U. S. DEPARTMENT OF LABOR

WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS

WASHINGTON, D.C. 20210

DATE: August 15, 1969
REPLY TO ATTN OF: OCE

SUBJECT: MEMORANDUM # 82

TO: AGENCIES ADMINISTERING STATUTES REFERRED TO IN 29 CFR, SUBTITLE A, PART 5

Re: Investigation and Enforcement Manual; 29 CFR Parts 3 and 5

Some contracting agencies, particularly smaller agencies or those that issue construction-type contracts infrequently, do not have a regular staff for making investigations under the Davis-Bacon and Related Acts. Such agencies may wish to refer any complaints they receive to the appropriate Regional Director or District Director of the Wage and Hour and Public Contracts Divisions for investigation. A list of names and addresses is enclosed for this purpose. Where investigations are being made by the agency, it will find the Investigation and Enforcement Manual and 29 CFR Parts 3 and 5 to be useful tools. A copy of each is enclosed; additional copies may be obtained from:

Wage and Hour and Public Contracts Divisions
U. S. Department of Labor
14th and Constitution Avenue, N. W.
Washington, D. C. 20210

Robert D. Moran

Robert D. Moran, Administrator
Wage and Hour and Public Contracts Divisions

Not distributed.

4 Enclosures

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CARIBBEAN OFFICE Tel. 723-8165 On FTS call 106 (Wash., D.C.) or 202-967-1221 (from outside Wash., D.C.) then ask operator for 723-8165 Joseph P. McAuliffe, Director 7th Floor, Condominio San Alberto Bldg. 1200 Ponce de Leon Ave. Stop 17 Santurce, Puerto Rico 00907	Puerto Rico Virgin Islands Canal Zone

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(Title 29, Subtitle A, Code of Fed. Regs.)

Investigation and Enforcement Manual With Respect to Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction Pursuant to Regulations, Part 5, of the Secretary of Labor

Effective March 1952

(Revised March 1967)

UNITED STATES DEPARTMENT OF LABOR

WASHINGTON, D.C.

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INVESTIGATION AND ENFORCEMENT MANUAL WITH RESPECT TO LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION, PURSUANT TO REGULATIONS, PART 5, OF THE SECRETARY OF LABOR (TITLE 29, SUBTITLE A, CODE OF FED. REGS.)

INTRODUCTION

Reorganization Plan No. 14 of 1950 provides that to assure coordination of administration and consistency of enforcement of the labor standards provisions of various designated acts by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable. Pursuant to this directive, the Act of September 23, 1950, 64 Stat. 967, and the Defense Housing and Community Facilities Act of 1951, Public Law 139, 82d Congress, the Secretary of Labor issued Regulations, Part 5, Title 29, Subtitle A, Code of Federal Regulations, which contain regulations, standards, and procedures to be followed by Federal agencies which are engaged in work subject to any of the statutes listed in section 5.1 of the Regulations. Particular attention is directed to section 5.6 of the Regulations setting forth the minimum investigatory requirements which must be met by the agencies.

This manual is intended to implement and supplement these minimum investigatory requirements with procedures to aid the agencies in discharging their responsibility to assure compliance with the labor standards provisions of the designated Statutes and Regulations, Part 5. It is contemplated that in particular situations an agency may find it necessary to supplement or vary these procedures to some extent. For this reason and because there is no substitute for the exercise of ingenuity, initiative, and good judgment in the application of investigation techniques, this manual is intended to serve only as a guide. It will be revised from time to time, and accordingly it will be helpful if the agencies will submit their suggestions for revision and examples of problems that arise in the course of their investigations.

Part I of these instructions is concerned with the duties of the project inspector and Part II with the duties of the special investigator who makes full-scale investigation when required.

PART I—INVESTIGATION BY PROJECT INSPECTOR

SEC. 1. Relationship with other duties.

(a) The investigation for compliance by the project inspectors or other persons similarly responsible for the enforcement of the contract provisions is continuous for the duration of the job. Their activities are fundamental to the success of this program, but the assumption of additional responsibilities on their part should be consistent with their presently assigned duties as well as their experience and knowledge of construction in all its phases. Accordingly, the effective use of this staff will require that the project inspector become fully familiar with each contractor's responsibilities in the employment and payment of persons engaged on the project as well as his responsibilities for meeting other specifications, such as, for example, materials used, adherence to building code regulations, and time of completion of work.

SEC. 2. Aid to Project inspector by the agency.

(a) To aid the project inspector in developing familiarity with the labor standards provisions of the contract and the importance of current compliance by the contractor the agency should:

(1) Specifically bring to his attention the labor standards provisions which are required to be inserted in the agency's contracts pursuant to section 5.5 of Regulations, Part 5, and assure itself that he understands their meaning and purpose. Many violations can be prevented if the inspector will in turn assure himself that the contractor understands these provisions in his contract from the very beginning of the project.

(2) Make it clear to the project inspector that the enforcement of such labor provisions is in the same category as other requirements of the contract specifications, and that failure to comply with such labor standards requires adjustments by contractors and subcontractors and, in addition, may result in penalties being imposed. He should understand that maintaining compliance during the course of construction is clearly advantageous in that it will save time, trouble, and expense to both the

contractor and the Government, as well as subserve the interest of the public in the enforcement of these provisions of law.

(3) Arrange to furnish a copy of the standard contract labor stipulations and this manual to the project inspector at the beginning of his assignment, and at such other times as are necessary.

SEC. 3. Extent of investigation by project inspector.

(a) As the inspector develops this awareness of the labor provisions of the contracts and gains a little experience in their application, he should be able, merely through observation and by asking questions in conjunction with carrying out his other inspection duties, to determine readily whether or not it is necessary to request the agency for a full scale investigation as outlined in Part II of this manual. Ordinarily it will not be necessary for him to make a detailed audit of the payrolls or to conduct extensive interviews. General familiarity with the payroll and time sheets, progress reports, contractors' apprenticeship agreements and similar data, together with oral inquiries of employees and other questions here and there, would seem to be sufficient to develop information as to whether there is compliance with the labor standards provisions. The inspector will find it helpful to become acquainted with the techniques outlined in Part II of this manual and many find it expedient to adapt some of them to his investigation.

(b) Substantial sums of money can be saved if violations are found and corrected in the early stages of the construction. For example, in one case a project inspector noted in scanning a payroll for a large project that more apprentices than journeymen were listed for a particular classification. By asking a few questions the inspector found that the employees classified as apprentices were performing the duties of journeymen and, further, that they were not employed under a bona fide apprenticeship program. As a result, the contractor was enabled to rearrange his methods whereby he utilized the proper number of apprentices in an approved program and was not later faced with a large back-pay bill and possible ineligibility for further contracts. The Government was saved the expense of searching out widely scattered former employees in order to reconstruct the evidence of what had taken place during the performance of the contract. In another case, an inspector, by questioning a bulldozer operator on a clearing job, discovered that th[illegible] operator and other employees in his group were being paid the rate for truck drivers. In each of these cases the job was just getting under way and the early correction of the violations resulted in savings of time and money.

(c) The inspector should bring to the attention of his superiors the need of investigative assistance or a complete investigation whenever he has reason to believe that violations, which are of a serious nature or not readily adjustable, may be present, for example where:

(1) Complaints alleging violations of such a nature are received which the inspector feels may have some validity. Some of the sources of such complaints will be employees, competing employers, their representatives or other interested persons. (Complaints shall be treated confidentially.)

(2) There are habitual and persistent violations of other requirements of the contract so as to indicate a general carelessness on the part of the contractor as respects his contractual and statutory responsibilities.

(3) Contractors delay in furnishing the required payrolls, certifications, or statements, if satisfactory explanation is not furnished or other suspicious circumstances exist.

(4) Discrepancies (other than routine errors) are discovered. The discovery of falsifications in the time and payroll records, or reasonable cause to believe such [illegible] situation to exist, calls for especially prompt and vigorous action.

SEC. 4. Preliminary checking of payrolls by the inspector.

(a) The weekly payroll should be utilized for spot checking in the course of investigation assignments whether such investigations are made on a selective basis or otherwise. The project inspector should assume responsibility for timely and proper submission of the required payroll data. He should, at least, scan this information for completeness and discrepancies, such as disproportionate employment in the various classifications, in the light of his knowledge of the status of construction on the project. He should, of course, compare the information on the payrolls with the daily time records on a spot check basis and at intervals sufficient to satisfy himself that the records truly reflect the existing conditions. The payrolls, certifications and statements, together with the project inspector's report of his findings and recommendations, should be transmitted promptly to the field or regional office for filing, or for further checking and use by the special investigator as may be necessary. The project inspector's r[illegible]

port, if potential violations of a serious nature or that are not readily adjustable are indicated, should contain sufficient data regarding the nature and extent of such potential violations to enable the agency to determine whether a full scale investigation by the special investigator is warranted.

SEC. 5. Posters.

(a) The project inspector should see that the wage determination decision and any other required material pertaining to the required labor standards provisions are posted by the contractor at the site of the work in a prominent and accessible place where it can be easily read by the workers. Enforcement will be materially aided if, in addition to the posting of the Secretary of Labor's wage determination decisions, a poster is conspicuously displayed which informs employees of their rights and that written complaints will be received by the project inspector or the agency. This would also serve to put the subcontractors on notice of the labor standards provisions. It is suggested that on projects covering large areas these posters be placed at more than one location.

PART II—FULL SCALE INVESTIGATION

SEC. 1. Scheduling of the investigation.

(a) Investigations of a reasonable percentage of projects should be made on a selective basis or whenever the agency is put on notice (as a result of the project inspector's investigation or otherwise) of any violations which are not readily adjustable, or of any violations which are of a serious nature.

(b) Investigations shall also be made whenever specifically requested by the Secretary of Labor.

(c) The selective investigations should ordinarily be made as soon as feasible after the start of substantial operations on the project, i. e., as soon as most of the trades involved have been employed on the work, in order to determine compliance adequately and to initiate enforcement remedies in the event violation of the terms of the contract or provisions of the pertinent statutes are found.

SEC. 2. Investigation steps.

(a) Steps to be taken in conducting the investigation should include:

(1) Introduction—initial employer interview.
(2) Examination of the contract, wage determination decision and posting requirements.
(3) Examination of the payroll.
(4) Examination of basic time and/or work records.
(5) Check on conformity with apprenticeship requirements.
(6) Check on laborers and mechanics not listed in the wage determination decision.
(7) Transcribing payrolls.
(8) Employee interviews.
(9) Disclosure of information to employees.
(10) Conclusion of investigation.
(11) Settlement by restitution.
(12) Potential blacklist or criminal cases.
(13) Report of the investigation.

SEC. 3. Conduct of Investigation.

(a) The full scale investigator should ordinarily conduct the investigation in the manner and order as outlined below:

1. *Introduction—initial employer interview*

(a) *Preliminary steps.* To the extent that the information is available to the agency, it is usually desirable for the investigator to gather as much of the information indicated in steps 2 through 7 as possible prior to the initial employer interview.

(b) *Credentials.* Upon arriving at the project site, the investigator should present his credentials to the contractors, subcontractors, or their representatives. (Credentials should also be presented to employees when being interviewed.)

(c) *Discussion with employer.* At his first interview with the employer or the employer's representative, or as soon thereafter as practicable, the investigator should:

(1) Inform the employer that the purpose of his visit is to make an investigation to determine compliance with the pertinent statutes and Regulations, Part 5, and outline in general terms the scope of the investigation, including the examination of pertinent records, employee interviews and physical inspection of the project.

(2) Obtain the exact legal name of the corporation or firm and any trade names, the full address, full names of owners or officers and their titles; number of persons employed, name and address of any subcontractors, and such similar information as may be necessary to make and complete the investigation.

