

# PROMOTING THE ACCURACY AND ACCOUNTABILITY OF THE DAVIS-BACON ACT

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## HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION

AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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## **PROMOTING THE ACCURACY AND ACCOUNTABILITY OF THE DAVIS-BACON ACT**

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**Tuesday, June 18, 2013  
U.S. House of Representatives  
Subcommittee on Workforce Protections  
Committee on Education and the Workforce  
Washington, DC**

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The subcommittee met, pursuant to call, at 10:04 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Rokita, Hudson, Courtney, Andrews, Bishop, Fudge, and Bonamici.

Staff present: Katherine Bathgate, Deputy Press Secretary; Casey Buboltz, Coalitions and Member Services Coordinator; Owen Caine, Legislative Assistant; Molly Conway, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Brian Newell, Deputy Communications Director; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Aaron Albright, Minority Communications Director for Labor; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Jody Calemine, Minority Staff Director; John D'Elia, Minority Labor Policy Associate; Eunice Ikene, Minority Staff Assistant; Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director; Michael Zola, Minority Deputy Staff Director; and Mark Zuckerman, Minority Senior Economic Advisor.

Chairman WALBERG. A quorum being present, the subcommittee will come to order.

Enacted in 1931, the Davis-Bacon Act requires the payment of local prevailing wages to workers on federal construction projects. Determining local prevailing wage rates is a complicated process to say the least—one that involves the Department of Labor's Wage and Hour Division conducting surveys to collect wage and benefit information for various job classifications in a given geographic location.

Unfortunately, independent reports reveal significant challenges surrounding implementation of the Davis-Bacon Act. Most recently, a 2011 Government Accountability Office report requested by Chairman Kline revealed widespread problems with the accuracy, quality, bias, and timeliness of the surveys used to determine wage rates.

For example, of the surveys reviewed by GAO, roughly 25 percent of the final rates were based on the wages of fewer than seven workers. Forty-six percent of the prevailing wages for nonunion workers were based on wages reported more than a decade ago.

As the GAO concluded, and I quote—“If the resultant prevailing wage rates are too high they potentially cost the federal government and taxpayers more for publicly-funded construction projects or, if too low, they cost workers in compensation.

Studies from years past have all echoed similar concerns. Each day problems plaguing administration of the law go unresolved is another day workers are shortchanged and taxpayers are overcharged.

Despite these challenges, the current administration has done nothing to improve implementation of the Davis-Bacon Act. It appears they have accepted a broken and costly enforcement regime as the price taxpayers, contractors, and workers must pay for federal construction projects. Rather than make even modest improvements, the Obama administration has actually exacerbated the problem by expanding the scope of the law beyond the original intent.

It began in the early days of the administration with enactment of the failed stimulus law. According to GAO, the President’s 2009 stimulus plan applied Davis-Bacon to 40 new programs. As a result, projects were delayed as states grappled with the law’s time-consuming administrative burdens.

This was not the first time the department expanded the scope of the law. More recently, the Department of Labor upended decades of policy to impose Davis-Bacon requirements on a new group of workers. Since the Kennedy administration, land surveyors have been exempt from the law because their work is, and I quote—“preconstruction” activity. But last March the department reversed this policy by reclassifying surveyors as laborers and mechanics.

This dramatic shift in policy came without notice or an opportunity for public comment. To make matters worse, the department has failed to make a wage rate available to survey crews. The confusion and uncertainty borne by this bureaucratic overreach will affect workers and construction projects across the country.

Finally, in 2011 the Wage and Hour Division determined the Davis-Bacon Act applies to the CityCenter construction project underway in our nation’s capital—right here. While the law does apply to construction contracts inside Washington, D.C., the CityCenter project is being built with private dollars on land leased to a private consortium for the next 99 years.

If allowed to stand, this radical decision will have a profound effect on countless construction projects. As the Wall Street Journal recently editorialized, the department’s actions would make, and I quote—“every private development—a public work” subject to the Davis-Bacon Act.

At a time when millions are struggling to find work, federal debt is reaching historic levels, and economic growth remains slow. The American people deserve more than a flawed law that intrudes further and further into workplaces. Ideas to enhance the accuracy and accountability of the Davis-Bacon Act have been put forward. Proposals to derive prevailing wage rates using Bureau of Labor

Statistics data and increasing the monetary threshold on federal contracts are both intended to enhance the accuracy and timeliness of the law's administration and enforcement.

I look forward to hearing from our witnesses today about ways we can help ensure appropriate implementation of the law while also serving the best interests of workers, employers, and taxpayers.

I would now like to yield to the distinguished ranking member of our subcommittee, Mr. Courtney, for his opening remarks.

[The statement of Chairman Walberg follows:]

**Prepared Statement of Hon. Tim Walberg, Chairman,  
Subcommittee on Workforce Protections**

Enacted in 1931, the Davis-Bacon Act requires the payment of local prevailing wages to workers on federal construction projects. Determining local prevailing wage rates is a complicated process, one that involves the Department of Labor's Wage and Hour Division conducting surveys to collect wage and benefit information for various job classifications in a given geographic location.

Unfortunately, independent reports reveal significant challenges surrounding implementation of the Davis-Bacon Act. Most recently, a 2011 Government Accountability Office report requested by Chairman Kline revealed widespread problems with the accuracy, quality, bias, and timeliness of the surveys used to determine wage rates.

For example, of the surveys reviewed by GAO, roughly 25 percent of the final rates were based on the wages of fewer than seven workers. Forty-six percent of the prevailing wages for non-union workers were based on wages reported more than a decade ago. As the GAO concluded, "If the resultant prevailing wage rates are too high, they potentially cost the federal government and taxpayers more for publicly funded construction projects or, if too low, they cost workers in compensation."

Studies from years past have all echoed similar concerns. Each day problems plaguing administration of the law go unresolved is another day workers are short-changed and taxpayers are overcharged.

Despite these challenges, the current administration has done nothing to improve implementation of the Davis-Bacon Act. It appears they've accepted a broken and costly enforcement regime as the price taxpayers, contractors, and workers must pay for federal construction projects. Rather than make even modest improvements, the Obama administration has actually exacerbated the problem by expanding the scope of the law beyond its original intent.

It began in the early days of the administration with enactment of the failed stimulus law. According to GAO, the president's 2009 stimulus plan applied Davis-Bacon to 40 new programs. As a result, projects were delayed as states grappled with the law's time consuming administrative burdens.

