontractors submit all required certified payrolls, and recommended that the words “copies of” be replaced with “all” to eliminate this confusion. They also noted a citation error in the proposed regulatory text. The Department agrees with these suggestions and has made these non-substantive changes in the final rule.

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

The Department offers no payments or gifts 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 systems of records notice (SORN) or privacy impact assessment (PIA), those should be cited and described here.

The Department makes no specific assurances of confidentiality to respondents with regard to the submission of certified payroll or the collection of contractor records as a part of an investigation. The disclosure of certified payroll records and information gathered during the course of an investigation of a complaint is governed by the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552; the Privacy Act, 5 U.S.C. 552a; and attendant regulations, 29 CFR parts 70 and 71. The FOIA provides various exceptions from its disclosure requirements, including, for example, for records or information compiled for law enforcement purposes to the extent that release of the information could reasonably be expected to disclose the identity of a confidential source. See 5 U.S.C. 552(b)(7)(D). The FOIA also provides an exemption for “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” *Id.* § 552(b)(4).

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

²³ WHD-2022-0001-33508

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

The Department requires Social Security numbers, addresses, and proposes to require email address and telephone number, be maintained by the employer. The final rule explicitly excludes such private data from the weekly payroll submission.

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 the 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 burden estimates for certified payrolls on agency experience, except as otherwise noted. F.W. Dodge report data for the period January 1, 2017, through December 31, 2019, indicates there were an annual average of 115,497 state and local construction projects and 5,335 federal construction projects during that time period. The Department estimates that 33% of those state and local construction projects use federal funds.

$115,497 \text{ state and local projects} \times 33\% = 38,114 \text{ state and local construction projects that use federal funds (rounded).}$

To this amount, the Department adds all the federal construction projects subject to DBRA labor standards.

$38,114 + 5,335 = 43,449 \text{ projects subject to DBRA labor standards (rounded).}$

To calculate the number of individual contractor and subcontractor projects, the Department estimates 8 contractors and subcontractors per covered project.

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43,449 projects × 8 contractors and subcontractors per project = 347,592 individual contractor and subcontractor projects (rounded).

To calculate the number of respondents, the Department estimates 4 Davis-Bacon projects per contractor.

347,592 projects ÷ 4 projects per contractor = 86,898 respondents.

To calculate the number of responses, the Department estimates 23 responses per project annually.

347,592 projects × 23 responses = 7,994,616 annual responses.

The Department estimates 55 minutes to complete the WH-347 form or its equivalent plus 1 minute for recordkeeping (total of 56 minutes per form).

7,994,616 annual responses × 56 minutes per/60 min per hour = 7,461,642 annual burden hours.

Absent specific data on salaries of employees in the construction industry who complete form WH-347 or its equivalent, the Department has used the seasonally adjusted average hourly earnings of construction employees on private nonfarm payrolls to determine respondent costs. The rate as of October 2022 is \$35.27.²⁴ The Department adds a 46% benefit cost and a 17% overhead cost to this rate in order to calculate the total loaded wage rate.

\$35.27 + (\$35.27 × 46%) + (\$35.27 × 17%) = \$57.49 total loaded wage rate.

The Department calculates respondent costs by multiplying the number of annual burden hours by the total loaded wage rate.

7,461,642 burden hours × \$57.49 = \$428,969,799 respondent costs (rounded).

In this revision, the Department adds two recordkeeping requirements (telephone number and email address) that are not required to be submitted with the certified payroll. 29 CFR 5.5(a)(3)(ii). While the Department believes that such records are kept as the normal course of business, it assesses a slight burden to account for the average cost of the new requirements, which is 10 seconds per worker.

These new recordkeeping requirements are not otherwise required in the FLSA general recordkeeping requirements, so they are not accounted for elsewhere. In the regulatory impact analysis of the final rule, the Department estimated there are 152,900 employers and 1.2 million workers that may be affected by the final rule. The Department uses the potentially affected employer population here for respondents and potentially affected workers for responses for these new recordkeeping requirements. This is slightly higher than the respondents who actually submit the WH-347.

²⁴ See The Employment Situation, October 2021, DOL, Bureau of Labor Statistics, Table B-3. Accessed on 11/25/22 at <https://www.bls.gov/news.release/empsit.t19.htm>.

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1,200,000 workers \times 10 seconds per worker \times 1 time per year = 12,000,000 seconds.

12,000,000 seconds \div 60 seconds per minute \div 60 min per hour = 3,333 hours (rounded) of additional recordkeeping burden per year.

Absent specific data on salaries of employees in the construction industry who complete form WH-347 or its equivalent, the Department has used the seasonally adjusted average hourly earnings of construction employees on private nonfarm payrolls to determine respondent costs. The rate as of October 2022 is \$35.27.²⁵ The Department adds a 46% benefit cost and a 17% overhead cost to this rate in order to calculate the total loaded wage rate.