2. *Examination of the contract, wage determination, posting requirements*

(a) An examination of the contract should be made in order to ascertain whether the stipulations required by section 5.5 of Regulations, Part 5, have been inserted in the contract. It should also be ascertained whether the wage determination decision has been properly posted.

(b) All pertinent information should be transcribed from the contract or otherwise incorporated in the report, including:

(1) Contract number.
(2) Date of award.
(3) Description of work of contractor and subcontractors.
(4) Applicable wage rates.
(5) Name and address of general contractor.

3. *Examination of the payrolls*

(a) An examination of the contractor's and subcontractor's payrolls, certified copies of which are required to be submitted by them weekly, should be made for accuracy, completeness, and true representation of the facts. The examination should cover the current or most recent payrolls as well as those for selected periods which reflect the practice of the contractor or subcontractor during the life of the contract.

(b) Check for completeness and accuracy of payrolls as to the names, addresses, job classifications, hourly wage rates, daily and weekly hours worked during the payroll period, gross weekly wages earned, deductions made from wages, and net weekly wages paid the employee.

(c) Check the wage rates shown in the payroll against the applicable wage determination.

(d) Check the number of employees in each job classification to determine whether there is a disproportionate employment of laborers, helpers or apprentices. By way of illustration, existence of any of the following circumstances may indicate a disproportionate employment, depending upon the status and type of project:

(1) Several laborers and only one journeyman electrician on a payroll submitted by the electrical subcontractor would normally indicate that laborers are performing electrical work.

(2) A greater number of helpers or apprentices than mechanics clearly indicates that (a) the ratio of apprentices to mechanics is being disregarded, (b) apprentices or helpers are performing the work of mechanics, and (c) all of the apprentices are not properly registered in an approved program or the contractor or subcontractor is not conforming to approved apprenticeship standards.

(e) *Interim reports.* If an interim inspection or progress report has been received, it should be carefully checked. It provides very valuable information that may be used in comparing the kind of work performed during a certain period with the classifications listed on the payrolls for corresponding periods. For instance, if sheet-metal work is done during a particular month and the payroll for that month fails to show any sheet metal workers, it is obvious that the contractor is in violation of the labor standards provisions.

(f) *Contract Work Hours Standards Act.* If the Contract Work Hours Standards Act is applicable and an employee worked in excess of eight hours in any calendar day or in excess of forty hours in any workweek, determine whether time and a half the employee's regular rate was paid him for such excess hours.

4. *Examination of basic time and/or work records*

(a) A sufficient number of checks of the basic time cards, books, sheets, or other work or personnel records of a representative number of employees in each classification should be made against the payroll record in order to disclose any possible discrepancies, or to give reasonable assurance that none exist. Pertinent excerpts, or copies of such records, should be included in the case file.

(b) The records of particular employees should be included in the check whenever there appears to be any doubt or question with respect to such individuals as a result of the payroll examination, interviews, or for any other reason.

5. *Check on conformity with apprenticeship requirements*

(a) Apprentices may not be employed on the project unless they are registered under a bona fide apprenticeship program registered with a State Apprenticeship Council which is recognized by the Federal Committee on Apprenticeship, U. S. Department of Labor, or, if no such recognized Council exists in a State, under a program registered with the Bureau of Apprenticeship, U. S. Department of Labor. (Sec. 5.5 (a) (4) of Regulations of the Secretary of Labor, Part 5.)

(b) If it is found that so-called "apprentices" are being employed who are not registered under a bona fide program, ascertain their correct names, addresses, type of work each is performing, their classification, age, and rates of pay each is receiving. Also ascertain the local prevailing practice in the particular construction industry for the employment of apprentices. It may be advisable in some cases to consult with employer or employee organizations, unions, State or Federal apprenticeship offices and others in the area for helpful

information as to wage rates and the permissible ratio of journeymen to apprentices. In the case of registered programs, permissible ratios of apprentices to mechanics may be found in the set of standards contained in the program to which the contractor has subscribed.

(c) In the case of employment of apprentices in excess of the approved ratio, or erroneous classification of mechanics as apprentices, the investigator should ascertain from interviews and available data all pertinent information such as work experience in the trade or related trades, age, type of work performed, rate of pay each is receiving, supervision received, and whether he has ever been classified as an apprentice.

6. *Laborers and mechanics not listed in the wage determination decision*

(a) Determine whether the contractor has been employing any laborers or mechanics whose classification is not listed in the wage determination. If so, describe the work they are performing, the tools used, and report the wage rates they are being paid and whether or not, as the case may be, they have been reclassified in accordance with section 5.5 (a) (1) (ii) of Regulations, Part 5.

7. *Transcribing payrolls*

(a) *Substantiation of compliance by representative transcriptions.* The investigator should, where necessary, substantiate a finding of compliance by representative payroll transcriptions which reflect the practices of the contractor throughout the course of the job. The transcriptions should include for the period covered by the investigation (1) an employee in each classification representing the lowest wage rate paid, (2) an employee in each classification representing the longest hours worked, (3) representative weeks in the most active period, (4) representative weeks in the most inactive period, (5) all methods of wage payments (salary, hourly, daily, etc.) in use during the period covered by the investigation.

(b) *Transcriptions in violation cases.* Representative transcriptions of the violations should be made. These transcriptions, to be useful, must be made in sufficient detail and in such form that they can be used as a check against subsequent computations or for purposes of restitution or as possible evidence in other legal proceedings or in making deductions on Standard Form 1093. Transcriptions should, insofar as possible, be prepared on the forms used by the employer and should be free of notes, comments, or other extraneous matter. Comments or explanations should be placed on separate memoranda or in the narrative report.

8. *Employee interviews*

(a) *Objectives of employee interviews.* Employee interviews are essential to the completeness of the investigation. They should be sufficient in number to establish the degree of adequacy and accuracy of the records and the nature and extent of any violations. They should also be representative of all classifications of employees on the project under investigation. In doubtful compliance situations they should include interviews with former employees. It is desirable that they be definite and clear enough to give anyone reviewing the investigation file an adequate and accurate picture of the violations, if any, as they existed during the period covered by the investigation.

The objectives of an employee interview will be attained only if the investigator prepares for, and approaches the interview in such a manner that the pertinent facts desired will be elicited. Transcriptions of records and the employees selected for interview should be coordinated. This will enable the employee to discuss the situation more adequately and will afford the investigator an opportunity to tie up the interview with the transcriptions and clear up any matters about which there may be doubt or question. The information derived from the interview will depend in part on the attitude of the employee being interviewed, which may be influenced by the way he is approached. The employee should be informed that the information given is confidential, and that his identity will not be disclosed to the employer without the employee's written permission.

(b) *Place of interview.* Employees currently employed may be interviewed during working hours on the job, in accordance with section 5.5 (a) (3) (ii) of Regulations, Part 5, provided the interview can be properly and privately conducted on the premises. In cases of falsification of records, fear of reprisals or intimidation, it may be more advisable to conduct the interview elsewhere such as in the employee's home, at the agency's

office, or other suitable place where it may be arranged.

(c) *Mail interviews.* Employees formerly employed on the job may be interviewed at their home, at the agency's office, or by mail.

Ordinarily, an interview should be made by mail only if a personal interview is impracticable. In addition to former employees, mail interviews may often be appropriate where employees are not on duty at the time of the investigation, but the use of the mail form of interview should be kept to a minimum and every effort should be made to make personal interviews.

(d) *Privacy of interviews.* Employees should not be interviewed in the presence of the employer, another employee, or any other person.

(e) *Interview time.* If the interview is conducted on the job site it should be arranged to cause the least inconvenience to the employer and employee. If conducted elsewhere, effort should be made to make it at the convenience of the employee. When held away from the job site, the period selected should necessarily be before or after the employee's usual working hours.

The investigator should be able to estimate the time to allow for an average interview and should schedule interviews to assure immediate reception of the employee. Careless scheduling results in delay and creates an unfavorable impression. Failure to adhere to the scheduling may cause resentment and lack of cooperation by the employees.

(f) *Oral interview statements.* An employee interview need not be recorded in a signed statement when it serves merely to confirm what the records reveal, and is not otherwise indicative of a violation, assuming no violation has been alleged and the records are adequate. A record of such oral interviews should be made, however, for the case file, showing date, name, classification, and digest of the employee's remarks.

(g) *Signed interview statements.* Signed interview statements are necessary under circumstances where, without them, the investigator might be left without support for his findings, if the employees later attempt to change or deny the testimony given.

A signed employee statement should not be recorded on the same sheet of paper as another signed employee statement. An employee's statement cannot be considered confidential if another employee is permitted to sign the same sheet of paper, and its use may otherwise be impaired.

The principal situations, which require the preparation of a signed statement, arise when the interview:

(1) Involves information as to hours, wages, classification or other essential facts which are in question or missing from the records but necessary for determination of whether a monetary violation has occurred, and as a basis for the computation of back wages due.

(2) Has a bearing on the question of falsification of records or other criteria of wilfulness.

(3) Indicates that the employee was intimidated, or forced to "kick back" any part of his compensation.

(4) Yields factual evidence pertinent to any actual or possible controversy with the employer as to whether a particular violation has occurred.

The foregoing are not necessarily inclusive of all situations in which good judgment will call for the taking of signed statements. The investigator should keep in mind that the conclusions he makes, or the facts he reports for decision by others, often involve the current and prospective expenditure of considerable sums of money. Therefore, insofar as possible his report should be based on interviews, personal observation, payroll records and other data.

When a representative number of interviews which result in written statements are followed by interviews of other employees in the same group who are found to be employed under like conditions, it is not usually necessary to prepare further additional statements if they will merely duplicate the essential information in the statements already taken. The investigator should explain in his report of the investigation that the employees named were in the same group and gave the same information with respect to their own employment as was given by other employees who made signed statements.

(h) *Preparation of interview statements—general principles.* When a written statement is taken, it should be recorded in the manner stated by the employee; it should be read by him, and contain a statement that it has been read and that it is correct. The investigator may restate or summarize the employee's remarks, but should do so in the first person and should phrase it in the employee's manner of speaking. The statement should be signed by the employee and the signature, except in mail interviews, should be witnessed by the investigator. Where the statement

s not signed, the investigator should give, either in the statement or in his report, the employee's reason for not signing. Any changes in a signed employee statement should be initialed by the employee.

Each interview statement should contain identifying information as follows:

(1) Place and date of interview.
(2) Name of employer (firm).
(3) Name and permanent address of employee being interviewed.
(4) Employment status (whether present or former employee).
(5) If an apprentice, the age, date of birth, and information concerning his status.
(6) Job classification and exact work performed, place where performed, period of employment, hour for starting and stopping work, daily and weekly hours worked, rate of pay, wages received, manner in which time and work are recorded.

The interview should cover all the allegations of violations (particularly those in a complaint) with respect to which the employee could be expected to be in a position to furnish information. The employee should be questioned as to whether he has ever been forced, intimidated or threatened with dismissal to give up any part of his compensation.

The interview should also cover any other details necessary to indicate accuracy of the employer's records, statements, or certifications in order to determine whether there has been compliance.

(i) *Employee interviews where records are inadequate or inaccurate.* When records are inadequate or inaccurate, the employee interviews should contain as much information as possible regarding the inadequacies or inaccuracies and hours of work. The workday, workweeks, and the periods covered by the active and less active periods should be established in order that a formula or pattern can be formulated for the computation of any back wages that may be due. Holiday weeks, if any, should be identified.