This was not the first time the department expanded the scope of the law. More recently, the Department of Labor upended decades of policy to impose Davis-Bacon requirements on a new group of workers. Since the Kennedy administration, land surveyors have been exempt from the law because their work is a "pre-construction" activity. But last March, the department reversed this policy by reclassifying surveyors as laborers and mechanics.

This dramatic shift in policy came without notice or an opportunity for public comment. To make matters worse, the department has failed to make a wage rate available to survey crews. The confusion and uncertainty borne by this bureaucratic overreach will affect workers and construction projects across the country.

Finally, in 2011 the Wage and Hour Division determined the Davis-Bacon Act applies to the CityCenter construction project underway in our nation's capital. While the law does apply to construction contracts inside Washington D.C., the CityCenter project is being built with private dollars on land leased to a private consortium for the next 99 years. If allowed to stand, this radical decision will have a profound effect on countless construction projects. As the Wall Street Journal recently editorialized, the department's action would make "every private development \* \* \* a public work" subject to the Davis-Bacon Act.

At a time when millions are struggling to find work, federal debt is reaching historic levels, and economic growth remains slow, the American people deserve more than a flawed law that intrudes further and further into workplaces.

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I look forward to hearing from our witnesses today about ways we can help ensure appropriate implementation of the law while also serving the best interests of workers, employers, and taxpayers. I'd now like to yield to the ranking member, Mr. Courtney, for his opening remarks.

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Mr. COURTNEY. Thank you, Mr. Chairman.

And thank you to the witnesses for being here this morning.

For the last eight decades the Davis-Bacon Act has provided millions of hardworking Americans fair wages for their hard work. During all these years, Davis-Bacon Act has done exactly what it was intended to do: to prevent federal projects from driving down local wage rates.

And I actually just want to parenthetically add that just a few days ago the Amtrak bridge in Niantic, Connecticut, the largest stimulus project Amtrak undertook—over \$100 million—is now allowing trains to move at high speeds through that coastal stretch between Washington and Boston. Before that bridge was repaired through the stimulus act, trains actually had to slow their speeds down to 40 miles per hour because it was a 100-year-old bridge. It was also a bridge which impeded boat traffic coming into the Niantic River from the Long Island Sound, damaging the maritime economy.

This is a stimulus project which, for the record—and there are, frankly, many, many more which I know some of the members could attest to—actually did work, in terms of upgrading long overdue infrastructure needs, employing over a 3-year period almost 400 construction workers, all within the ages of the Davis-Bacon. By the way, it was a nonunion project, so Davis-Bacon was there to make sure that those workers who, again, were getting a federally-funded job were getting adequate wages and benefits, which is exactly what the law was intended to do when it was passed many decades ago.

At its core, the Davis-Bacon Act enabled local contractors to compete for local projects without being underbid and undercut by contractors who import workforces from outside the local community. The Davis-Bacon Act is about local jobs and fair wages, and that is why the Davis-Bacon Act continues to enjoy strong bipartisan support.

Look at the chart to my right. It shows that time and time again in the last couple of years efforts to repeal the Davis-Bacon Act have met with crushing defeat. That is why it is surprising that we are even having this hearing today rather than focusing on the many serious economic challenges that workers are facing today.

And again, almost every one of those votes has occurred with a Republican majority in the House. Again, a bipartisan, strong majority has rejected efforts to weaken and repeal the Davis-Bacon Act time and time again even just over the last couple of years.

Millions of workers receive wages today that are just flat out insufficient to support a family. The minimum wage has been frozen at \$7.25 per hour for 4 years. Low-wage workers and families are falling further behind.



You would think that there would be bipartisan interest in rewarding hard work. Wage disparity, low wages for hardworking Americans is a real problem with far-reaching consequences for our economy.

However, the committee's majority refuses to take up H.R. 1010, the Fair Minimum Wage Act of 2013, which allows workers to earn a fair wage and contribute more to the economy.

In addition, women continue to fight for wage equality, making only 77 cents for every dollar paid to men for the same work. That is a real problem that we should be trying to solve together.

Wage disparity is demeaning to women and needs urgent attention by this committee. We have pressed for passage of H.R. 377, the Paycheck Fairness Act, but the subcommittee refuses to take it up or even give the issue a respectful public hearing.

Also today four in 10 workers don't have access to any paid leave on their job. Democrats have introduced H.R. 1286, the Healthy Families Act, which would provide a minimum number of sick days for workers to recover and seek medical attention for illnesses. That is a real and urgent problem for millions of families every day but this committee apparently is not interested.

Finally, as we all know, millions of Americans are out of work and too many have been unemployed for long stretches of time. That is a real problem that we should be tackling together with key investments in our nation's infrastructure, education, and job training. Instead, billions of dollars in education and training cuts supported by the majority threaten to move us backwards in our efforts to stay economically competitive and expand economic opportunities.

On the issue before us today, Davis-Bacon wages, my colleagues on the other side of the aisle propose to shift responsibility for collecting Davis-Bacon wage data from the Department of Labor's Wage and Hours Division to the Bureau of Labor Statistics. That would represent a step backward for the program as the data collected by these two divisions is completely different. I look forward to the witnesses' testimony today, which, I think, will underscore that fact.

For example, BLS doesn't collect fringe benefits as part of its wage survey, which is required to set Davis-Bacon rates. It doesn't collect wage data by county, but instead, by larger metropolitan areas, undermining the concept of local wage rates.

BLS focuses on work for certain, quote—"establishments," which may or may not be headquartered in the county where the work is actually being performed. Wage and Hour wages are based on work performed at projects in the local area. BLS has one category of wages for the entire construction industry, while the Wage and Hour survey recognizes the different skill craft of various workers in the industry.

This proposal is simply a strategy to scramble and disrupt Davis-Bacon wages and protections, not a sensible or serious reform. I hope today that we will have the opportunity to talk to the commissioner and other witnesses about real problems facing today's workforce and to acknowledge that Davis-Bacon is actually helping our nation and workforce to remain strong.

And with that I yield back, Mr. Chairman.

[The statement of Mr. Courtney follows:]

**Prepared Statement of Hon. Joe Courtney, Ranking Member,  
Subcommittee on Workforce Protections**

I want to thank all of our witnesses for testifying today.

For the last eight decades, the Davis-Bacon Act has provided millions of hard working Americans fair wages for their hard work. During all these years, the Davis-Bacon Act has done exactly what it was intended to do—prevent federal projects from driving down local wage rates.

At its core, the Davis-Bacon Act enables local contractors to compete for local projects without being underbid and undercut by contractors who import workforces from outside the local community. The Davis-Bacon Act is about local jobs and fair wages—and this is why the Davis-Bacon Act continues to enjoy strong bipartisan support.

