



JAN 29 1992

MEMORANDUM NO. 161

TO: ALL CONTRACTING AGENCIES OF THE FEDERAL
GOVERNMENT AND THE DISTRICT OF COLUMBIA

John R. Fraser

FROM: JOHN R. FRASER
Acting Administrator

SUBJECT: Implementation of Revisions to Davis-Bacon
Regulations, 29 CFR Parts 1 and 5

On December 4, 1990, the Department of Labor (DOL) published in the Federal Register (55 FR 50148) its notice implementing revised final Davis-Bacon regulations, 29 CFR Parts 1 and 5 (attached hereto), governing the use of semi-skilled "helpers" on federal and federally-assisted construction contracts subject to the Davis-Bacon and Related Acts. The final rule, published on January 27, 1989 (54 FR 4234), became effective on February 4, 1991.

On January 2, 1991, All Agency Memorandum (AAM) No. 154 provided initial instructions for implementing the subject regulatory changes. However, Section 303 of the Dire Emergency Supplemental Appropriations Act prohibited the use of Department of Labor appropriated funds to implement or administer these "helper" regulations. The Solicitor of Labor has advised that implementation is now legally permissible. Therefore, the revised contract clauses set forth at section 5.5 of 29 CFR Part 5 should be incorporated in all contracts for which bids are solicited or negotiations concluded on or after the date of this memorandum.

The Department is currently evaluating the effect of these regulations on contracts awarded or solicited between February 4, 1991 and this date. Additional information on this matter, as well as more general information on the application of the "helper" regulations will be provided to you shortly.

If we can be of any assistance in answering questions, please contact Dr. Alan L. Moss or his staff, who can be reached at (202) 523-7531.

Attachment

DEPARTMENT OF LABOR

Employment Standards
Administration, Wage and Hour
Division

Office of the Secretary

29 CFR Parts 1 and 5

**Procedures for Predetermination of
Wage Rates; Labor Standards
Provisions Applicable to Contracts
Covering Federally Financed and
Assisted Construction and to Certain
Nonconstruction Contracts**

AGENCY: Wage and Hour Division,
Employment Standards Administration,
Labor.

ACTION: Establishment of effective date.

SUMMARY: This document provides the effective date for amended Regulations, 29 CFR parts 1 and 5, governing the use of semi-skilled "helpers" on federally-financed and assisted construction contracts subject to the Davis-Bacon and Related Acts (DBRA). This final rule was previously published in the *Federal Register* (54 FR 4234) on January 27, 1989. The implementation of an earlier version of this rule was enjoined by the U.S. District Court for the District of Columbia on July 22, 1982. Following promulgation of the revised final regulation, that injunction was vacated on September 24, 1990.

EFFECTIVE DATE: February 4, 1991.

FOR FURTHER INFORMATION CONTACT:
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200 Constitution Avenue, NW.,
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523-8305. (This is not a toll-free
number.)

SUPPLEMENTARY INFORMATION

Background

The Department of Labor (DOL) attempted to implement helper rules in May 1982. (See 47 FR 23644, 23658 (May 28, 1982); 47 FR 32070 (July 20, 1982).) Among other provisions, lower paid helpers would have been allowed on DBRA projects under a broad definition of duties and in a maximum ratio of two helpers for three journeymen whenever the helper classification was "identifiable" in an area. The rules were enjoined by the U.S. District Court for the District of Columbia in a lawsuit brought by the Building and Construction Trades Department, AFL-CIO, and a number of individual unions (*Building and Construction Trades Department, AFL-CIO, et al. v.*

Donovan, et al., 543 F. Supp. 1282, 553 F. Supp. 352).

On appeal, the Court of Appeals for the District of Columbia Circuit upheld DOL's authority to allow an expanded use of helpers and approved the regulatory definition of a helper's duties (*Building and Construction Trades Department, AFL-CIO, et al. v. Donovan, et al.*, 712 F.2d 611). However, that ruling required that the regulations be modified to require that DOL first find the use of a particular helper classification prevailing in an area (rather than identifiable) before it may be used. The court concluded that allowing a lower paid helper classification to be used on DBRA work when that classification was only "identifiable" would result in payment of less than prevailing wages for some work, which is prohibited by the DBRA. The court did not rule on the remaining helper provisions. *Certiorari* was denied by the Supreme Court (464 U.S. 1069).

The District Court subsequently issued an order which lifted the injunction on the definition of helper but continued the injunction against all the other helper provisions, and stated that DOL could "submit to this court reissued regulations governing the use of helpers, and if these regulations conform to the decision of the court of appeals, they will be approved." (*Building and Construction Trades Department, AFL-CIO, et al. v. Donovan, et al.*, 102 CCH Labor Cases para. 34,648 (December 21, 1984)).