(j) *Complainant interview.* All complaint investigations must include, except under extraordinary circumstances, an interview with the complainant. When the complaint was made in person, particularly by a person who was not employed at the time by the employer complained against, the complaint itself may be in sufficient detail to constitute an interview. In such a case, an interview or a notice by letter may be postponed until the complainant can be informed that the investigation has been made and of the results insofar as the complainant is personally concerned. When a complainant interview is impracticable or impossible, the omission of the interview should be justified in the report of the investigation. The investigator should use caution and consider all aspects of the investigation in determining whether he should interview the complainant at, or away from, the work site.

9. *Disclosure of information to employees*

During an investigation, the investigator may receive oral inquiries from employees as to the provisions of the acts, compliance with those provisions by the employer, and whether the employees may expect to receive back wages as a result of the investigation.

An inquiring employee has a right to be informed of the provisions of the acts and of his rights. He should, however, be given no information by the investigator which was obtained from an examination of the employer's records, except that the investigator may check with the employee transcriptions from the employer's records of pertinent matters, such as proper classification, hours worked, and wages paid. This should be done not by showing the transcriptions to the employee, but by questioning him as to his work performance, hours worked in particular days and weeks, wages paid, and by checking his answers against the transcriptions, or by comparing the transcriptions, check stubs, personal time records, or any evidence possessed by the employee. Under no circumstances may the employee be given, or allowed to make, copies of data obtained from the employer's records.

The investigator should not, under any circumstances, give his opinion as to whether any back wages are due an employee because of the violations by the employer, but he may instruct the employee as to how his wages or overtime pay, if applicable, should be computed.

The investigator must carefully refrain from words or acts which may be interpreted as suggesting to employees, or groups of employees, that resort be had to the courts.

The investigator may advise inquirers that his sole function as an investigator is to ascertain and to report to his superiors all of the facts concerning the employer's compliance with the provisions of the statutes, that the investigation is not completed until his superiors have received and acted upon the facts, and that any further inquiries concerning the investigation should be addressed to the agency.

10. *Conclusion of the investigation*

(a) When the investigator has completed his examination of the employer's pertinent records, interviewed representative employees, and obtained all the facts necessary to determine the extent of the employer's compliance or noncompliance, he may, when appropriate, confer with the employer, or his designated representative, and

(1) Inform him generally of the investigation findings, and indicate that these findings are based solely on the facts and information disclosed by the investigation.

(2) Detail to him specifically what must be done to eliminate the violations, if any, and give him any available informational material, in addition to that already given him, which the investigation has developed he may need or should have, or request that it be mailed to him by the agency office. In appropriate cases the investigator may, within the limits of the authority delegated to him by the agency head, arrange for payment of restitution.

11. *Settlement by restitution*

In accordance with section 5.10 (a) of the Regulations, Part 5, in appropriate cases where violations of the labor standards stipulations required by the regulations and the applicable statutes result in underpayment of wages, and such underpayment is found to be nonwilful, restitution may be ordered by the agency to be made to all the employees involved. Computation of back wages may be made by the agency, or the employer may be requested to do so, subject to check by the agency.

Upon completion of computations, a summary sheet of the unpaid amounts payable to the employees involved should be prepared by the agency a copy of which shall be furnished the employer. The agency shall advise the employer of the procedure which will satisfy it conclusively that proper restitution has been made.

12. *Potential blacklist or criminal cases*

When an investigator develops a case in which the blacklist might be applied under section 5.6 (b) of Regulations, Part 5, or in which criminal action might be undertaken under section 5.10 (b) of the Regulations, he shall not negotiate for restitution nor reveal the detailed evidence on which his findings are based to the employer. He should, however, advise him generally as to the steps he should take to bring himself into compliance.

In such cases the investigator shall obtain sufficient evidence such as transcriptions, employee interviews, and official reports which justify his referral of the case to his agency for action under either or both of these sections of the Regulations.

13. *Report of the investigation*

(a) After completing all aspects of the investigation as prescribed and gathering sufficient evidence to support the conclusions reached, the case file containing documents, employee statements, transcripts of records, computations, and other material shall be referred through channels to the agency with an appropriate written report covering details of the investigation, findings, manner of settlement or recommendation as to further action. Where restitution is made, evidence of the payments should be included in the case file.

(b) In all cases where wilful violations are found, as well as in all cases of underpayment of $500 or more, whether wilful or not, a copy of the investigation report, including the information required under section 5.7 (a) of the Regulations, Part 5, shall be forwarded to the Secretary of Labor by the agency.

(c) In his report in a potential blacklist or criminal case the investigator should make definite recommendations when he has probable cause to conclude that the violations are aggravated, wilful or contravene a criminal statute, as the case may be, as to whether the blacklist should be applied under section 5.6 (b) of Regulations, Part 5, or whether the matter should be forwarded to the Attorney General of the United States in accordance with section 5.10 (b) of the Regulations, or both. In such cases, as in all others, the file should contain sufficient evidence to justify his recommendations.

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REGULATIONS

TITLE 29
SUBTITLE A
PART 3
OF THE CODE OF FEDERAL REGULATIONS

PAYMENT AND REPORTING OF WAGES

CONTRACTORS AND SUBCONTRACTORS ON PUBLIC BUILDING AND PUBLIC WORK AND ON BUILDING AND WORK FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM THE UNITED STATES

[This publication conforms to the Code of Federal Regulations as of July 17, 1968, the date this reprint was authorized.]

OFFICE OF THE SOLICITOR

UNITED STATES DEPARTMENT OF LABOR

Wage and Hour and Public Contracts Divisions

WASHINGTON, D.C. 20210

WHPC Publication 1243

Title 29—LABOR

Subtitle A—Office of the Secretary of Labor

PART 3—CONTRACTORS AND SUBCONTRACTORS ON PUBLIC BUILDING OR PUBLIC WORK FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM THE UNITED STATES

Sec.

AUTHORITY: The provisions of this Part 3 issued under R.S. 161, sec. 2, 48 Stat. 848; Reorg. Plan No. 14 of 1950, 64 Stat. 1267; 5 U.S.C. 22, 133z–15 note; 40 U.S.C. 276c.

SOURCE: The provisions of this Part 3 appear at 29 F.R. 97, Jan. 4, 1964, unless otherwise noted.

Title 29—Labor

Subtitle A—Office of the Secretary of Labor

PART 3—CONTRACTORS AND SUBCONTRACTORS ON PUBLIC BUILDING OR PUBLIC WORK FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM THE UNITED STATES

Section 3.1 Purpose and scope.

This part prescribes "anti-kickback" regulations under section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 276c), popularly known as the Copeland Act. This part applies to any contract which is subject to Federal wage standards and which is for the construction, prosecution, completion, or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States. The part is intended to aid in the enforcement of the minimum wage provisions of the Davis-Bacon Act and the various statutes dealing with Federally-assisted construction that contain similar minimum wage provisions, including those provisions which are not subject to Reorganization Plan No. 14 (e.g., the College Housing Act of 1950, the Federal Water Pollution Control Act, and the Housing Act of 1959), and in the enforcement of the overtime provisions of the Contract Work Hours Standards Act whenever they are applicable to construction work. The part details the obligation of contractors and subcontractors relative to the weekly submission of statements regarding the wages paid on work covered thereby; sets forth the circumstances and procedures governing the making of payroll deductions from the wages of those employed on such work; and delineates the methods of payment permissible on such work.

Section 3.2 Definitions.

As used in the regulations in this part:

(a) The terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, powerlines, pumping stations, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals; dredging, shoring, scaffolding, drilling, blasting, excavating, clearing, and landscaping. Unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, the manufacture or furnishing of materials, articles, supplies, or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not a "building" or "work" within the meaning of the regulations in this part.

(b) The terms "construction," "prosecution," "completion," or "repair" mean all types of work done on a particular building or work at the site thereof, including, without limitation, altering, remodeling, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the contruction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work, by persons employed at the site by the contractor or subcontractor.

(c) The terms "public building" or "public work" include building or work for whose construction, prosecution, completion, or repair, as defined above, a Federal agency is a contracting party, regardless of whether title thereof is in a Federal agency.

(d) The term "building or work financed in whole or in part by loans or grants from the United States" includes building or work for whose construction, prosecution, completion, or

repair, as defined above, payment or part payment is made directly or indirectly from funds provided by loans or grants by a Federal agency. The term does not include building or work for which Federal assistance is limited solely to loan guarantees or insurance.

(e) Every person paid by a contractor or subcontractor in any manner for his labor in the construction, prosecution, completion, or repair of a public building or public work or building or work financed in whole or in part by loans or grants from the United States is "employed" and receiving "wages," regardless of any contractual relationship alleged to exist between him and the real employer.

(f) The term "any affiliated person" includes a spouse, child, parent, or other close relative of the contractor or subcontractor; a partner or officer of the contractor or subcontractor; a corporation closely connected with the contractor or subcontractor as parent, subsidiary or otherwise, and an officer or agent of such corporation.

(g) The term "Federal agency" means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including corporations, all or substantially all of the stock of which is beneficially owned by the United States, by the District of Columbia, or any of the foregoing departments, establishments, agencies, and instrumentalities.

Section 3.3 Weekly statement with respect to payment of wages.

(a) As used in this section, the term "employee" shall not apply to persons in classifications higher than that of laborer or mechanic and those who are the immediate supervisors of such employees.

(b) Each contractor or subcontractor engaged in the construction, prosecution, completion, or repair of any public building or public work, or building or work financed in whole or in part by loans or grants from the United States, shall furnish each week a statement with respect to the wages paid each of its employees engaged on work covered by 29 CFR Parts 3 and 5 during the preceding weekly payroll period. This statement shall be executed by the contractor or subcontractor or by an authorized officer or employee of the contractor or subcontractor who supervises the payment of wages, and shall be on form WH 348, "Statement of Compliance", or on an identical form on the back of WH 347, "Payroll (For Contractors Optional Use)" or on any form with identical wording. Sample copies of WH 347 and WH 348 may be obtained from the Government contracting or sponsoring agency, and copies of these forms may be purchased at the Government Printing Office.

(c) The requirements of this section shall not apply to any contract of $2,000 or less.

(d) Upon a written finding by the head of a Federal agency, the Secretary of Labor may provide reasonable limitations, variations, tolerances, and exemptions from the requirements of this section subject to such conditions as the Secretary of Labor may specify.

[29 F.R. 95, Jan. 4, 1964, as amended at 33 F.R. 10186, July 17, 1968]

Section 3.4 Submission of weekly statements and the preservation and inspection of weekly payroll records.

(a) Each weekly statement required under § 3.3 shall be delivered by the contractor or subcontractor, within seven days after the regular payment date of the payroll period, to a representative of a Federal or State agency in charge at the site of the building or work, or, if there is no representative of a Federal or State agency at the site of the building or work, the statement shall be mailed by the contractor or subcontractor, within such time, to a Federal or State agency contracting for or financing the building or work. After such examination and check as may be made, such statement, or a copy thereof, shall be kept available, or shall be transmitted together with a report of any violation, in accordance with applicable procedures prescribed by the United States Department of Labor.

(b) Each contractor or subcontractor shall preserve his weekly payroll records for a period of three years from date of completion of the contract. The payroll records shall set out accurately and completely the name and address of each laborer and mechanic, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid. Such payroll records shall be made available at all times

for inspection by the contracting officer or his authorized representative, and by authorized representatives of the Department of Labor.

Section 3.5 Payroll deductions permissible without application to or approval of the Secretary of Labor.

Deductions made under the circumstances or in the situations described in the paragraphs of this section may be made without application to and approval of the Secretary of Labor:

(a) Any deduction made in compliance with the requirements of Federal, State, or local law, such as Federal or State withholding income taxes and Federal social security taxes.