Look at the chart to my right. It shows that time and time again in the last couple of years, efforts to repeal the Davis-Bacon Act have met with crushing defeat. That is why it is surprising that we are even having this hearing today, rather than focusing on the many serious economic challenges workers are facing today.

Millions of workers receive wages today that are just flat out insufficient to support a family. The minimum wage has been frozen at \$7.25 per hour for four years. Low wage workers and families are falling further behind. You would think there would be bipartisan interest in rewarding hard work. Wage disparity, low wages for hard working Americans is real problem with far-reaching consequences for our economy. However, the committee's majority refuses to take up H.R. 1010, The Fair Minimum Wage Act of 2013, which allows workers to earn a fair wage and contribute more to the economy.

In addition, women continue to fight for wage equality, making only 77 cents for every dollar paid to men for the same work. That's a real problem we should be trying to solve together. Wage disparity is demeaning to women, and needs urgent attention by this Committee. We have pressed for passage of H.R. 377, the Paycheck Fairness Act, but this Subcommittee refuses to take it up or even give the issue a respectful public hearing.

Also, today, 4 in 10 workers don't have access to any paid leave on their job. Democrats have introduced H.R. 1286, the Healthy Families Act, which would provide a minimum number of sick days for workers to recover and seek medical attention for illnesses. That's a real and urgent problem for millions of families every day, but this Committee is not interested.

Finally, as we all know, millions of Americans are out of work, and too many have been unemployed for long stretches of time. That's real problem that we could be tackling together with key investments in our nation's infrastructure, education and job training. Instead, billions of dollars in education and training cuts supported by the Majority threaten to move us backwards in our efforts to stay economically competitive and expand economic opportunities.

On the issue before us today—Davis-Bacon wages—my colleagues on the other side of the aisle propose to shift responsibility for collecting Davis-Bacon wage data from the Department of Labor's Wage and Hour Division to the Bureau of Labor Statistics. That would represent a step backward for the program as the data collected by these two divisions is completely different.

For example, BLS doesn't collect fringe benefits as part of its wage survey—which is required to set Davis-Bacon rates. It doesn't collect wage data by county, but instead by larger metropolitan areas, undermining the concept of local wage rates. BLS focuses on work for certain "establishments" which may or not be headquartered in the county where the work is actually being performed. Wage and Hour wages are based on work performed at projects in the local area. BLS has one category of wages for the entire construction industry, where the Wage and Hour survey recognizes the different skill craft of various workers in the industry.

This proposal is simply is a strategy to scramble and disrupt Davis-Bacon wages and protections, not a sensible or serious reform.

I hope today we have the opportunity to talk to the Commissioner and other witnesses about real problems facing today's workforce, and to acknowledge that Davis-Bacon is helping keep our nation and workforce strong.

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Chairman WALBERG. I thank the gentleman.

And we look forward to improving on the record of dealing with Davis-Bacon. I think education opportunities, including hearings

like this, will expand a greater understanding, and I think the ranking member and I would both agree that we want more people working, want more success in the workplace, more remuneration for solid work given, and a growing economy. It is just how we get there that we have some differences, but I think we are moving with the same objective.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous materials referenced during the hearing to be submitted in the official record.

It is now my pleasure to introduce our distinguished witnesses.

We certainly appreciate you being here and taking your time and adding your expertise and experience to our deliberations.

First, we have the Honorable Erica Groshen, who is the commissioner of the Bureau of Labor Statistics here in Washington, D.C.

Welcome.

Mr. Curtis Sumner is the executive director at the national Society of Professional Surveyors in Frederick, Maryland.

Thanks for being here.

Mr. Ross Eisenbrey, very familiar to this committee and this subcommittee, is the vice president at Economic Policy Institute in Washington, D.C., and, I must add, a distinguished graduate of University of Michigan.

Mr. Maury Baskin, also familiar to this committee, is a shareholder at Littler Mendelson law firm in Washington, D.C.

Thank you for being here with us.

Before I recognize each of you to provide your testimony I just would do my due diligence in indicating the lights are there. You understand the process of the green light to go, yellow light to start drawing to conclusion, and red light wrap up as quickly as you possibly can. The same will be true for our committee members as we ask our 5 minutes of questions.

And so let me recognize the Honorable Erica Groshen for your opening statement.

**STATEMENT OF HON. ERICA GROSHEN, COMMISSIONER,  
BUREAU OF LABOR STATISTICS**

Ms. GROSHEN. Thank you for this opportunity to describe the occupational wage data available in the Bureau of Labor Statistics Occupational Employment Statistics program.

Let me begin by describing the role of the BLS. Like all federal statistical agencies, we execute our statistical mission with independence, serving our users by providing products and services that are accurate, objective, relevant, timely, and accessible. We strive to adhere to the principles and the practices for federal statistical agencies published by the National Research Council, including: to protect our impartiality and independence we take no role in regulation, law enforcement, and rulemaking, and we do not conduct policy analysis ourselves.

Regarding today's topics, then, we have no role in setting prevailing wages nor in determining what data are appropriate for that purpose. Also, in keeping with principles and practices for fed-

eral statistical agencies, we are happy to share information about our data so that you and others can make appropriate decisions.

Because the BLS data are used for so many purposes, we generally don't design them for particular applications, such as the Davis-Bacon wage determinations. Of course, agencies charged with carrying out policy and regulatory functions sometimes need particular representations of our data, and in such cases, resources permitting, we may prepare special tabulations for an agency.

So, that aside, now what about the OES? What is it?

The OES publishes data for 820 occupations and by industry for the nation and also for 642 areas that span the entire country, including each state, D.C., Guam, Puerto Rico, the Virgin Islands, metropolitan areas, and non-metro areas. So for each area and occupation, for workers in both the public and the private sectors, OES provides employment and wage estimates, including hourly and annual mean and median wages.

By industry, we publish employment and wages by occupation on a national basis only, both for broad industry sectors and for more detailed industries. So, for example, we have data for the job "carpenters" in the construction sector as a whole and for the detailed construction industry, "residential building construction," to give you an idea of the specificity. We also provide state and local area estimates by industry to the states so that they can release them at their discretion.

So let me turn to data uses. Like all BLS products, OES data are used in many ways. Within the BLS, OES data are inputs to our occupational employment projections, which are used by millions to make their career decisions and are part of the information given to the President's pay agent for setting locality pay for federal workers.

We provide special tabulations of these data to the Department of Labor's Employment and Training Administration for its Occupational Information, the O\*NET Network program, and other federal agencies, including the National Science Foundation and the Bureau of Economic Analysis.

