

Supporting Statement for the Paperwork Reduction Act

OMB Control Number: 1235-0023

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  
Expiration 07/2025

The U.S. Department of Labor (Department) proposes to revise its information collection request (ICR) related to Conformed Wage Classifications and Unconventional Fringe Benefit Plans under the Davis-Bacon Act (DBA), the Davis-Bacon Related Acts (DBRA), and the Contract Work Hours and Safety Standards Act (CWHSSA), OMB Control No. 1235-0023.

This ICR accompanied a March 18, 2022, Notice of Proposed Rulemaking (NPRM) and was submitted to OMB upon publication of the NPRM in the *Federal Register*. 87 FR 15698. On April 26, 2022, OMB issued a NOA asking that the Department respond to any comments received as part of the NPRM and identify any changes made in response to the comments prior to submitting as part of the final rule. The Department submits this revision to the ICR as part of the final rule. The Department does not estimate a change in the number of responses or hours, and estimates a slight increase in cost burdens covered by this ICR due to inflation.

**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.**

Regulations at 29 CFR part 5 prescribe labor standards for federally financed and assisted construction contracts subject to the DBA, 40 U.S.C. 3141 et seq., the DBRA, and labor standards for all contracts subject to the 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, to laborers and mechanics on most federally financed or federally assisted construction projects. See 40 U.S.C. 3142(a) and 29 CFR 5.5(a)(1). CWHSSA requires the payment of one and one-half times the basic rate of pay for hours worked over 40 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 (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) requires that any class of laborer or mechanic not listed in the wage determination that is to be employed under the contract must 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) must be

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submitted through the contracting officer to the Department for review and approval.

In the NPRM, the Department proposed to add new subsections to § 5.5(a)(1), which resulted in the following changes to the provisions on conformances:

<b>Current paragraph</b>	<b>New paragraph</b>
§ 5.5(a)(1)(ii)(A)	§ 5.5(a)(1)(iii)(A)
	§ 5.5(a)(1)(iii)(B) [paragraph added]
§ 5.5(a)(1)(ii)(B)	§ 5.5(a)(1)(iii)(C)
§ 5.5(a)(1)(ii)(C)	§ 5.5(a)(1)(iii)(D)
§ 5.5(a)(1)(ii)(D)	§ 5.5(a)(1)(iii)(E)

The final rule adopts the additions and revisions to § 5.5(a)(1) as proposed in the NPRM. All references in this supporting statement are based in the final rule.

The Department also proposed to add language to § 5.5(a)(1) to state that the conformance process may not be used to split, subdivide, or otherwise avoid classifications listed in the wage determination. The Department also proposed to make non-substantive revisions to § 5.5(a)(1)(iii)(C) and (D) to describe the conformance request process more clearly, including by providing that contracting officers should submit the required conformance request information to the Wage and Hour Division (WHD) via email using a specified WHD email address. The Department adopted these proposals without changes. These changes merely clarified the existing conformance request process and did not alter the information collection burden on the public or on the Department.

- B. Unfunded Fringe Benefit Plans (29 CFR 5.5(a)(1)(v) and 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. The current regulations, at 29 CFR 5.5(a)(1)(iv), require that contractors must request approval of unfunded fringe benefit plans, but 5.28, which describes criteria for unfunded plans in more detail, does not expressly contain this approval requirement.

In the NPRM, the Department proposed to add a new paragraph (b)(5) to § 5.28, explicitly stating that unfunded benefit plans or programs must be approved by the Secretary in order to qualify as bona fide fringe benefits, and to replace the text in current paragraph (c) with language explaining the process contractors and subcontractors must

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use to request such approval. To accommodate these changes, the Department proposed to add a new paragraph (d) that contains the text currently located in paragraph (c) with non-substantive edits for clarity and readability. Additionally, to accommodate other changes to § 5.5(a)(1), the Department proposed to move the language on unfunded fringe benefit plans currently located at § 5.5(a)(1)(iv) to § 5.5(a)(1)(v). These changes are summarized as follows:

Current paragraph	New paragraph
§ 5.5(a)(1)(iv)	§ 5.5(a)(1)(v)
	§ 5.28(b)(5) [paragraph added]
	§ 5.28(c) [paragraph added]
§ 5.28(c)	§ 5.28(d)

All references in this supporting statement are based in the final rule.