(b) Any deduction of sums previously paid to the employee as a bona fide prepayment of wages when such prepayment is made without discount or interest. A "bona fide prepayment of wages" is considered to have been made only when cash or its equivalent has been advanced to the person employed in such manner as to give him complete freedom of disposition of the advanced funds.

(c) Any deduction of amounts required by court process to be paid to another, unless, the deduction is in favor of the contractor, subcontractor or any affiliated person, or when collusion or collaboration exists.

(d) Any deduction constituting a contribution on behalf of the person employed to funds established by the employer or representatives of employees, or both, for the purpose of providing either from principal or income, or both, medical or hospital care, pensions or annuities on retirement, death benefits, compensation for injuries, illness, accidents, sickness, or disability, or for insurance to provide any of the foregoing, or unemployment benefits, vacation pay, savings accounts, or similar payments for the benefit of employees, their families and dependents: *Provided, however*, That the following standards are met: (1) The deduction is not otherwise prohibited by law; (2) it is either: (i) Voluntarily consented to by the employee in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of or for the continuation of employment, or (ii) provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its employees; (3) no profit or other benefit is otherwise obtained, directly or indirectly, by the contractor or subcontractor or any affiliated person in the form of commission, dividend, or otherwise; and (4) the deductions shall serve the convenience and interest of the employee.

(e) Any deduction contributing toward the purchase of United States Defense Stamps and Bonds when voluntarily authorized by the employee.

(f) Any deduction requested by the employee to enable him to repay loans to or to purchase shares in credit unions organized and operated in accordance with Federal and State credit union statutes.

(g) Any deduction voluntarily authorized by the employee for the making of contributions to governmental or quasi-governmental agencies, such as the American Red Cross.

(h) Any deduction voluntarily authorized by the employee for the making of contributions to Community Chests, United Givers Funds, and similiar charitable organizations.

(i) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments: *Provided, however*, That a collective bargaining agreement between the contractor or subcontractor and representatives of its employees provides for such deductions and the deductions are not otherwise prohibited by law.

(j) Any deduction not more than for the "reasonable cost" of board, lodging, or other facilities meeting the requirements of section 3(m) of the Fair Labor Standards Act of 1938, as amended, and Part 531 of this title. When such a deduction is made the additional records required under § 516.27(a) of this title shall be kept.

Section 3.6 Payroll deductions permissible with the approval of the Secretary of Labor.

Any contractor or subcontractor may apply to the Secretary of Labor for permission to make any deduction not permitted under § 3.5. The Secretary may grant permission whenever he finds that:

(a) The contractor, subcontractor, or any affiliated person does not make a profit or benefit directly or indirectly from the deduction either in the form of a commission, dividend, or otherwise;

(b) The deduction is not otherwise prohibited by law;

(c) The deduction is either (1) voluntarily con-

sented to by the employee in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of employment or its continuance, or (2) provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its employees; and

(d) The deduction serves the convenience and interest of the employee.

Section 3.7 Applications for the approval of the Secretary of Labor.

Any application for the making of payroll deductions under § 3.6 shall comply with the requirements prescribed in the following paragraphs of this section:

(a) The application shall be in writing and shall be addressed to the Secretary of Labor.

(b) The application shall identify the contract or contracts under which the work in question is to be performed. Permission will be given for deductions only on specific, identified contracts, except upon a showing of exceptional circumstances.

(c) The application shall state affirmatively that there is compliance with the standards set forth in the provisions of § 3.6. The affirmation shall be accompanied by a full statement of the facts indicating such compliance.

(d) The application shall include a description of the proposed deduction, the purpose to be served thereby, and the classes of laborers or mechanics from whose wages the proposed deduction would be made.

(e) The application shall state the name and business of any third person to whom any funds obtained from the proposed deductions are to be transmitted and the affiliation of such person, if any, with the applicant.

Section 3.8 Action by the Secretary of Labor upon applications.

The Secretary of Labor shall decide whether or not the requested deduction is permissible under provisions of § 3.6; and shall notify the applicant in writing of his decision.

Section 3.9 Prohibited payroll deductions.

Deductions not elsewhere provided for by this part and which are not found to be permissible under § 3.6 are prohibited.

Section 3.10 Methods of payment of wages.

The payment of wages shall be by cash, negotiable instruments payable on demand, or the additional forms of compensation for which deductions are permissible under this part. No other methods of payment shall be recognized on work subject to the Copeland Act.

Section 3.11 Regulations part of contract.

All contracts made with respect to the construction, prosecution, completion, or repair of any public building or public work or building or work financed in whole or in part by loans or grants from the United States covered by the regulations in this part shall expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see § 5.5(a) of this subtitle.

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LABOR STANDARDS PROVISIONS

DAVIS-BACON AND RELATED ACTS
CONTRACT WORK HOURS STANDARDS ACT

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OFFICE OF THE SOLICITOR

UNITED STATES DEPARTMENT OF LABOR

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Title 29—LABOR

Subtitle A—Office of the Secretary of Labor

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NON-CONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS STANDARDS ACT)

Subpart A—General

Sec.

Subpart B—Interpretation of the Fringe Benefits Provisions of the Davis-Bacon Act

AUTHORITY: The provisions of this Part 5 issued under R.S. 161, Reorg. Plan No. 14 of 1950, 64 Stat. 1267; sec. 2, 48 Stat. 948; sec. 10, 61 Stat. 89; 5 U.S.C. 22, 133z–15 note, 29 U.S.C. 258; 40 U.S.C. 276c, unless otherwise noted.

Subpart A—General

Section 5.1 Purpose and scope.

(a) The regulations contained in this part are promulgated in order to coordinate the administration and enforcement of the labor standards provisions of each of the following acts by the Federal agencies responsible for their administration and such additional statutes as may from time to time confer upon the Secretary of Labor additional duties and responsibilities similar to those confered upon him under Reorganization Plan No. 14 of 1950:

The Davis-Bacon Act (40 U.S.C. 276a—276a-7), and as extended to the Federal-Aid Highway Act of 1956 (23 U.S.C. 113).

Copeland Act (40 U.S.C. 276c).

The Contract Work Hours Standards Act (40 U.S.C. 327–330).

National Housing Act (12 U.S.C. 1713, 1715a, 1715c, 1715k, 1715(d) (3) and (4), 1715v, 1715w, 1715x, 1743, 1747, 1748b, 1748h–2, 1750g).

Hospital Survey and Construction Act (42 U.S.C. 291h).

Federal Airport Act (49 U.S.C. 1114).

Housing Act of 1949 (42 U.S.C. 1459).

School Survey and Construction Act of 1950 (20 U.S.C. 636).

Defense Housing and Community Facilities and Services Act of 1951 (42 U.S.C. 1592i).

United States Housing Act of 1937 (42 U.S.C. 1416).

Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281).

Area Redevelopment Act (42 U.S.C. 2518).

Delaware River Basin Compact (sec. 15.1, 75 Stat. 714).

Health Professions Educational Assistance Act of 1963 (42 U.S.C. 292d(c) (4), 293a(c) (5)).

Mental Retardation Facilities Construction Act (42 U.S.C. 295(a) (2) (d), 2662(5), 2675(a) (5)).

Community Mental Health Centers Act (42 U.S.C. 2685 (a) (5)).

Higher Educational Facilities Act of 1963 (20 U.S.C. 753).

Vocational Educational Act of 1963 (20 U.S.C. 35f).

Library Services and Construction Act (20 U.S.C. 355c (a) (4)).

Urban Mass Transportation Act of 1964 (sec. 10a, 78 Stat. 307).

Economic Opportunity Act of 1964 (sec. 607, 78 Stat. 532).

Public Health Service Act (sec. 605(a) (5), 78 Stat. 454).

Housing Act of 1964 (78 Stat. 797).

The Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199).

The Nurse Training Act of 1964 (sec. 2, 78 Stat. 910).

Elementary and Secondary Education Act of 1965 (20 U.S.C. 239).

Federal Water Pollution Control Act (33 U.S.C. 466).

Appalachian Regional Development Act of 1965 (79 Stat. 5, 21, sec. 402).

National Technical Institute for the Deaf Act (79 Stat. 125, 126, sec. 5(b) (5)).

(b) Sections 5.3 and 5.4 contain the Department's procedural rules governing requests for wage determinations under the Davis-Bacon Act and its related statutes listed in § 1.1 of this subtitle and the use of such wage determinations.

[29 F.R. 99, Jan. 4, 1964, as amended at 30 F.R. 13136, Oct. 15, 1956]

Section 5.2 Definitions.

As used in this part:

(a) The term "Agency Head" means the principal official of the Federal Agency and includes those persons duly authorized to act in his behalf;

(b) The term "Contracting Officer" means the individual, his duly appointed successor, or his authorized representative who is designated and authorized to enter into contracts on behalf of the Federal agency, or other administering agency;

(c) The term "Apprentices" means persons who are indentured and employed in a bona fide apprenticeship program and individually registered by the program sponsor with a State Apprenticeship Agency which is recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no recognized Agency exists in a State, in a program registered with the Bureau of Apprenticeship and Training, United States Department of Labor;

(d) The term "wage determination" includes the original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision, issued prior to the award of the construction contract, except that under the National Housing Act changes in the decision shall be effective if made at any time prior to the beginning of construction. The use of the wage determination shall be subject to the provisions of § 5.4;

(e) The term "contract" means any contract within the scope of the labor standards provisions of any of the acts listed in § 5.1 and which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution, except where a different meaning is expressly indicated;

(f) The terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscapping. The manufacture or furnishing of materials, articles, supplies or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not a "building" or "work" within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.

(g) The terms "construction", "prosecution", "completion", or "repair" mean all types of work done on a particular building or work at the site thereof or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project, including without limitation, altering, remodeling, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project, by persons employed by the contractor or subcontractor. A mere token beginning of the work shall not be deemed to be the "beginning of construction" as that term is used in the National Housing Act.

(h) The term "public building" or "public work" includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency. However, the term "initial construction" in the Federal-Aid Highway Act of 1956 does not include repair or maintenance work.

(i) Every person paid by a contractor or subcontractor in any manner for his labor in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or guarantees from the United States, is "employed" and receiving "wages", regardless of any contractual relationship alleged to exist.

(j) The term "Federal agency" means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including corporations, all or substantially all of the stock of which is beneficially owned by the United Staes, by the District of Columbia, or any of the foregoing departments, establishments, agencies, and instrumentalities.

(k) The term "wages" (and its singular form) has the meaning prescribed in section 1(b) of the Davis-Bacon Act.

[29 F.R. 99, Jan. 4, 1964, as amended at 29 F.R. 13463, Sept. 30, 1964]

Section 5.3 Procedure for requesting wage determinations.

(a)(1) The Federal Agency shall initially request a wage determination under the Davis-Bacon Act or any of its related prevailing wage statutes by submitting to the Solicitor of Labor, United States Department of Labor, Washington

D.C. 20210, a completed Department of Labor Form DB–11. State Highway Departments under the Federal-Aid Highway Act of 1956 shall similarly request a wage determination by using Department of Labor Form DB–11(a). These forms are available from the Office of the Solicitor, United States Department of Labor. The agency shall check only those classifications on the applicable form which will be needed in the performance of the work (inserting a note such as "entire schedule" or "all applicable classifications" is not sufficient). Additional classifications needed which are not on the form may be typed in the blank spaces or on a separate list and attached to the form. The agency shall not list classifications which can be fitted into classifications on the form, or classifications which are not generally recognized in the area or in the construction industry.

(2) In completing Form DB–11 or DB–11(a), the agency shall furnish:

(i) A sufficiently detailed description of the work to indicate whether heavy, highway, or building construction, or any other type of construction is involved. Additional description or separate attachment, if necessary for identification of type of project, shall be furnished.