Now, you may be interested in how we actually conduct the survey. We collect data from 1.2 million establishments that together employ nearly 60 percent of all U.S. wage and salary workers. We select the employers from a business list derived from unemployment insurance records and participation in the survey is voluntary.

Establishments are surveyed once every 3 years with a response rate of about 75 percent. Using statistical procedures, then, we make estimates for a single year and we publish those about 10 months after the reference date.

So, like all statistical products, the OES has certain limitations that users need to understand, and let me list a few. While we do provide estimates for some very small occupations at detailed levels of geography, others must be suppressed because of large sampling errors. We don't gather information on all possible attributes of interest—no data on skill requirements or licenses, we don't produce data for all possible geographic breakdowns including counties.

We collect our data by establishments, not by worksites. We don't measure total compensation—no overtime pay or benefits. And we don't have information on part-time versus full-time jobs.

So to sum up, the OES program produces wage and employment data at great occupational and geographic detail and by industry. These are used for many purposes, some of which are based on special tabulations.

However, the BLS has no role in setting prevailing wages nor in determining what data are—should be used for that purpose.

So I thank you for the opportunity to testify and I am happy to answer any questions you have.

[The statement of Ms. Groshen follows:]

**Prepared Statement of Hon. Erica L. Groshen, Commissioner,  
Bureau of Labor Statistics, U.S. Department of Labor**

Thank you for the opportunity to provide this overview of the occupational wage data available from the Bureau of Labor Statistics' Occupational Employment Statistics or OES survey.

*Role of the Bureau of Labor Statistics*

Let me first discuss the role of the Bureau of Labor Statistics. Like all Federal statistical agencies, BLS executes its mission with independence, serving its diverse user communities by providing products and services that are accurate, objective, relevant, timely, and accessible. We adhere to the principles and practices for federal statistical agencies published by the Committee on National Statistics of the National Research Council. To protect our impartiality and independence, we take no role in regulation, law enforcement, and policy making and do not conduct policy analysis ourselves.<sup>1</sup> Regarding today's topic, BLS has no role in establishing prevailing wages or determining what data are appropriate for that purpose.

Also consistent with the principles and practices for statistical agencies, we are very happy to share with you information about our data so that you and other policymakers can make appropriate decisions. BLS data are used for a wide range of purposes; they generally are not designed for any one particular program application such as Davis-Bacon wage determinations. Of course, agencies charged with carrying out policy and regulatory functions sometimes request special presentations of our data. In these instances, resources permitting, we may prepare special data tabulations based on specifications provided by the requesting agency.

What is collected in the Occupational Employment Statistics (OES) survey?

Let me turn now to describing the OES, which is the only federal statistical survey designed with the goal of providing detailed wage and employment data for every occupation for a set of geographic areas that span the entire country. I will cover what we collect and then how the data are used, how we conduct the survey, and the limitations of the data.

In all of our programs, we use occupational, industry and geographic definitions that allow our users to compare and combine data from different sources. To ensure such comparability for the OES, we adhere to the following standard classifications established by the Office of Management and Budget:

- the Standard Occupational Classification System (SOC), which defines occupations, the job that someone holds
- the North American Industry Classification System (NAICS), which defines industries, the type of business someone works for
- Metropolitan Statistical Areas (MSAs) and metropolitan divisions, which define labor market areas

I will reference these throughout my remarks as occupations, industries, and metropolitan areas.

The OES program publishes data for 820 occupations for the nation and for areas that cover the entire geography of the country. Data are available for 642 areas, including each state, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, 414 metropolitan areas, and 174 non-metropolitan areas.

<sup>1</sup>National Research Council. (2013). Principles and Practices for a Federal Statistical Agency, Fifth Edition. Committee on National Statistics. Constance F. Citro and Miron L. Straf, Editors. Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. (p. 14)

For each area and occupation, OES provides employment and several wage estimates, including hourly and annual mean and median wages. These estimates include workers in both the private and public sectors.

BLS publishes nationwide OES employment and wage estimates by occupation within industries. Data are available for broad industry sectors, as well as for more detailed industries. For example, data are available for the occupation “carpenters” in the construction sector as a whole as well as for the more detailed construction industry, “residential building construction.”

BLS also produces estimates for states and local areas by industry. We do not regularly publish these data; however, we do provide these estimates to states, which release them at their discretion. And, just this year, BLS released the statewide industry estimates as a research dataset.

To illustrate the OES data available locally, let me use the example of the metropolitan area of Minneapolis—St. Paul—Bloomington, which includes 11 counties in Minnesota—including, Mr. Chairman, Dakota, Scott, and Washington Counties in your district—and 2 counties in Wisconsin.<sup>2</sup> For this metropolitan area, we recently published May 2012 wage data for 39 construction occupations. Among these construction occupations, the four largest occupations (in terms of employment) are carpenters; electricians; plumbers, pipefitters, and steamfitters; and construction laborers. Hourly mean wages for these four occupations in the Minneapolis—St. Paul—Bloomington area ranged from \$32.08 for plumbers, pipefitters, and steamfitters to \$22.99 for construction laborers.<sup>3</sup>

#### *Data uses*

Like all BLS products, OES data are used in many ways, but let me summarize a few of its uses. Within BLS, OES employment estimates are a key input to occupational employment projections, which are used by millions of individuals making decisions about their careers. OES data also are used by BLS to produce the Employment Cost Index, occupational injuries and illness rates, and data provided to the President’s Pay Agent for setting locality pay for Federal workers.

The Department of Labor’s Employment and Training Administration’s (ETA’s) Foreign Labor Certification (FLC) program uses OES data in its nonimmigrant and immigrant visa certification programs. BLS provides special tabulations of OES wage data to ETA for this purpose, following specifications provided by ETA.

BLS also produces special tabulations for other federal agencies, including the National Science Foundation, the Bureau of Economic Analysis, and the Employment and Training Administration’s Occupational Information Network or O\*NET program.

State and local government agencies use the OES employment and wage data in counseling students and jobseekers, and making training and workforce investment decisions, directing resources toward occupations that are present in the local economy and perhaps to those that have wages above some criterion. OES data also are used by the State Workforce Agencies in preparing state and area occupational projections.

#### *Survey methods*

Now, how do we conduct the survey? The OES program collects employment and wage data from a sample of 1.2 million business establishments that employ nearly 60 percent of wage and salary workers in the country. These establishments are selected from a business list derived from unemployment insurance records. Participation in the OES survey is voluntary. Because the business list from which the sample is selected includes only wage and salary workers covered by unemployment insurance, self-employed workers are not in the OES data.