The final rule adopts the additions and revisions to § 5.28 as proposed in the NPRM, as these changes merely conformed regulatory language in § 5.28 to the existing approval process for unfunded fringe benefit plan under 29 CFR 5.5(a)(1). These proposals did not alter the information collection burden on the public or on the Department.

- 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: WHD reviews a proposed conformance action report to determine the appropriateness of the request. 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 construction industry uses the proposed classification in the area; and (3) whether the proposed wages and fringe benefits bear a reasonable relationship to the rates contained in the wage determination. Upon completion of the review, WHD approves, modifies, or denies 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.**

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

- A. Conformance Reports: WHD currently receives about electronic (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 email. The 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 information required by the report of a proposed conformance action or a request to review an unfunded fringe benefit plan does not overlap with or duplicate other information collections and is not available from any other source. Other information collection requirements related to the DBA and DBRA pertain to recordkeeping and certified payrolls (OMB Control No. 1235-0008), and wage survey reports (OMB Control No. 1235-0015). The WHD does not receive similar information under these collections or others that would enable it to determine whether a particular conformance request should be granted or whether a particular unfunded plan should be approved.

- 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. The WHD requires the same information to determine whether a conformance request should be granted or whether an unfunded plan should be approved irrespective of the size of the business and therefore has not identified any methods to minimize burden in this context.

- 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

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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 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 statute provides. 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:** WHD expects a contractor only to obtain approval for any given unfunded fringe benefit plan one time. Failure to collect the information would prevent 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;**
- **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.**

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.**

On March 18, 2022, the Department published this ICR in conjunction with the NPRM inviting public comments [87 FR 15698]. The Department received a few comments on each of the requirements of this information collection and responds as follows:

- A. Conformance Reports (29 CFR 5.5(a)(1)(iii)): The Department received a few comments on the newly introduced § 5.5(a)(1)(iii)(B), which prohibits the use of conformances to "split, subdivide or otherwise avoid application of classifications listed in the wage determination." The comments generally supported the proposal as it could prevent abuses in the conformance process. The comments did not address whether the proposal would affect the burden of this ICR on the regulated community or the Federal Government.

The Department also received comments regarding other revisions to part 1 and part 5 of the DBA regulations that potentially affect conformance requests. Such revisions are related to the Department's authority to collect information rather than the burden caused by the information collection itself.

Related to this ICR, the Department revised 29 CFR 5.5(a)(1)(iii)(C) and (D) to include an email address to which contracting officers must send the conformance requests. The Department received no comments suggesting that revisions to § 5.5(a)(1)(iii)(C) and (D) had an impact in the burden of this information collection.

- B. Unfunded Fringe Benefit Plans (29 CFR 5.5(a)(1)(v) and § 5.28): The Department received comments opposing these revisions to § 5.5(a)(1)(v) and § 5.28, suggesting that the information collection burden would be increased due to the revisions. CC&M commented that requiring DOL approval of unfunded plans, especially vacation and holiday plans, is unduly burdensome to contractors. Similarly, IUOE commented that over 60% of construction workers receive health care from self-funded plans. They expressed concern that contractors might not possess the documentation necessary to substantiate more "informal" self-funded benefits such as vacation, holiday, and sick leave. IUOE also expressed concern that a preapproval process would be unnecessarily

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burdensome on WHD.

The comments in opposition appear to be premised on a misconception that the revisions impose new substantive requirements with respect to unfunded plans. Nothing in these revisions alters the four substantive conditions for unfunded plans set out in § 5.28(b)(1)–(4) or the overall requirements that an unfunded plan must be “bona fide” and able to “withstand a test . . . of actuarial soundness.” Consistent with §§ 5.5(a)(1)(iv) and 5.29(e), the Department has long required written approval if a contractor seeks credit for the reasonably anticipated costs of an unfunded benefit plan towards its Davis-Bacon prevailing wage obligations, including with respect to vacation and holiday plans. The revisions to § 5.28 merely clarify this preexisting requirement and detail the process through which contractors may request such approval from the Department.