(ii) Location of the proposed project (include distance in miles and direction from the nearest point of reference).

(iii) The agency's evaluation as to whether the project is a building, heavy, highway or other type of construction project.

(3) Such request for a wage determination shall be accompanied by any pertinent wage payment information, which may be available. This information need not accompany a request in areas where the wage patterns are clearly established. When the requesting agency is a State Highway Department under the Federal-Aid Highway Act of 1956, such agency shall also include its recommendations as to the wages which are prevailing for each classification of laborers and mechanics on similar construction in the immediate locality.

(b) Whenever the wage patterns in a particular area for a particular type of construction are well settled and whenever it may be reasonably anticipated that there will be a large volume of procurement in that area for such a type of construction, the Secretary of Labor, upon the request of a Federal agency or in his discretion, may issue such a general wage determination when, after consideration of the facts and circumstances involved, he finds that the applicable statutory standards and those of Part 1 of this subtitle will be met.

(c) The time required for processing requests for wage determinations varies according to the facts and circumstances in each case. An agency should anticipate that such processing in the Department of Labor will take at least 30 days.

[29 F.R. 100, Jan. 4, 1964, as amended at 29 F.R. 13463, Sept. 30, 1964]

Section 5.4 Use and effectiveness of wage determinations.

(a) Wage determinations initially issued shall be effective for 120 calendar days from the date of such determinations. If such a wage determination is not used in the period of its effectiveness, it is void. If it appears that a wage determination may expire between bid opening and award, the agency should request a new wage determination sufficiently in advance of the bid opening to assure receipt prior thereto. However, when due to unavoidable circumstances a determination expires before award and after bid opening, the Solicitor upon a written finding to that effect by the Head of the Federal Agency in individual cases may extend the expiration date of a determination whenever he finds it necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business.

(b) All actions modifying an original wage determination prior to the award of the contract or contracts for which the determination was sought shall be applicable thereto, but modifications received by the Federal agency (in the case of the Federal-Aid Highway Act of 1956, the State Highway Department of each State) later than 10 days before the opening of bids shall not be effective except when the Federal agency (in the case of the Federal-Aid Highway Act of 1956, the State Highway Department of each State) finds that there is a reasonable time in which to notify bidders of the modification. Similarly, in the case of contracts entered into pursuant to the National Housing Act, changes or modifications in the original determination shall be effective if made prior to the beginning of construction, but shall not apply after the mortgage is initially en-

dorsed by the Federal agency. A modification in no case will continue in effect beyond the effective period of the wage determination to which it relates.

(c) Upon his own initiative or the request of a Federal agency (or a State Highway Department under the Federal-Aid Highway Act of 1956), the Secretary shall correct any wage determination included in a contract subject to the minimum wage provisions of the statutes listed in § 1.1 of this subtitle whenever he finds such a wage determination contains clerical errors.

[29 F.R. 100, Jan. 4, 1964, as amended at 29 F.R. 13463, Sept. 30, 1964]

Section 5.5 Contract provisions and related matters.

(a) The Agency Head shall cause or require to be inserted in full in any contract subject to the labor standards provisions of any of the acts listed in § 5.1, except those subject only to the Contract Work Hours Standards Act, the following clauses or any modifications thereof to meet the particular needs of the agency if first approved by the Department of Labor:

(1) *Minimum wages.* (i) All mechanics and laborers employed or working upon the site of the work, or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project, will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3), the full amounts due at time of payment computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics; and the wage determination decision shall be posted by the contractor at the site of the work in a prominent place where it can be easily seen by the workers. For the purpose of this clause, contributions made or costs reasonably anticipated under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of 29 CFR 5.5(a)(1)(iv). Also for the purpose of this clause, regular contributions made or costs incurred for more than a weekly period under plans, funds, or programs, but covering the particular weekly period, are deemed to be constructively made or incurred during such weekly period.

(ii) The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract, shall be classified or reclassified conformably to the wage determination, and a report of the action taken shall be sent by the Federal agency to the Secretary of Labor. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question accompanied by the recommendation of the contracting officer shall be referred to the Secretary for final determination.

(iii) The contracting officer shall require, whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly wage rate and the contractor is obligated to pay a cash equivalent of such a fringe benefit, an hourly cash equivalent thereof to be established. In the event the interested parties cannot agree upon a cash equivalent of the fringe benefit, the question, accompanied by the recommendation of the contracting officer, shall be referred to the Secretary of Labor for determination.

(iv) If the contractor does not make payments to a trustee or other third person, he may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing benefits under a plan or program of a type expressly listed in the wage determination decision of the Secretary of Labor which is a part of this contract: *Provided, however,* The Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) *Withholding.*

The [write in name of Federal agency] may withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics employed by the contractor or any subcontractor on the work the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic employed or working on the site of the work, or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project, all or part of the wages required by the contract, the [Agency] may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) *Payrolls and basic records.* (i) Payrolls and basic records relating thereto will be maintained during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work, or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project. Such records will contain the name and address of each such employee, his correct classification, rates of pay (including rates of contributions or costs anticipated of the types described in section 1(b)(2) of the Davis-Bacon Act), daily and

weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

(ii) The contractor will submit weekly a copy of all payrolls to the (write in name of appropriate Federal agency) if the agency is a party to the contract, but if the agency is not such a party the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency). The copy shall be accompanied by a statement signed by the employer or his agent indicating that the payrolls are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor and that the classifications set forth for each laborer or mechanic conform with the work he performed. A submission of a "Weekly Statement of Compliance" which is required under this contract and the Copeland regulations of the Secretary of Labor (29 CFR, Part 3) and the filing with the initial payroll or any subsequent payroll of a copy of any findings by the Secretary of Labor under 29 CFR 5.5(a)(1)(iv) shall satisfy this requirement. The prime contractor shall be responsible for the submission of copies of payrolls of all subcontractors. The contractor will make the records required under the labor standards clauses of the contract available for inspection by authorized representatives of the (write the name of agency) and the Department of Labor, and will permit such representatives to interview employees during working hours on the job.

(4) *Apprentices.* Apprentices will be permitted to work as such only when they are registered, individually, under a bona fide apprenticeship program registered with a State apprenticeship agency which is recognized by the Bureau of Apprenticeship and Training, United States Department of Labor; or, if no such recognized agency exists in a State, under a program registered with the Bureau of Apprenticeship and Training, United States Department of Labor. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the Secretary of Labor for the classification of work he actually performed. The contractor or subcontractor will be required to furnish to the contracting officer written evidence of the registration of his program and apprentices as well as of the appropriate ratios and wage rates, for the area of construction prior to using any apprentices on the contract work.

(5) *Compliance with Copeland Regulations (29 CFR Part 3).* The contractor shall comply with the Copeland Regulations (29 CFR Part 3) of the Secretary of Labor which are herein incorporated by reference.

(6) *Subcontracts.* The contractor will insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (5) and (7) and such other clauses as the (write in the name of Federal agency) may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts which they may enter into, together with a clause requiring this insertion in any further subcontracts that may in turn be made.

(7) *Contract termination; debarment.* A breach of clauses (1) through (6) may be grounds for termination of the contract, and for debarment as provided in 29 CFR 5.6.

(b)(1) In the construction of a dwelling or dwellings insured under 12 U.S.C. 1715v, or 1715w, compliance with the requirements of paragraph (a) of this section may be waived by the Agency Head in cases or classes of cases where laborers or mechanics, not otherwise employed at any time on the project, voluntarily donate their services without full compensation for the purpose of lowering the cost of construction and the Agency Head determines that any amounts saved thereby are fully credited to the nonprofit corporation, association, or other organization undertaking the construction.

(2) In construction assisted by any loan or grant under 20 U.S.C. Ch. 21, the Agency Head may waive the application of 20 U.S.C. 753(a) in cases or classes of cases where laborers or mechanics not otherwise employed at any time in the construction of the project, voluntarily donate their services for the purpose of lowering the costs of construction and the Agency Head determines that any amounts saved thereby are fully credited to the educational institution undertaking the construction.

(3) In construction assisted under Section 503 of the Housing Act of 1964, the Agency Head may waive the application of the prevailing wage standards prescribed therein in cases or classes of cases where laborers or mechanics, not otherwise employed at any time on the project, voluntarily donate their services without compensation for the purpose of lowering the costs of construction and the Agency Head determines that any amounts thereby saved are fully credited to the person, corporation, association, organization, or other entity undertaking the project.

(c) The Agency Head shall cause or require the following clauses set forth in subparagraphs (1), (2), (3), and (4) of this paragraph to be included in full in any contract subject to the Contract Work Hours Standards Act. As used in this paragraph, the terms "laborers" and "mechanics" include watchmen and guards.

(1) *Overtime requirements.* No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic in any workweek in which he is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his basic rate of pay for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, as the case may be.

(2) *Violation; liability for upaid wages; liquidated damages.* In the event of any violation of the clause set forth in subparagraph (1), the contractor and any subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the clause set forth in subparagraph (1), in the sum of $10 for each calendar day on which such employee was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in subparagraph (1).

(3) *Withholding for unpaid wages and liquidated damages.* The (write in the name of the Federal agency) may withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in subparagraph (2).

(4) *Subcontracts.* The contractor shall insert in any subcontracts the clauses set forth in subparagraphs (1), (2), and (3) of this paragraph and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts which they may enter into, together with a clause requiring this insertion in any further subcontracts that may in turn be made.

(d) In any contract required to contain the withholding clause set forth in subparagraph (2) of paragraph (a) of this section, the Federal Agency may modify the clause in subparagraph (3) of paragraph (c) of this section so as to refer only to the withholding and determination of sums for liquidated damages.

(e) In any contract subject only to the Contract Work Hours Standards Act and not to any of the other statutes cited in § 5.1, the Agency Head shall cause or require to be inserted a clause requiring the maintenance of records containing the information specified in § 516.2(a) of this Title. Records containing such information shall be preserved for a period of three years from the completion of the contract. Further, the Agency Head shall cause or require to be inserted in any such contract a clause providing that the records to be maintained under this paragraph shall be available for inspection in the manner that inspection of records is available under the terms of paragraph (a) (3) (ii) of this section.

(f) In contracts subject to section 803 of the National Housing Act, the Agency Head shall cause or require inclusion of the following clause: Every laborer and mechanic employed by the contractor or any subcontractor engaged in the construction of the project shall receive compensation at a rate of not less than one and one-half times his basic or regular rate of pay for all hours worked in any workweek in excess of eight hours in any workday or forty hours in the workweek, as the case may be.

[29 F.R. 100, Jan. 4, 1964, as amended at 29 F.R. 13463, Sept. 30, 1964; 30 F.R. 13136, Oct. 15, 1965]

Section 5.6 Enforcement.

(a) (1) It shall be the responsibility of the Federal agency to ascertain whether the clauses required by § 5.5 have been inserted in the contracts. Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to require that the contracts contain the provisions of § 5.5 or such modifications thereof which have been approved by the Department of Labor. No payment, advance, grant, loan or guarantee of funds shall be approved by the Federal agency after the beginning of construction unless there is on file with the agency a certification by the contractor that he and his subcontractors have complied or that there is a substantial dispute with respect to the required provisions.

(2) The Federal agency shall make such examination of the submitted payrolls and statements as may be necessary to assure compliance with the labor standards clauses required by the regula-

tions contained in this part and the applicable statutes listed in § 5.1. In connection with such examination particular attention should be given to the correctness of classifications and disproportionate employment of laborers, helpers or apprentices. Such payrolls and statements shall be preserved by the agency for a period of 3 years from the date of completion of the contract and shall be produced at the request of the Secretary of Labor at any time during the 3-year period.