Collection of this large sample requires 3 years, with data solicited from a new set of 200,000 establishments every 6 months. Establishments are surveyed just once in the 3-year cycle.

Although the data are collected over a 3-year period, BLS uses well-established statistical procedures to make estimates for a single year and publishes those estimates about 10 months after the reference date. For example, our most recent estimates are for May 2012 and were published in March 2013.

The OES survey is a federal-state cooperative effort. Under agreements with BLS, most of the data are collected by the State Workforce Agencies. BLS and the states

<sup>2</sup>The counties included in the Minnesota portion of the Minneapolis—St. Paul—Bloomington metropolitan area are Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, and Wright counties; in Wisconsin, the counties include Pierce and St. Croix counties.

<sup>3</sup>May 2013 wages for the other occupations noted are \$ 25.60 for carpenters and \$31.64 for electricians.

collect OES data primarily through a mail survey, although employers may respond by many other means, including telephone, fax, or email. Overall the survey has a response rate of about 75 percent.

*Data limitations*

As with all statistical products, the OES data have certain limitations that users need to understand.

The OES design allows us to provide estimates for some very small occupations at detailed levels of geography. However, some of these estimates are based on responses from only a handful of employers, which may result in large sampling error or require suppression of the data to protect the confidentiality of individual respondents.

The OES program does not gather information on all the attributes that might be of interest when examining occupational wages. For example, the OES does not have data on license requirements, skill level, or years of experience. Although the OES estimates are available for areas that cover the entire geography of the country, the estimates are not available for every geographic breakdown that users might want. For example, we cannot produce estimates by county. And, the OES collects data from business establishments, not by worksites or construction project sites. A construction business may have multiple projects in the same area or in different areas. Also, OES does not measure total compensation, and therefore does not include overtime pay or benefits. Nor does the OES collect information on hours or provide wages by part-time versus full-time jobs.

Finally, let me also note that in addition to occupational wage data from the OES program, the BLS National Compensation Survey provides information on employer costs for wages and benefits, as well as information on the percentage of workers covered by various employee benefits. This survey also produces occupational wage data for union and nonunion workers, part-time and full-time workers, and supervisors, but not by detailed industry, and only for 15 large areas.

*Conclusion*

To sum up, the Bureau of Labor Statistics Occupational Employment Statistics survey produces employment and wage data at great occupational and geographic detail, and by industry. These data are used for a variety of purposes, some of which are based on special tabulations produced by the BLS on request. However, BLS has no role in establishing prevailing wages or determining what data are appropriate for the purpose of prevailing wage determinations.

I have attached to my written testimony information on the specific construction industries and construction occupations for which OES provides data. To illustrate the level of geographic detail, a list of the areas in Minnesota for which data are provided is also attached.

Thank you for the opportunity to testify before this committee. I am happy to answer any questions you may have.

OES DATA ARE AVAILABLE FOR THE FOLLOWING CONSTRUCTION INDUSTRIES

*Sector 23—Construction*

236000—Construction of Buildings

236100—Residential Building Construction 236200—Nonresidential Building Construction

237000—Heavy and Civil Engineering Construction

237100—Utility System Construction

237130—Power and Communication Line and Related Structures Construction

237200—Land Subdivision

237300—Highway, Street, and Bridge Construction 237900—Other Heavy and Civil Engineering Construction

238000—Specialty Trade Contractors

238100—Foundation, Structure, and Building Exterior Contractors 238110—Poured Concrete Foundation and Structure Contractors 238140—Masonry Contractors

238160—Roofing Contractors 238200—Building Equipment Contractors

238210—Electrical Contractors and Other Wiring Installation Contractors 238220—Plumbing, Heating, and Air-Conditioning Contractors

238290—Other Building Equipment Contractors 238300—Building Finishing Contractors

238310—Drywall and Insulation Contractors 238320—Painting and Wall Covering Contractors

238900—Other Specialty Trade Contractors

Construction trades occupations in the Standard Occupational Classification

47-2000 Construction Trades Workers

47-2010 Boilermakers  
 47-2020 Brickmasons, Blockmasons, and Stonemasons 47-2021 Brickmasons and Blockmasons  
 47-2022 Stonemasons  
 47-2030 Carpenters  
 47-2040 Carpet, Floor, and Tile Installers and Finishers 47-2041 Carpet Installers  
 47-2042 Floor Layers, Except Carpet, Wood, and Hard Tiles 47-2043 Floor Sanders and Finishers  
 47-2044 Tile and Marble Setters  
 47-2050 Cement Masons, Concrete Finishers, and Terrazzo Workers 47-2051 Cement Masons and Concrete Finishers  
 47-2053 Terrazzo Workers and Finishers 47-2060 Construction Laborers  
 47-2070 Construction Equipment Operators  
 47-2071 Paving, Surfacing, and Tamping Equipment Operators 47-2072 Pile-Driver Operators  
 47-2073 Operating Engineers and Other Construction Equipment Operators 47-2080 Drywall Installers, Ceiling Tile Installers, and Tapers  
 47-2081 Drywall and Ceiling Tile Installers 47-2082 Tapers  
 47-2110 Electricians  
 47-2120 Glaziers  
 47-2130 Insulation Workers  
 47-2131 Insulation Workers, Floor, Ceiling, and Wall 47-2132 Insulation Workers, Mechanical  
 47-2140 Painters and Paperhangers  
 47-2141 Painters, Construction and Maintenance 47-2142 Paperhangers  
 47-2150 Pipelayers, Plumbers, Pipefitters, and Steamfitters 47-2151 Pipelayers  
 47-2152 Plumbers, Pipefitters, and Steamfitters 47-2160 Plasterers and Stucco Masons  
 47-2170 Reinforcing Iron and Rebar Workers 47-2180 Roofers  
 47-2210 Sheet Metal Workers  
 47-2220 Structural Iron and Steel Workers 47-2230 Solar Photovoltaic Installers  
 47-3000 Helpers, Construction Trades  
 47-3010 Helpers, Construction Trades  
 47-3011 Helpers—Brickmasons, Blockmasons, Stonemasons, and Tile and Marble Setters 47-3012 Helpers—Carpenters  
 47-3013 Helpers—Electricians  
 47-3014 Helpers—Painters, Paperhangers, Plasterers, and Stucco Masons 47-3015 Helpers—Pipelayers, Plumbers, Pipefitters, and Steamfitters  
 47-3016 Helpers—Roofers  
 47-3019 Helpers, Construction Trades, All Other  
 47-4000 Other Construction and Related Workers  
 47-4010 Construction and Building Inspectors 47-4020 Elevator Installers and Repairers  
 47-4030 Fence Erectors  
 47-4040 Hazardous Materials Removal Workers 47-4050 Highway Maintenance Workers  
 47-4060 Rail-Track Laying and Maintenance Equipment Operators 47-4070 Septic Tank Servicers and Sewer Pipe Cleaners  
 47-4090 Miscellaneous Construction and Related Workers 47-4091 Segmental Pavers  
 47-4099 Construction and Related Workers, All Other