Therefore, the adoption of the proposals regarding the approval process for unfunded plan did not alter the information collection burden on the public.

**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:**

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- **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 federally 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, though it recognizes that this number likely is an overestimate given the new regulatory provision authorizing publication of pre-approved classifications and wage rates. See 29 CFR 5.5(a)(1)(ii).

**Annual time burden (Conformance):**  $8,500 \times 15 \text{ minutes} \div 60 \text{ minutes per hour} = 2,125 \text{ hours}$

- 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. Therefore, the annual reporting and recordkeeping burden for unfunded fringe benefit plans is 18 hours.

**Annual time burden (Unfunded Fringe Benefit Plans):**  $18 \text{ plans} \times 1 \text{ hour} = 18 \text{ hours}$

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



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Total annual time burden: 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 November 2022 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 \$35.27. See the Employment Situation, November 2022, DOL, Bureau of Labor Statistics, Table B-3. To this amount, the Department adds 45% benefits cost (\$15.87) plus 17% overhead cost (\$6.00) for a total loaded wage rate of \$57.14.

Accordingly, the Department estimates annual respondent costs will be \$122,451.02 (2,143 annual reporting and recordkeeping hours × \$57.14 staff wages per hour).

**Total Monetized Value of the Time Burden: \$122,451.02**

**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 that 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 overestimate, 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 \$5,355 (8,500 conformance reports × \$0.63 (\$0.60 postage + \$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 \$11.34 (18 unfunded fringe benefit plans × \$0.63 (\$0.60 postage + \$0.03 envelope per response), rounded).

Therefore, the Department estimates the total annual mailing and postage cost of providing information for each response submission to be \$5,366.34 (\$5,355 for conformance reports + \$11.34 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**

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**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. The Department estimates that the annualized federal costs associated with this collection of information are as follows:

Mailing charges for mailing conformance report replies to procuring agencies: 8,500 conformance reports × (\$0.60 postage + \$0.03 envelope for each report) = \$5,355.

Total federal costs for conformance reports: \$5,355.

- B. Unfunded Fringe Benefit Plans: The Department receives approximately 18 requests to approve unfunded fringe benefit plans per year. The Department estimates that the annualized federal costs associated with this collection of information are as follows:

Mailing charges for mailing unfunded fringe benefit plan replies to procuring agencies: 18 unfunded fringe benefit plans × \$0.63 (\$0.60 postage + \$0.03 envelope for each submission) = \$11.34.

No other costs beyond the normal labor costs for federal staff.<sup>1</sup>

**TOTAL ESTIMATED ANNUAL FEDERAL COST: \$5,366.34 (\$5,355 + \$11.34).**

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

This ICR Rev is being submitted as a result of the changes to the regulation as described below:

- A. Conformance Reports: The Department added new subsections to § 5.5(a)(1) (see item 1A above) and made non-substantive revisions to § 5.5(a)(1)(iii)(C) and (D) (see item 1A above). These changes merely clarified the existing conformance request process and did not alter the information collection burden on the public or on the Department.
- B. Unfunded Fringe Benefit Plans: The Department added a new paragraph (b)(5) to § 5.28 and replaced the text in current paragraph (c) (see item 1B above). To accommodate these changes, the Department also added a new paragraph (d) (see item 1B above). These changes did not alter the information collection burden on the public or on the Department.

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<sup>1</sup> See PRA guide Supporting Statement guidance, pp. 40, indicating that if there are no other labor costs beyond normal labor costs for federal staff, so state.

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The slight increases in this ICR's costs were due to adjustments for inflation.

**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.

**Part B: Employing Statistical Methods**

This information collection does not employ statistical methods.