(3) In addition to the examination of payrolls and statements required by subparagraph (2) of this paragraph, the Federal agency shall cause investigations to be made as may be necessary to assure compliance with the labor standards clauses required by the regulations contained in this part and the applicable statutes listed in § 5.1. Projects where the contract is of short duration (6 months or less) shall be investigated before the work is accepted, if feasible. In the case of contracts which extend over a long period of time the investigation shall be made with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees and examinations of payroll data to determine the correctness of classifications and disproportionate employment of laborers, helpers, or apprentices. Complaints of alleged violations shall be given priority and statements, written or oral, made by an employee shall be treated as confidential and shall not be disclosed to his employer without the consent of the employee.

(b) (1) Whenever any contractor or subcontractor is found by the Secretary of Labor or the Agency Head with the concurrence of the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1, other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts subject to any of the statutes listed in § 5.1. *Provided, however*, That the Solicitor shall direct the removal from the debarred bidders list of any contractor or subcontractor whom he has found to have demonstrated a current responsibility to comply with the labor standards provisions applicable to Federal contracts and Federally-assisted construction work subject to any of the applicable statutes listed in § 5.1. In cases arising under contracts covered by the Davis-Bacon Act, the ineligibility provision prescribed in that act shall govern.

(2) The Agency Head shall furnish to the Secretary of Labor for transmittal to the Comptroller General the names of the persons or firms who have been found to have disregarded their obligations to employees. The Comptroller General will distribute a list to all Departments of the Government giving the names of such ineligible persons or firms.

(c) (1) Whenever as a result of an investigation conducted by the Agency or the Department of Labor, the Deputy Administrator of the Wage and Hour and Public Contracts Divisions, Department of Labor, finds reasonable cause to believe that a contractor or subcontractor has committed willful or aggravated violations of the labor standards provisions of any of the statutes listed in § 5.1 (other than the Davis-Bacon Act), or has committed violations of the Davis-Bacon Act which constitute a disregard of its obligations to employees or subcontractors under section 3(a) thereof, he shall promptly notify by registered or certified mail the contractor or subcontractor and its responsible officers, if any (and any firms in which the contractor or subcontractor are known to have a substantial interest), of the finding and afford such contractor or subcontractor and any other parties notified an opportunity to present such reasons or considerations as they have to offer relating to why debarment action should not be taken under paragraph (b) of this section or section 3(a) of the Davis-Bacon Act. The Deputy Administrator shall furnish to those notified a summary of the investigative findings and shall make available to them any information disclosed by the investigation which is not privileged or found confidential for good cause. If this opportunity is requested, an informal proceeding shall be held before a hearing examiner, a regional director of the Wage and Hour and Public Contracts Divisions, or any other Departmental officer of appropriate ability. At the conclusion of the informal proceeding, the presiding officer shall issue his

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decision which shall be served by registered or certified mail upon the interested parties.

(2) Within 30 days after service of the decision, any party may file objections to the decision with the Solicitor of Labor, United States Department of Labor, Washington, D.C. 20210. Such objections shall be specific, and shall be accompanied by reasons or bases therefor. In his discretion, the Solicitor may permit oral argument. If no objections are filed, the decision of the presiding officer shall be final, except in cases under section 3 of the Davis-Bacon Act as to any action to be taken by the Comptroller General under that section.

(3) The decision of the Solicitor shall show a ruling upon each objection presented, and shall include a statement of (i) the findings and conclusions, as well as the reasons or bases therefor, upon all material issues of fact, law, or discretion presented on the record, and (ii) an appropriate order or recommendation. The decision of the Solicitor shall be final, except in cases accepted for review, upon petition, by the Wage Appeals Board [2] and in cases under section 3 of the Davis-Bacon Act as to any action to be taken by the Comptroller General under that section.

(d) Any person or firm debarred under § 5.6(b) may in writing request removal from the debarment list. The procedure for removal shall be substantially similar to the debarment procedure set forth in paragraph (c) of this section. That is, the person or firm shall have an opportunity to demonstrate in an informal proceeding a current responsibility to comply with the labor standards provisions applicable to Federal contracts and to Federally assisted construction work and to file objections to the presiding officer's decision for consideration by the Solicitor of Labor.

[29 F.R. 102, Jan. 4, 1964, as amended at 33 F.R. 8448, June 7, 1968]

Section 5.7 Reports to the Secretary of Labor.

(a) *Enforcement reports.* (1) Where underpayments total less than $500.00 and are nonwillful, and where restitution has been effected and future compliance assured, the Federal agency need not submit its investigative findings and recommendations, except where the Department of Labor has expressly requested that the investigation be made. In the latter case, the investigating agency shall submit a factual summary report including any data on the amount of restitution paid, the number of workers who received restitution, liquidated damages assessed, corrective measures taken (such as "letters of notice"), and any information that may be necessary to review any recommendations for an appropriate adjustment in liquidated damages under § 5.8.

(2) Where underpayments total $500 or more, or are willful, the Federal agency shall furnish to the Department of Labor, as soon as practicable, a detailed enforcement report. The report should be prepared in accordance with the "Investigation and Enforcement Manual" published by the Department of Labor with respect to "Labor Standards Provisions Applicable to Contracts Covering Federally-Financed and Assisted Construction". In cases involving underpayments under the Davis-Bacon Act, the report should meet the reporting requirements contained in Comptroller General's Letter B–3368, dated March 19, 1957.

(b) *Semi-annual enforcement reports.* To assist the Secretary in fulfilling his responsibilities under Reorganization Plan No. 14 of 1950, Federal agencies shall furnish to the Secretary by July 31 and January 31 of each calendar year semi-annual reports on compliance with and enforcement of the labor standards provisions of the Davis-Bacon Act and its related acts covering the periods of January 1 through June 30 and July 1 through December 31, respectively. Such reports shall be prepared in the manner prescribed in circular memoranda of the Secretary.

(c) *Additional information.* Upon request, the Agency Head shall transmit to the Secretary of Labor such information available to the Agency with respect to contractors and subcontractors, their contracts, and the nature of the contract work as the Secretary may find necessary for the performance of his duties with respect to the labor standards provisions referred to in this part.

(d) *Contract termination.* Where the contract is terminated by reason of violations of the labor standards a report shall be submitted to the Secretary of Labor and the Comptroller General giving the name and address of the contractor or subcontractor whose right to proceed has been terminated, the name and address of the contractor or subcontractor, if any, who is to complete the

[2] The Wage Appeals Board is established by Secretary of Labor's Order 32–63 published in the Federal Register on this date (Jan. 4, 1964).

work, the amount and number of his contract, and the description of the work he is to perform.

[29 F.R. 102, Jan. 4, 1964, as amended at 30 F.R. 13136, Oct. 15, 1965]

Section 5.8 Review of recommendations for an appropriate adjustment in liquidated damages under the Contract Work Hours Standards Act.

(a) *Findings and recommendations by the head of the Agency.* Whenever the head of an agency finds that a sum of liquidated damages administratively determined to be due under section 104(a) of the Contract Work Hours Standards Act and to be in excess of $100.00, is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Contract Work Hours Standards Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, he may make recommendations to the Secretary that an appropriate adjustment in liquidated damages be made or that the contractor or subcontractor be relieved of liability for such liquidated damages. Such findings with respect to liquidated damages necessarily include findings with respect to any wage underpayment for which the liquidated damages are determined.

(b) The recommendations of the head of an agency submitted to the Department of Labor under paragraph (a) of this section shall be reviewed initially by the Deputy Administrator of the Wage and Hour and Public Contracts Divisions. Whenever the Deputy Administrator concurs in the findings and recommendations of the head of the agency, he shall issue an order to that effect, which shall be the final action of the Department of Labor with respect to the issues involved. Whenever the Deputy Administrator makes findings differing from those of the head of the agency, his decision shall be transmitted forthwith to the Administrator of the Wage and Hour and Public Contracts Divisions for review. The Administrator shall issue a decision and order. In its discretion, the Wage Appeals Board may review the decision and order of the Administrator.

(c) Whenever the head of an agency finds that a sum of liquidated damages administratively determined to be due under section 104(a) of the Contract Work Hours Standards Act and to be $100.00 or less is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Contract Work Hours Standards Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, he may make an appropriate adjustment in such liquidated damages or relieve the contractor or subcontractor of liability for such liquidated damages without submitting recommendations to this effect to the Secretary. This delegation of authority is made under section 105 of the Contract Work Hours Standards Act and has been found to be necessary and proper in the public interest to prevent undue hardship and to avoid serious impairment of the conduct of Government business.

[29 F.R. 103, Jan. 4, 1964, as amended at 33 F.R. 8448, June 7, 1968]

Section 5.9 Suspension of funds.

In the event of failure or refusal of the contractor or any subcontractor to comply with labor standards stipulations required by the regulations contained in this part and the applicable statutes listed in § 5.1, the Federal agency shall take such action as may be necessary to cause the suspension of the payment, advance or guarantee of funds until such time as the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled and to cover any liquidated damages which may be due.

[29 F.R. 103, Jan. 4, 1964]

Section 5.10 Restitution, criminal action.

(a) The Agency Head may, in appropriate cases where violations of the labor standards clauses required by the regulations contained in this part and the applicable statutes listed in § 5.1 resulting in underpayment of wages to employees are found to be nonwillful, request that restitution be made to such employees or on their behalf to plans, funds, or programs for any type of fringe benefit prescribed in the applicable wage determination.

(b) In cases where the Agency Head finds substantial evidence that such violations are willful and in violation of a criminal statute, the Agency Head shall forward the matter to the Attorney General of the United States for prosecution if

the facts warrant. In all such cases the Secretary of Labor shall be informed of the action taken.

[29 F.R. 103, Jan. 4, 1964, as amended at 29 F.R. 13464, Sept. 30, 1964]

Section 5.11 Department of Labor investigations, hearings.

(a) The Secretary of Labor shall cause to be made such investigations as he deems necessary, in order to obtain compliance with the labor standards provisions of the applicable statutes listed in § 5.1, or to affirm or reject the recommendations by the Head of an agency for an appropriate adjustment in liquidated damages assessed under the Contract Work Hours Standards Act. Federal agencies, contractors, subcontractors, sponsors, applicants or owners shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all other aspects of the investigation. Any authorized representative of the Department of Labor under this section is deemed a person designated to aid in the enforcement of the overtime standards required by the Contract Work Hours Standards Act within the meaning of section 104(a) of that Act. A report of the investigation of such representative shall be transmitted to proper officers of the United States, any territory or possession, as the case may be, as required by the aforesaid section 104(a).

(b) In the event of disputes concerning the payment of prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations, the Secretary of Labor may, upon request by a Federal agency, direct a hearing to be held. For the purpose of the hearing the Secretary of Labor shall, in writing, designate a hearing examiner who shall, after notice to all interested parties, make such investigation and conduct such hearings as may be necessary and render a decision embodying his findings and conclusions and if wages are found to be due, the amounts thereof. The hearing examiner's decision shall be sent to the interested parties and shall be final unless a petition for review of the decision by the Solicitor of Labor is filed by any such parties in quadruplicate with the Chief Hearing Examiner, United States Department of Labor, Washington, D.C. 20210, within 20 days after receipt thereof. The petition for review must set out separately and particularly each objection asserted. The petition for review and the record which shall include the examiner's decision then shall be certified by the hearing examiner to the Solicitor of Labor. The petitioner may file a brief (original and four copies) in support of his petition within the 20-day period and any interested party upon whom the hearing examiner's decision has been served may within 10 days after the expiration of the time for filing the petition for review, file a brief in support of, or in opposition to the hearing examiner's decision. The Solicitor of Labor's decision shall be subject to such further review by the Wage Appeals Board, as it may provide in its discretion.