OES DATA ARE AVAILABLE FOR THESE AREAS IN MINNESOTA

*Minnesota*

*Metropolitan areas*

Duluth, MN-WI Fargo, ND-MN Grand Forks, ND-MN La Crosse, WI-MN  
 Mankato-North Mankato, MN  
 Minneapolis-St. Paul-Bloomington, MN-WI Rochester, MN  
 St. Cloud, MN

*Nonmetropolitan areas*

Northwest Minnesota nonmetropolitan area (includes Becker, Beltrami, Cass, Clearwater, Crow Wing, Douglas, Grant, Hubbard, Kittson, Lake of the Woods, Mahnomen, Marshall, Morrison, Norman, Otter Tail, Pennington, Pope, Red Lake, Roseau, Stevens, Todd, Traverse, Wadena, and Wilkin counties)  
 Northeast Minnesota nonmetropolitan area (includes Aitkin, Cook, Itasca, Kanabec, Koochiching, Lake, Mille Lacs, Pine counties)



Southwest Minnesota nonmetropolitan area (includes Big Stone, Chippewa, Cottonwood, Jackson, Kandiyohi, Lac Qui Parle, Lincoln, Lyon, McLeod, Meeker, Murray, Nobles, Pipestone, Redwood, Renville, Rock, Swift, and Yellow Medicine counties)

Southeast Minnesota nonmetropolitan area (includes Brown, Faribault, Fillmore, Freeborn, Goodhue, Le Sueur, Martin, Mower, Rice, Sibley, Steele, Waseca, Watonwan, and Winona counties)

Chairman WALBERG. Thank you.

Ms. GROSHEN. You are welcome.

Chairman WALBERG. Now I recognize Mr. Sumner for his 5 minutes of testimony?

**STATEMENT OF CURTIS SUMNER, EXECUTIVE DIRECTOR,  
NATIONAL SOCIETY OF PROFESSIONAL SURVEYORS**

Mr. SUMNER. Thank you, Mr. Chairman and members of the subcommittee.

I am Curt Sumner. I am a licensed professional land surveyor as well as the executive director of the National Society of Professional Surveyors, a professional society with affiliates in all 50 states.

I am pleased to be here today to discuss with you our experience with the Department of Labor and the Davis-Bacon Act. The Davis-Bacon Act, as you know, applies to laborers and mechanics but does not define what that term is; that is left up to the Department of Labor under the guidelines provided in the Federal Acquisition Regulation.

For more than 50 years the Labor Department has considered survey crews not to be laborers and mechanics and, therefore, exempt from the provisions of the Davis-Bacon Act. We have documentation from then Secretary Arthur Goldberg in the Kennedy administration stating that members of survey crews are exempt from the act except to the extent to which they, quote—"perform manual work, such as clearing brush and sharpening stakes," which Secretary Goldberg observed—correctly, I might add—"are not commonplace."

As a result, since at least the 1960s federal agencies and the private sector alike have operated with the understanding that survey crews are exempt. That was until a few weeks ago, when an NSPS member received notification pursuant to a federal contract that the Labor Department had issued a new order, reversing more than 50 years of policy, and determined that members of land surveying crews on federal construction projects are now laborers and mechanics subject to the act.

Before I discuss the practical and policy implications and problems with this ruling, permit me to address the process. The Operating Engineers Union wrote a letter to the Department of Labor in August of 2011 asking for this change. While the Labor Department deliberated for 18 months on a reversal of this 50-plus-year policy, neither NSPS nor, to our knowledge, any other management organization related to the survey community was notified or consulted.

The decision was made on March 23rd this year. Again, no notice to the affected parties was provided except to the Operating Engineers and a notice sent to all federal contracting agencies. In the

meantime, between August 2011 and the March 2013 decision, there was no public notice that the Labor Department was considering a change in its regulation; no request for public input or comments; no notifications seeking advice, comment, or input from the surveying profession, employers, or management; and in fact, no public announcement of the new policy.

We believe the manner in which the Department of Labor acted is in violation of the spirit if not the letter of the Administrative Procedures Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act.

There are a number of reasons this ruling is detrimental to the surveying profession. First, the classification of members of survey crews as laborers and mechanics is contrary to virtually every other classification, including those of the Labor Department itself and the Office of Personnel Management for surveying technicians employed by the federal government.

NSPS administers a Certified Survey Technician program used by both government agencies and private companies. The classification of members of survey crews as laborers and mechanics—

[Audio gap.]

Chairman WALBERG. Mr. Sumner, check your mic and see if it went off for some reason.

Mr. SUMNER. I was off and I am sorry. Should I start over or are we good? I apologize.

Thirdly, there is no evidence that members of survey crews are paid substandard wages and no demonstrated need for including such workers in the prevailing wage law based on Bureau of Labor Statistics.

Finally, this ruling will be an administrative nightmare for surveying firms, contracting agencies, and the Labor Department itself. This will result in confusion and costly compliant issues.

Survey crews are not like construction workers. Survey crew members may be on a construction site a few hours per day, one day a week, or otherwise on an intermittent basis, but rarely on an entire 40-hour work week.

Some work may be preliminary to construction, some to post-construction, or not related to construction at all. Documenting what every surveying technician is doing every hour of the work day, determining whether an activity is covered or not covered, construction-related or not, is an expensive, time-consuming, and counter-productive burden.

The payroll the administration required for compliance for a surveying profession dominated by very small businesses is extraordinary. Moreover, with today's computerized data collectors, survey crews can commonly consist of one person. That skilled individual is certainly exercising judgment and working in a supervisory capacity.

Today's technicians are performing services that are mental in nature, requiring certain expertise, and are not apprentices, trainees, or helpers. Therefore, they do not meet the criteria for a laborer or mechanic.

We urge the Labor Department to rescind its policy and request the assistance of Congress in that matter. We deeply appreciate your attention, your time, and your assistance, and we look for-

ward to working with you to rectify this inappropriate, unnecessary, and unfair process and policy employed by the Department of Labor.