$\$35.27 + (\$35.27 \times 46\%) + (\$35.27 \times 17\%) = \57.49 total loaded wage rate. 3,333 hours \times \$57.49 = \$191,614 (rounded) additional recordkeeping cost.

Given existing requirements in the Federal Acquisition Regulation, the Department believes that there is no additional burden associated with the new recordkeeping requirement that contractors and subcontractors retain contract- and subcontract-related documents.

Total Estimated Annualized Respondent Burden and Costs

Requirement	Respondents	Responses	Burden Hours	Costs
Form WH-347	86,898*	7,994,616	7,461,642	\$428,969,799
Final Rule	152,900	1,200,000	3,333	\$191,614
TOTAL	152,900	9,194,616	7,464,975	\$429,161,413

**Note: Those respondents who complete the WH-347 form annually is a subset of the larger recordkeeping respondents.*

To calculate total respondent costs, the cost associated with WH-347 and the cost associated with the final rule are added together.

Monetized Value of the Time Burden - \$428,696,799 + \$191,614 = \$429,161,413

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).

- The cost estimate should be split into two components: (a) a total capital and start-up cost component (annualized over its expected useful life) and (b) a total operation and**

²⁵ See The Employment Situation, October 2021, DOL, Bureau of Labor Statistics, Table B-3. Accessed on 11/25/22 at <https://www.bls.gov/news.release/empsit.t19.htm>.

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maintenance and purchase of services component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information. Include descriptions of methods used to estimate major cost factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software; monitoring, sampling, drilling and testing equipment; and record storage facilities. If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collections services should be a part of this cost burden estimate. In developing cost burden estimates, agencies may consult with a sample of respondents (fewer than 10), utilize the 60-day pre-OMB submission public comment process and use existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate. Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.

Most contractors submit certified payrolls in person during their frequent contacts with the contracting agency, usually with the contracting officer responsible for the building project. Some contractors now use electronic submission. The Department estimates that approximately ten percent of contractors currently mail their submissions, at a cost of \$0.60 for a first-class stamp as of November 2022, and \$0.03 for an envelope. The Department estimated 799,461 responses will be mailed in, although this may be an overestimate, as the codification of electronic submission guidelines may lead to a reduction in the number of responses mailed in paper form.

$$7,994,616 \text{ responses} \times 10\% = 799,461 \text{ responses sent via mail.}$$

$$799,461 \times \$0.63 (\$0.60 \text{ cents postage} + \$0.03 \text{ cents envelope}) = \$503,660 \text{ (rounded) total mailing costs.}$$

Additionally, contractors print and copy the certified payroll, which the Department estimates at a cost of \$0.04 a copy, with two copies per response, (an original and one for recordkeeping).

$$7,994,616 \times 2 \text{ copies} \times \$0.04 = \$639,569 \text{ (rounded) printing costs.}$$

$$\textbf{Total maintenance and operations cost} = \$503,660 + \$639,569 = \$1,143,229.$$

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

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information. Agencies may also aggregate cost estimates from Items 12, 13, and 14 in a single table.

In calculating federal costs, the Department estimates that contracting agencies on average use an employee paid at the GS-5, Step 4 rate²⁶, which is \$19.04 an hour. The Department estimates an employee on average devotes approximately 10 minutes to reviewing and verifying every third submitted payroll.

7,994,616 responses ÷ 3 = 2,664,872 responses reviewed annually.

2,664,872 responses reviewed × 10 minutes per response/60 min per hour = 444,145 hours (rounded).

444,145 hours × \$19.04 = \$8,456,521 (rounded).

Additionally, the Department estimates that a federal worker paid at a GS-2, Step 4 rate²⁷, which is \$13.70 an hour, files the agency copy of certified payrolls, which takes one minute.

7,994,616 responses × 1 minute ÷ 60 min per hour = 133,244 hours (rounded).

133,244 hours × \$13.70 = \$1,825,443 (rounded).

\$8,456,521 + \$1,825,443 = \$10,281,964 (rounded) total federal cost.

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

The final rule includes three new recordkeeping requirements (worker telephone numbers, email addresses, and contract-related documents), although it is not proposed that these records be added to the certified payroll form WH-347). As a result of these new requirements, there is an increase of 1,200,000 responses and a corresponding increase of 3,333 burden hours. The increase of \$71,861 in cost burden reflect an increase in postage costs since the last OMB approval.

16. For collections of information whose results are planned to 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 statutory purpose of the certified payroll requirements is to aid in enforcement of the DBRA requirements, and the Department does not publish the information collected as part of the enforcement process, other than, where necessary and relevant, the information is filed or submitted as evidence during litigation. As noted, the Department is also permitted to use

²⁶ https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2022/RUS_h.pdf

²⁷ https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2022/RUS_h.pdf

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submitted certified payroll data as part of the process of determining prevailing wages. However, this use does not affect the content or schedule of the information collection.

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 does not seek an exception to the requirement to display the expiration date on 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 requesting an exception to any of the certification requirements for this information collection.

Part B: EMPLOYING STATISTICAL METHODS

Not applicable.