[29 F.R. 103, Jan. 4, 1964]

Section 5.12 Rulings and interpretations.

All questions arising in any agency relating to the application and interpretation of the rules contained in this part and in Parts 1 and 3 of this subtitle, and of the labor standards provisions of any of the statutes listed in § 5.1 shall be referred to the Secretary for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative and those under the Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be addressed to the Secretary of Labor. United States Department of Labor, Washington, D.C. 20210.

[29 F.R. 103, Jan. 4, 1964]

Section 5.13 Variations, tolerances, and exemptions from Parts 1 and 3 of this subtitle and this part.

The Secretary may make variations, tolerances, and exemptions from the requirements of this part and those of Parts 1 and 3 of this subtitle whenever he finds that such action is necessary and proper in the public interest or to prevent injustice and undue hardship.

[29 F.R. 104, Jan. 4, 1964]

Section 5.14 Limitations, variations, tolerances, and exemptions under the Contract Work Hours Standards Act.

(a) *General.* Upon his own initiative or upon

the request of any Federal agency, the Secretary of Labor may provide under section 105 of the Contract Work Hours Standards Act reasonable limitations and allow variations, tolerances, and exemptions to and from any or all provisions of that Act whenever he finds such action to be necessary and proper in the public interest to prevent injustice, or undue hardship, or to avoid serious impairment of the conduct of Government business. Any request for such action by the Secretary shall be submitted in writing, and shall set forth the reasons for which the request is made.

(b) *Exemptions.* Pursuant to section 105 of the Contract Work Hours Standards Act, the following classses of contracts are found exempt from all provisions of that Act in order to prevent injustice, undue hardship, or serious impairment of Government business:

(1) Agreements entered into my or on behalf of the Commodity Credit Corporation providing for the storing in or handling by commercial warehouses of wheat, corn, oats, barley, rye, grain sorghums, soybeans, flaxseed, rice, naval stores, tobacco, peanuts, dry beans, seeds cotton, and wool.

(2) Sales of surplus power by the Tennessee Valley Authority to States, counties, municipalities, cooperative organization of citizens or farmers, corporations and other individuals pursuant to section 10 of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831i).

(3) Contracts of $2,000.00 or less.

(4) Purchases and contracts other than construction contracts in the aggregate amount of $2,500.00 or less. In arriving at the aggregate amount involved, there must be included all property and services which would properly be grouped together in a single transaction and which would be included in a single advertisement for bids if the procurement were being effected by formal advertising.

(5) Contract work performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: A State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462); American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; Johnston Island; and the Canal Zone.

(c) *Tolerances.* (1) The "basic rate of pay" under section 102 of the Contract Work Hours Standards Act may be computed as an hourly equivalent to the rate on which time-and-one-half overtime compensation may be computed and paid under section 7 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 207), as interpreted in Part 778 of this title. This tolerance is found to be necessary and proper in the public interest in order to prevent undue hardship.

(2) Concerning the tolerance provided in subparagraph (1) of this paragraph, the provisions of section 7(e)(2) of the Fair Labor Standards Act and § 778.216–778.224 of this title should be noted. Under these provisions, payments for occassional periods when no work is performed, due to vacations, and similar causes are excludable from the "regular rate" under the Fair Labor Standards Act. Such payments, therefore, are also excludable from the "basic rate" under the Contract Work Hours Standards Act.

(3) See § 5.8(c) providing a tolerance subdelegating authority to the heads of agencies to make appropriate adjustments in the assessment of liquidated damages totaling $100.00 or less under specified circumstances.

(4)(i) Time spent in an organized program of related, supplemental instruction by laborers or mechanics employed under bona fide apprenticeship programs may be excluded from working time if the criteria prescribed in subdivisions (ii) and (iii) of this subparagraph are met.

(ii) The apprentice comes within the definition contained in § 5.2(c).

(iii) The time in question does not involve productive work or performance of the apprentice's regular duties.

(d) *Variations.* (1) In order to prevent undue hardship, a workday consisting of a fixed and recurring 24-hour period commencing at the same time on each calendar day may be used in lieu of the calendar day in applying the daily overtime provisions of the Act to the employment of firefighters or fireguards, under the following conditions: (i) Where such employment is under a platoon system requiring such employees to remain at or within the confines of their post of duty in

excess of eight hours per day in a standby or on-call status; and (ii) if the use of such alternate 24-hour day has been agreed upon between the employer and such employees or their authorized representatives before performance of the work; and (iii) provided that, in determining the daily and the weekly overtime requirements of the Act in any particular workweek of any such employee whose established workweek begins at an hour of the calendar day different from the hour when such agreed 24-hour day commences, the hours worked in excess of 8 hours in any such 24-hour day shall be counted in the established workweek (of 168 hours commencing at the same time each week) in which such hours are actually worked.

(Sec. 105, 76 Stat. 359; 40 U.S.C. 331) [29 F.R. 104, Jan. 4, 1964, as amended at 29 F.R. 13464, Sept. 30, 1964, 30 F.R. 7819, June 17, 1965; 32 F.R. 1088, Jan. 31, 1967]

Subpart B—Interpretation of the Fringe Benefits of the Davis-Bacon Act

SOURCE: The provisions of this Subpart B appear at 29 F.R. 13465, Sept. 30, 1964, unless otherwise noted

Section 5.20 Scope and significance of this subpart.

The 1964 amendments (Pub. Law 88–349) to the Davis-Bacon Act require, among other things, that the prevailing wage determined for Federal and federally-assisted construction include: (a) The basic hourly rate of pay; and (b) the amount contributed by the contractor or subcontractor for certain fringe benefits (or the cost to them of such benefits). The purpose of this subpart is to explain the provisions of these amendments. This subpart makes available in one place official interpretations of the fringe benefits provisions of the Davis-Bacon Act. These interpretations will guide the Department of Labor in carrying out its responsibilities under these provisions. These interpretations are intended also for the guidance of contractors, their associations, laborers and mechanics and their organizations, and local, State and Federal agencies, who may be concerned with these provisions of the law. The interpretations contained in this subpart are authoritative and may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). The omission to discuss a particular problem in this subpart or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor with respect to such problem or to constitute an administrative interpretation, practice, or enforcement policy. Questions on matters not fully covered by this subpart may be referred to the Secretary for interpretation as provided in § 5.12.

Section 5.22 Effect of the Davis-Bacon fringe benefits provisions.

The Davis-Bacon Act and the prevailing wage provisions of the related statutes listed in § 1.1 of this subtitle confer upon the Secretary of Labor the authority to predetermine, as minimum wages, those wage rates found to be prevailing for corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the area in which the work is to be performed. See paragraphs (a) and (b) of § 1.2 of this subtitle. The fringe benefits amendments enlarge the scope of this authority by including certain bona fide fringe benefits within the meaning of the terms "wages", "scale of wages", "wage rates", "minimum wages" and "prevailing wages", as used in the Davis-Bacon Act.

Section 5.23 The statutory provisions.

The fringe benefits provisions of the 1964 amendments to the Davis-Bacon Act are, in part, as follows:

(b) As used in this Act the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) The basic hourly rate of pay; and

(2) The amount of—

(A) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide

fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits * * *.

Section 5.24 The basic hourly rate of pay.

"The basic hourly rate of pay" is that part of a laborer's or mechanic's wages which the Secretary of Labor would have found and included in wage determinations prior to the 1964 amendments. The Secretary of Labor is required to continue to make a separate finding of this portion of the wage. In general, this portion of the wage is the cash payment made directly to the laborer or mechanic. It does not include fringe benefits.

Section 5.25 Rate of contribution or cost for fringe benefits.

(a) Under the amendments, the Secretary is obligated to make a separate finding of the rate of contribution or cost of fringe benefits. Only the amount of contributions or costs for fringe benefits which meet the requirements of the act will be considered by the Secretary. These requirements are discussed in this subpart.

(b) The rate of contribution or cost is ordinarily an hourly rate, and will be reflected in the wage determination as such. In some cases, however, the contribution or cost for certain fringe benefits may be expressed in a formula or method of payment other than an hourly rate. In such cases, the Secretary may in his discretion express in the wage determination the rate of contribution or cost used in the formula or method or may convert it to an hourly rate of pay whenever he finds that such action would facilitate the administration of the Act. See § 5.5(a)1 (i) and (iii).

Section 5.26 "* * * contributions irrevocably made * * * to a trustee or to a third person".

Under the fringe benefits provisions (Section 1(b)(2) of the act) the amount of contributions for fringe benefits must be made to a trustee or to a third person irrevocably. The "third person" must be one who is not affiliated with the contractor or subcontractor. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that in no event will the contractor or subcontractor be able to recapture any of the contributions paid in or any way divert the funds to his own use or benefit. Although contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the contractor or subcontractor of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of making payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employees in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employee contributions, will be borne by the contractor or subcontractor. In such a case the return by the insurance company to the contractor or subcontractor of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the contractor or subcontractor, will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan. (See Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 963, 88th Cong., 2d Sess., p. 5.)

Section 5.27 "* * * fund, plan, or program".

The contributions for fringe benefits must be made pursuant to a fund, plan or program (sec. 1(b)(2)(A) of the act). The phrase "fund, plan, or program" is merely intended to recognize the various types of arrangements commonly used to provide fringe benefits through employer contributions. The phrase is identical with language contained in section 3(1) of the Welfare and Pension Plans Disclosure Act. In interpreting this phrase, the Secretary will be guided by the experience of the Department in administering the latter statute. (See Report of Senate Committee on Labor and Public Welfare, S. Rep. No. 963, 88th Cong., 2d Sess., p. 5.)

Section 5.28 Unfunded plans.

(a) The costs to a contractor or subcontractor which may be reasonably anticipated in providing benefits of the types described in the act pursuant to an enforceable commitment to carry out a financially responsible plan or program, are considered fringe benefits within the meaning of the act

(see 1(b)(2)(B) of the act). The legislative history suggests that these provisions were intended to permit the consideration of fringe benefits meeting, among others, these requirements and which are provided from the general assets of a contractor or subcontractor. (Report of the House Committee on Education and Labor, H. Rep. No. 308, 88th Cong., 1st Sess., p. 4.)

(b) No type of fringe benefit is eligible for consideration as a so-called unfunded plan unless:

(1) It could be reasonably anticipated to provide benefits described in the act;

(2) It represents a commitment that can be legally enforced;

(3) It is carried out under a financially responsible plan or program; and

(4) The plan or program providing the benefits has been communicated in writing to the laborers and mechanics affected. (See S. Rep. No. 963, p. 6.)

(c) It is in this manner that the act provides for the consideration of unfunded plans or programs in finding prevailing wages and in ascertaining compliance with the act. At the some time, however, there is protection against the use of this provision as a means of avoiding the act's requirements. The words "reasonably anticipated" are intended to require that any unfunded plan or program be able to withstand a test which can perhaps be best described as one of actuarial soundness. Moreover, as in the case of other fringe benefits payable under the act, an unfunded plan or program must be "bona fide" and not a mere simulation or sham for avoiding compliance with the act. (See S. Rep. No. 963, p. 6.) The legislative history suggests that in order to insure against the possibility that these provisions might be used to avoid compliance with the act, the committee contemplates that the Secretary of Labor in carrying out his responsibilities under Reorganization Plan No. 14 of 1950, may direct a contractor or subcontractor to set aside in an account assets which, under sound actuarial principles, will be sufficient to meet the future obligation under the plan. The preservation of this account for the purpose intended would, of course, also be essential. (S. Rep. No. 963, p. 6.) This is implemented by the contractual provisions required by § 5.5(a)(1)(iv).