DOL reexamined the enjoined provisions to the extent required by the court rulings and on August 19, 1987, issued a new proposal with necessary revisions (52 FR 31366).

Comments were invited on several alternatives for determining if the use of a helper classification prevailed.

The Department published a final rule on January 27, 1989 (54 FR 4234), stating therein that once the injunction against implementation of some provisions was lifted, the Department would publish a notice providing for an effective date 60 days thereafter. The Department submitted the revised rules to the District Court in accordance with the court's decision of December 21, 1984. The court vacated the injunction on September 24, 1990. (*Building and Construction Trades Department, AFL-CIO, et al. v. Dole, et al.*, Civil Action No. 82-1631).

Summary of Rule

To determine whether a helper classification prevails, the Department has adopted a scheme patterned after the codified regulatory standards for determining the prevailing wage for a

given classification. Section 1.7(d) provides a decision that proceeds in two steps:

(1) If the prevailing journeylevel wage is set by the "majority rule" (29 CFR 1.2(a)(1); more than 50 percent of the journeymen are paid the same rate), then the practice followed by those contractors whose rates prevail for the journeymen is also deemed the prevailing practice for determining whether a helper classification prevails, or,

(2) If no majority journeylevel rate exists and the prevailing wage is set by the "weighted average rule" (29 CFR 1.2(a)(1); the average of the wages paid to the journeymen, weighted by the total journeymen in the classification), then the total number of workers in the classification employed by contractors using helpers (journeymen plus apprentices, trainees and helpers) will be compared to the total number of workers in the classification employed by contractors not using helpers (journeymen plus apprentices and trainees); the practice covering the larger number of workers will decide whether a helper classification prevails.

The notice of proposed rulemaking made no changes to the helper definition at § 5.2(n)(4) promulgated in 1982. It was repeated in the preamble of the 1987 proposal for informational purposes only, and is implemented herein. The rule defines a helper as a semi-skilled worker who works under the direction of and assists a journeyman. Helpers are able to perform a broad range of duties under a journeyman's supervision; the duties vary according to area practice.

Section 5.5(a)(1)(ii)(A) sets forth special criteria under which helper classifications and wage rates can be "conformed" (i.e., added after the wage determination has been issued) if a particular wage determination does not contain a helper classification. This section provides, as did the rule promulgated in 1982, that helper rates can be conformed without regard to the longstanding requirement, applicable to all other conformance actions, that the work of a proposed classification to be conformed not be performed by another classification already listed in the wage determination. In addition, a provision was added as a result of the court of appeals decision to require that helper classifications may be conformed only where they prevail in the area covered by the wage determination.

The enjoined 1982 regulations contained a numerical limitation on the use of helpers: Two helpers for every three journeymen, or not more than 40 percent of the total number of helpers

and journeymen, in the contractors' work force on the job site. (A one-helper-to-five-journeymen ratio was originally proposed, but was raised to 2:3 in the final rule in response to public comments that 1:5 was too restrictive and would not reflect the actual number of helpers used in the industry.)

Helpers employed in excess of this ratio would be required to be paid the applicable journeymen (or laborer's where appropriate) wage rate for the work actually performed. To insure that this ratio does not disrupt existing established local practices in areas where DBRA wage determinations currently contained helper classifications without any limitation on the number permitted, DOL will consider requests for variances from the ratio limitation prior to bid opening on a contract, if supported by a showing that the DBRA wage determination for the type of construction in effect in the area before the effective date of the final helper regulations contained a helper classification, and that there was a practice in the area of utilizing such helpers in the classification on DBRA projects in excess of the two-to-three ratio.

The ratio and variance provisions were not open for additional comment in the 1987 proposed rulemaking and are implemented herein.

Paperwork Reduction Act

The information collection requirements contained in § 5.5(a)(1)(ii) of part 5 were previously approved by the Office of Management and Budget under the Paperwork Reduction Act and assigned OMB Control number 1215-0140.

Dates of Applicability

This regulation shall be effective February 4, 1991.

The revisions to § 1.7(d) of part 1 shall be applicable only as to wage determinations issued based on wage surveys completed on or after the effective date of this revised rule. A wage survey will be deemed to be completed as of the cut-off date established for submission of wage data.

The revisions to §§ 5.2 and 5.5 of part 5 shall be applicable only as to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after the effective date of this revised rule. None of the revisions herein shall be applicable to any contract entered into prior to such date.