Thank you.

[The statement of Mr. Sumner follows:]

**Prepared Statement of Curtis W. Sumner, LS, Executive Director,  
National Society of Professional Surveyors**

Mr. Chairman, members of the Subcommittee. I am Curt Sumner, a licensed professional land surveyor and Executive Director of the National Society of Professional Surveyors (NSPS), a non-profit professional society with affiliates in all 50 states whose goal is to advance the sciences of surveying and mapping and related fields, in furtherance of the welfare of those who use and make surveys, maps and other geographic information. The NSPS membership, which includes surveyors in private practice, government service, industry, and academic instruction, strives to establish and further common interests, objectives, and policy efforts to advance the surveying profession in its service to the people of the United States. NSPS is the successor of the American Congress on Surveying and Mapping (ACSM), founded in 1941 as the voice of the surveying profession.

I am pleased to be here today to share with you the NSPS experience with the Department of Labor and the Davis-Bacon Act.

As you know, Mr. Chairman, the Davis-Bacon Act is a controversial law that requires the payment of the "prevailing wage" to "laborers and mechanics" on federally funded construction projects. It applies to direct federal contracts (prime contractors and subcontractors), as well as to state and local governments expending federal (grant or loan) funds. The prevailing wages required by the law are above and beyond the "minimum wage" provided in the Fair Labor Standards Act.

The Government Accountability Office has long recommended that Davis-Bacon be repealed, noting in 1979 it inflates the cost of federally funded construction projects by "several hundred million of dollars annually".

The Davis-Bacon Act itself applies to "laborers and mechanics", but does not define that term. That is left up to the Department of Labor, under the guidelines provided in the Federal Acquisition Regulation, 48 CFR 22.401.

For more than 50 years, the Labor Department has considered survey crews exempt from the provisions of the Davis-Bacon Act. We have documentation from then-Secretary Arthur Goldberg in the Kennedy Administration stating that members of survey crews are exempt from the Act except to the extent to which they "perform manual work, such as clearing brush and sharpening stakes" which Secretary Goldberg observed, correctly I might add, "are not commonplace". (That letter is attached.)

So since at least the 1960s, both federal agencies, and the private sector have operated with the understanding that survey crews are exempt. There was never any controversy, question or ambiguity.

That was until a few weeks ago when an NSPS member, a small business, received notification pursuant to a federal contract on which he is a subcontractor that the Labor Department has issued a new order, AAM212, reversing more than 50 years of policy and determined that members of land surveying crews working on Federal construction projects are "laborers and mechanics" as that term is used in the Davis Bacon Act, making those workers subject to the Act. (SEE: <http://www.dol.gov/whd/programs/dbra/Survey/AAM212.pdf>)

This ruling came at the urging of the International Union of Operating Engineers. (See attached letter).

Before I discuss the practical and policy implications and problems with this ruling, permit me to address the process.

The Operating Engineers wrote the Labor Department in August of 2011 asking for this change. While the Labor Department deliberated for 18 months on a reversal of 50+ year policy, NSPS, nor to the best of our knowledge any other business, management, or professional organization related to the surveying community, was notified or consulted. During that 50 year period, NSPS and its predecessor, ACSM had been engaged with the Department, so it knew who we were and that we had an interest in this issue.

A decision was made on March 23 of this year. Again, no notice to affected parties was provided, except to the Operating Engineers and a notice sent to all federal contracting agencies. In the time between the August 2011 letter from the Operating Engineers and the March 2013 decision, there was no public notice that the Labor Department was considering a change in its regulations; no request for public input

or comments; no notification, seeking of advice, comment or input from the surveying profession and employers/management; and in fact no public announcement of the new policy.

We believe the manner in which the Department of Labor considered and promulgated this drastic and significant change in policy and government contracting procedure is a violation of the spirit if not the letter of the Administrative Procedures Act (5 U.S.C. § 551-59, 701-06, 1305, 3105, 3344, 5372, 7521), the Regulatory Flexibility Act (5 U.S.C. § 601—612), and the Paperwork Reduction Act (44 U.S.C. § 3501-3521).

There are a number of reasons this ruling is ill-conceived, unnecessary, and detrimental to the surveying profession.

First, the classification of members of survey crews as “laborers and mechanics” is inconsistent with and contrary to virtually every other classification, including those of the Labor Department itself. This ruling is in direct contrast with the classification of such workers promulgated elsewhere in the Department of Labor and other federal agencies, including the Occupational Employment Statistics (17-3031 Surveying and Mapping Technicians), the Occupational Outlook Handbook (Surveying and Mapping Technicians), the Occupational Information Network, successor to the Dictionary of Occupational Titles, (Code 22521A Surveying Technicians), and the Office of Personnel Management (OPM) General Schedule Qualification Standard (GS 817 Survey Technical Series) for surveying technicians employed by the federal government. None of these federal classifications categorize members of survey crews as “laborers and mechanics”.

NSPS administers a “Certified Survey Technician” (CST) program for employees of surveying firms and government agencies, including those who perform field survey functions. The classification of members of survey crews as “laborers and mechanics” is inconsistent with the CST program and the standard in the surveying community. A number of public and private organizations recognize the CST program and its standards. For example, the Metropolitan Washington Area Transit Authority (WMATA), has utilized the CST standard for its employees and contractors since the 1990s.

Second, there has been no legislation, court ruling, Comptroller General or other governmental action that changed Secretary Goldberg’s interpretation. In fact, as recently as 2010 a Connecticut Superior Court ruled against Davis-Bacon application to surveying, citing the longstanding federal policy as justification. (SEE: James Fazzino v. State of Connecticut Department of Labor, CV094021804S, October 29, 2010, <http://caselaw.findlaw.com/ct-superior-court/1545698.html>). The Indiana Department of Transportation issued an opinion on January 24, 2007, consistent with that of Secretary Goldberg (<http://www.in.gov/dot/div/contracts/connmemo/07-02.pdf>).