Section 5.29 Specific fringe benefits.

(a) The act lists all types of fringe benefits which the Congress considered to be common in the construction industry as a whole. These include the following: medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, vacation and holiday pay, defrayment of costs of apprenticeship or other similar programs, or other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits.

(b) The legislative history indicates that it was not the intent of the Congress to impose specific standards relating to administration of fringe benefits. It was assumed that the majority of fringe benefits arrangements of this nature will be those which are administered in accordance with requirements of section 302(c)(5) of the National Labor Relations Act, as amended (S. Rep. No. 963, p. 5).

(c) The term "other bona fide fringe benefits" is the so-called "open end" provision. This was included so that new fringe benefits may be recognized by the Secretary as they become prevailing. It was pointed out that a particular fringe benefit need not be recognized beyond a particular area in order for the Secretary to find that it is prevailing in that area (S. Rep. No. 963, p. 6).

(d) The legislative reports indicate that, to insure against considering and giving credit to any and all fringe benefits, some of which might be illusory or not genuine, the qualification was included that such fringe benefits must be "bona fide" (H. Rep. No. 308, p. 4; S. Rep. No. 963, p. 6). No difficulty is anticipated in determining whether a particular fringe benefit is "bona fide" in the ordinary case where the benefits are those common in the construction industry and which are established under a usual fund, plan, or program. This would be typically the case of those fringe benefits listed in paragraph (a) of this section which are funded under a trust or insurance program. Contractors may take credit for contributions made under such conventional plans without requesting the appro-

val of the Secretary of Labor under § 5.5(a)(1)(iv).

(e) Where the plan is not of the conventional type described in the preceding paragraph, it will be necessary for the Secretary to examine the facts and circumstances to determine whether they are "bona fide" in accordance with requirements of the act. This is particularly true with respect to unfunded plans. Contractors or subcontractors seeking credit under the act for costs incurred for such plans must request specific permission from the Secretary under § 5.5(a)(1)(iv).

(f) The act excludes fringe benefits which a contractor or subcontractor is obligated to provide under other Federal, State, or local law. No credit may be taken under the act for the payments made for such benefits. For example, payment for workmen's compensation insurance under either a compulsory or elective State statute are not considered payments for fringe benefits under the Act. While each situation must be separately considered on its own merits, payments made for travel, subsistence or to industry promotion funds are not normally payments for fringe benefits under the Act. The omission in the Act of any express reference to these payments, which are common in the construction industry, suggests that these payments should not normally be regarded as bona fide fringe benefits under the Act.

Section 5.30 Types of wage determinations.

(a) when fringe benefits are prevailing for various classes of laborers and mechanics in the area of proposed construction, such benefits are includable in any Davis-Bacon wage determination. Illustrations, contained in paragraph (c) of this section, demonstrate some of the different types of wage determinations which may be made in such cases.

(b) Wage determinations of the Secretary of Labor under the act do not include fringe benefits for various classes of laborers and mechanics whenever such benefits do not prevail in the area of proposed construction. When this occurs the wage determination will contain only the basic hourly rates of pay, that is only the cash wages which are prevailing for the various classes of laborers and mechanics. An illustration of this situation is contained in paragraph (c) of this section.

(c) Illustrations:

Classes	Basic hourly rates	Fringe benefits payments				
		Health and welfare	Pensions	Vacations	Apprenticeship program	Others
Laborers	$3.25					
Carpenters	4.00	$0.15				
Painters	3.90	.15	$0.10	$0.20		
Electricians	4.85	.10	.15			
Plumbers	4.95	.15	.20		$0.05	
Ironworkers	4.60			.10		

(It should be noted this format is not necessarily in the exact form in which determinations will issue; it is for illustration only.)

Section 5.31 Meeting wage determination obligations.

(a) A contractor or subcontractor performing work subject to a Davis-Bacon wage determination may discharge his minimum wage obligations for the payment of both straight time wages and fringe benefits by paying in cash, making payments or incurring costs for "bona fide" fringe benefits of the types listed in the applicable wage determination or otherwise found prevailing by the Secretary of Labor, or by a combination thereof.

(b) A contractor or subcontractor may discharge his obligations for the payment of the basic hourly rates and the fringe benefits where both are contained in a wage determination applicable to his laborers or mechanics in the following ways:

(1) By paying not less than the basic hourly rate to the laborers or mechanics and by making the contributions for the fringe benefits in the wage determinations, as specified therein. For example, in the illustration contained in paragraph (c) of § 5.30, the obligations for "painters" will be met by the payment of a straight time hourly rate of not less than $3.90 and by contributing not less

than at the rate of 15 cents an hour for health and welfare benefits, 10 cents an hour for pensions, and 20 cents an hour for vacations; or

(2) By paying not less than the basic hourly rate to the laborers or mechanics and by making contributions for "bona fide" fringe benefits in a total amount not less than the total of the fringe benefits required by the wage determination. For example, the obligations for "painters" in the illustration in paragraph (c) of § 5.30 will be met by the payment of a straight time hourly rate of not less than $3.90 and by contributions of not less than a total of 45 cents an hour for "bona fide" fringe benefits; or

(3) By paying in cash directly to laborers or mechanics for the basic hourly rate and by making an additional cash payment in lieu of the required benefits. For example, where an employer does not make payments or incur costs for fringe benefits, he would meet his obligations for "painters" in the illustration in paragraph (c) of § 5.30, by paying directly to the painters a straight time hourly rate of not less than $4.35 ($3.90 basic hourly rate plus 45 cents for fringe benefits); or

(4) As stated in paragraph (a) of this section, the contractor or subcontractor may discharge his minimum wage obligations for the payment of straight time wages and fringe benefits by a combination of the methods illustrated in subparagraphs (1) thru (3) of this paragraph. Thus, for example, his obligations for "painters" may be met by an hourly rate, partly in cash and partly in payments or costs for fringe benefits which total not less than $4.35 ($3.90 basic hourly rate plus 45 cents for fringe benefits). The payments in such case may be $4.10 in cash and 25 cents in payments or costs in fringe benefits. Or, they may be $3.75 in cash and 60 cents in payments or costs for fringe benefits.

[30 F.R. 13136, Oct. 15, 1965]

Section 5.32 Overtime payments.

(a) The act excludes amounts paid by a contractor or subcontractor for fringe benefits in the computation of overtime under the Fair Labor Standards Act, the Contract Work Hours Standards Act, and the Walsh-Healey Public Contracts Act whenever the overtime provisions of any of these statutes apply concurrently with the Davis-Bacon Act or its related prevailing wage statutes. It is clear from the legislative history that in no event can the regular or basic rate upon which premium pay for overtime is calculated under the aforementioned Federal statutes be less than the amount determined by the Secretary of Labor as the basic hourly rate (i.e. cash rate) under section 1(b)(1) of the Davis-Bacon Act. (See S. Rep. No. 963, p. 7.) Contributions by employees are not excluded from the regular or basic rate upon which overtime is computed under these statutes; that is, an employee's regular or basic straight-time rate is computed on his earnings before any deductions are made for the employee's contributions to fringe benefits. The contractor's contributions or costs for fringe benefits may be excluded in computing such rate so long as the exclusions do not reduce the regular or basic rate below the basic hourly rate contained in the wage determination.

(b) The legislative report notes that the phrase "contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program" was added to the bill in Committee. This language in essence conforms to the overtime provisions of section 7(d)(4) of the Fair Labor Standards Act, as amended. The intent of the committee was to prevent any avoidance of overtime requirements under existing law. See H. Rep. No. 308, p. 5.

(c)(1) The act permits a contractor or subcontractor to pay a cash equivalent of any fringe benefits found prevailing by the Secretary of Labor. Such a cash equivalent would also be excludable in computing the regular or basic rate under the Federal overtime laws mentioned in paragraph (a). For example, the W construction contractor pays his laborers or mechanics $3.50 in cash under a wage determination of the Secretary of Labor which requires a basic hourly rate of $3.00 and a fringe benefit contribution of 50 cents. The contractor pays the 50 cents in cash because he made no payments and incurred no costs for fringe benefits. Overtime compensation in this case would be computed on a regular or basic rate of $3.00 an hour. However, in some cases a question of fact may be presented in ascertaining whether or not a cash payment made to laborers or mechanics is actually in lieu of a fringe benefit or is simply part of their straight time cash wage. In the latter situation, the cash payment is not excludable in computing overtime compensation. Consider the

examples set forth in subparagraphs (2) and (3) of this paragraph.

(2) The X construction contractor has for some time been paying $3.25 an hour to a mechanic as his basic cash wage plus 50 cents an hour as a contribution to a welfare and pension plan. The Secretary of Labor determines that a basic hourly rate of $3 an hour and a fringe benefit contribution of 50 cents are prevailing. The basic hourly rate or regular rate for overtime purposes would be $3.25, the rate actually paid as a basic cash wage for the employee of X, rather than the $3 rate determined as prevailing by the Secretary of Labor.

(3) Under the same prevailing wage determination, discussed in subparagraph 2 of this paragraph, the Y construction contractor who has been paying $3 an hour as his basic cash wage on which he has been computing overtime compensation reduces the cash wage to $2.75 an hour but computes his costs of benefits under section 1(b)(2)(B) as $1 an hour. In this example the regular or basic hourly rate would continue to be $3 an hour. See S. Rep. No. 963, p. 7.

NOTE:—In addition to the Acts listed in Section 5.1, these Regulations may be applicable to the following:

1. Cooperative Research Act Amendments of 1965 (79 Stat. 46).
2. Housing and Urban Development Act of 1965 (79 Stat. 492).
3. Public Works and Economic Development Act of 1965 (79 Stat. 575).
4. National Foundation on the Arts and Humanities Act of 1965 (79 Stat. 849).
5. Heart Disease, Cancer, and Stroke Amendments of 1965 (79 Stat. 929).
6. National Capital Transportation Act of 1965 (79 Stat. 664).
7. Vocational Rehabilitation Act Amendments of 1965 (79 Stat. 1284).
8. Medical Library Assistance Act of 1965 (79 Stat. 1061).
9. High Speed Ground Transportation Study (79 Stat. 984).
10. Water Quality Act of 1965 (79 Stat. 907).
11. Mental Retardation Facilities and Community Mental Health Centers Construction Act Amendments of 1965 (79 Stat. 430).
12. Solid Waste Disposal Act (79 Stat. 1000).
13. Veterans Nursing Home Care Act (78 Stat. 502).
14. United States Housing Act of 1937 as amended, (42 USC 1416).
15. Alaska Purchase Centennial Act (80 Stat. 83).
16. Model Secondary School for the Deaf Act (80 Stat. 1028).
17. Allied Health Professions Personnel Training Act of 1966 (80 Stat. 1224).
18. Demonstration Cities and Metropolitan Development Act of 1966 (80 Stat. 1259).
19. Vocational Rehabilitation Amendments of 1967 (81 Stat. 250).
20. Air Quality Act of 1967 (81 Stat. 485).
21. Elementary and Secondary Education Amendments of 1967 (81 Stat. 783).
22. Bilingual Education Act (title VII of the Elementary and Secondary Education Amendments of 1967) (81 Stat. 816).
23. National Visitor Center Facilities Act of 1968 (82 Stat. 43).
24. Juvenile Delinquency Prevention and Control Act of 1968 (PL 90-445).
25. Federal Aid Highway Act of 1968 (PL 90-495).
26. Housing and Urban Development Act of 1968 (PL 90-448).
27. Health Manpower Act of 1968 (PL 90-490).

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