This document was prepared under the direction and control of Samuel D. Walker, Acting Administrator, Wage and Hour Division, Employment

Standards Administration, U.S. Department of Labor.

List of Subjects

29 CFR Part 1

Administrative practice and procedures, Government contracts, Labor, Minimum wages, Wages.

29 CFR Part 5

Administrative practice and procedures, Government contracts, Labor, Minimum wages, Penalties, Reporting and recordkeeping requirements, Wages.

Signed at Washington, DC on this 28th day of November, 1990.

Roderick A. DeArment,
Acting Secretary of Labor.

William C. Brooks,
Assistant Secretary for Employment Standards.

Samuel D. Walker,
Acting Administrator, Wage and Hour Division.

Accordingly, an effective date of February 4, 1991 is established for 29 CFR parts 1 and 5, which were published in the Federal Register of January 27, 1989 (54 FR 4234).

For the convenience of the public, the rules are hereby republished as set forth below:

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

2. The authority citation for part 1 continues to read as follows:

Authority: 5 U.S.C. 301; R.S. 161.64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 29 U.S.C. 259; 40 U.S.C. 276a-276a-7; 40 U.S.C. 276c; and the laws listed in Appendix A of this Part.

2. Section 1.7 is amended by adding a new paragraph (d) to read as follows:

§ 1.7 Scope of consideration.

(d) The use of *helpers, apprentices* and *trainees* is permitted in accordance with part 5 of this subtitle. Wage rates for semi-skilled classifications of helpers will be issued when the classifications are prevailing in the area. In determining whether use of a particular helper classification prevails in the area, the Administrator will follow the criteria set forth in paragraphs (d)(1) and (d)(2) of this section.

(1) If the prevailing wage for a particular journeyman classification is a wage that is paid to the majority of the journeymen in the classification as defined in § 1.2(a)(1) of this part, then the practice followed by those

contractors whose rates are adopted as prevailing for the journeyman shall also be deemed the prevailing practice in determining whether to issue a helper classification. Any ambiguity with regard to such practice, will be resolved by following the rule in paragraph (d)(2) of this section with respect to those contractors.

(2) If the prevailing wage for a particular journeyman classification is the average of the wages paid to the journeymen, weighted by the total number of journeymen in the classification as defined in § 1.2(a)(1) of this part, then the total number of workers in the classification employed by contractors utilizing helpers (journeymen plus apprentices, trainees, and helpers as defined in § 5.2(n)(4) of this chapter) on reported projects will be compared to the total number of workers in the classification employed by contractors not utilizing helpers (journeymen plus apprentices and trainees as defined in § 5.2(n)(4) of this chapter), and the practice which covers the majority of such workers shall be deemed the prevailing practice in determining whether to issue a helper classification.

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

Subpart A—Davis-Bacon and Related Acts Provisions and Procedures

3. The authority citation for part 5 continues to read as follows:

Authority: 40 U.S.C. 276a-276a-7; 40 U.S.C. 276c; 40 U.S.C. 327-332; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; 29 U.S.C. 259; and the statutes listed in § 5.1(a) of this part.

4. Section 5.2 is amended by revising paragraph (n) introductory text and by adding paragraph (n)(4) to read as follows:

§ 5.2 Definitions.

(n) The terms apprentice, trainee, and helper are defined as follows:

(4) A *helper* is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and

supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials; tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

5. Section 5.5 is amended by revising paragraph (a)(1)(ii)(A) and adding a new paragraph (a)(4)(iv), to read as follows:

§ 5.5 Contract provisions and related matters.

- (a) * * *
(1) * * *

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the

contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(1) Except with respect to helpers as defined in 29 CFR 5.2(n)(4), the work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and

(4) With respect to helpers as defined in 29 CFR 5.2(n)(4), such a classification prevails in the area in which the work is performed.

- (4) * * *

(iv) Helpers. Helpers will be permitted to work on a project if the helper classification is specified on an

applicable wage determination or is approved pursuant to the conformance procedure set forth in § 5.5(a)(1)(ii). The allowable ratio of helpers to journeymen employed by the contractor or subcontractor on the job site shall not be greater than two helpers for every three journeymen (in other words, not more than 40 percent of the total number of journeymen and helpers in each contractor's or in each subcontractor's own work force employed on the job site). Any worker listed on a payroll at a helper wage rate, who is not a helper as defined in 29 CFR 5.2(n)(4), shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any helper performing work on the job site in excess of the ratio permitted shall be paid not less than the applicable journeyman's (or laborer's, where appropriate) wage rate on the wage determination for the work actually performed.

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