Third, there is no evidence that members of survey crews are paid substandard wages and no demonstrated need for including such workers in a “prevailing wage” law. According to the Bureau of Labor Statistics (BLS), the mean annual wage for a surveying technician is \$42,680. To put that in perspective, the BLS national employment and wage data from the Occupational Employment Statistics, shows the mean annual wage for all occupations, is \$45,790. (<http://www.bls.gov/news.release/ocwage.htm>)

Finally, this ruling will be an administrative nightmare for surveying firms, contracting agencies, and the Labor Department. AAM 212 itself is vague with regard to which members of survey crews, and which activities, and at what phase in a project the surveying service is being provided. This will result in confusion and costly compliance issues. The letter the Labor Department sent to the Operating Engineers Union is more specific, but since it is in a letter and not a government policy document, confusion will reign. It suggests the Davis-Bacon Act applies to “work immediately prior to or during construction which involves laying off distances and angles to locate construction lines and other layout measurements. This includes the setting of stakes, the determination of grades and levels and other work which is performed as an aid to the crafts which are engaged in the actual physical construction of projects \* \* \* the chainmen and rodmen whose work is largely of a physical nature such as clearing brush, sharpening and setting stakes, handling the rod and tape and other comparable activities are laborers and mechanics \* \* \*”

The Act triggers application to a “laborer and mechanic” when more than 20 percent of the workweek is in the performance of such services on a covered site.

Survey crews are not like construction workers. A survey crew member may be on a construction site a few hours a day, one day a week, and otherwise on a sporadic and intermittent basis, but rarely an entire 40 hour work week. Some work may be preliminary to construction, post-construction, or not related to construction at all.

Documenting what every survey crew member is doing every hour of the work day, determining whether an activity is covered or not covered, construction related or not, is an expensive, time consuming and counter-productive burden. The payroll administration required for compliance for a surveying profession dominated by very small businesses is extraordinary.

Moreover, the described activities are outdated and irrelevant to today's surveying. The Labor Department attempts to distinguish between licensed professional surveyors, party chiefs, and technicians, such as rodmen and chainmen. However, with today's computerized data collectors, survey crews can commonly consist of one person. That individual is certainly exercising judgment and working in a supervisory capacity. Today's surveying technicians are performing services that are mental and managerial in nature, and are not "apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act". Therefore, they do not meet the criteria for a laborer or mechanic under FAR 22.401.

We believe the Department of Labor has made an arbitrary and capricious decision that is not supported by the facts.

We urge the Labor Department to rescind AAM 212.

Mr. Chairman, we deeply appreciate the time, attention and assistance you and your capable staff have provided and we look forward to working with you to rectify this inappropriate, unnecessary and unfair process and policy employed by the Department of Labor.

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Chairman WALBERG. I thank you.

Mr. Eisenbrey, recognize you for 5 minutes of testimony?

**STATEMENT OF ROSS EISENBREY, VICE PRESIDENT,  
ECONOMIC POLICY INSTITUTE**

Mr. EISENBREY. Thank you, Mr. Chairman.

I think it is important to start by reminding everybody what the purposes of the Davis-Bacon Act are, and I think that they were well summarized by Alice Rivlin in a CBO report back in 1983: "The Davis-Bacon Act's benefits include protecting both the living standards of construction workers and the competitiveness of local construction firms bidding against transient contractors who might win federal contracts on the basis of lower-than-prevailing local wages. Government contracts are especially vulnerable to such practices because they must be awarded to the lowest qualified bidder.

"Further, by excluding bids from contractors who would use lower-wage, less-skilled workers, Davis-Bacon may aid federal agencies in choosing contractors who will do high quality work. Finally, by helping to stabilize wage rates in the inherently volatile construction labor market, Davis-Bacon may aid the industry in recruiting and training workers, thereby helping to maintain the long-term supply of skilled labor."

We at EPI reviewed all of the economic literature back in 2008, and if you—I would be happy to submit that report for the record, but what we found was that Davis-Bacon—the research overall shows that Davis-Bacon achieves all of those goals that I just mentioned without raising the federal government's cost of construction. By protecting the wages of higher-skilled workers, Davis-Bacon raises employee productivity and offsets the pay the cost of higher hourly rates.

The increased productivity offsets the higher cost because there is no question the whole point of the act is to keep firms from being underbid by using lower wages, but the effect of that is offset by higher productivity of the better-skilled workers. Better-managed

firms and more-skilled employees also tend to work more safely, reducing the number of accidents, lowering workers compensation costs, and preventing damage to materials and equipment.

So on the question of whether BLS can substitute, Mr. Courtney went through the list of all the problems—the obstacles to having BLS do this, and I think he hit the nail on the head. It is important to remember that first off, the OES does not collect fringe benefits, as Commissioner Groshen said.

And back in 1997 when I was at the Labor Department and Congress asked us to look at this, BLS actually, with the Wage Hour Division, ran an experiment to see how much it would cost to do this on a local, project-by-project basis, collect the fringe benefit information. They did three tests and the estimates for the cost of doing this on just these three projects was about \$3 million, and you can—I would be happy to submit for the record a statement of that from the Wage and Hour Division.

But you can see that this is—Mr. Baskin says, well, there is no obstacle—no statutory reason they can't do it, but there is a tremendous cost reason. It is true, you could have BLS substitute for Wage Hour and do the exact same survey that the Wage Hour Division is doing, but you can't use BLS surveys, as currently constituted, to substitute for the requirements of the act.

I would like to just go through a few problems that I saw in Mr. Baskin's testimony that—he claims that the Davis-Bacon Act hinders economic growth. He presents no evidence to that effect. And when you think about it, the Davis-Bacon Act was in an even stronger form from 1940 to 1980, during the period of the greatest growth—economic growth in American history. At that point the prevailing wage was set as the wage that was paid to 30 percent or more of the workers instead of 50 percent or more. So it was a stronger, more protective statute then and we had the greatest economic growth that—you know, the Eisenhower National Defense Highway Act built the interstate highway system under Davis-Bacon wages.

There are a couple of studies that I think are important to look at—one from Colorado and one from California—that look at the effect on bidders. You know, Mr. Baskin suggests that it prevents nonunion firms from bidding.

Both of those studies show that the prevailing wage laws do not prevent nonunion firms from bidding. It doesn't prevent them from winning contracts, as Mr. Courtney suggested. And there is no evidence from those studies that it raises the ultimate cost of construction at all.

I have a list of other issues and I hope someone will ask me to go through Mr. Baskin's testimony because there are a lot of things that are just wrong.

Thank you—

[The statement of Mr. Eisenbrey follows:]

**Prepared Statement of Ross Eisenbrey, Vice President,  
Economic Policy Institute**

Mr. Chairman and members of the subcommittee, thank you for inviting me to testify today. I'd like to begin by reminding the subcommittee of the important purposes the Davis-Bacon Act has served for over 80 years. The Congressional Budget Office summarized them succinctly in a 1983 report signed by Alice Rivlin:

The Davis-Bacon Act's benefits include protecting both the living standards of construction workers and the competitiveness of local construction firms bidding against transient contractors who might win federal contracts on the basis of lower-than-prevailing local wages. Government contracts are especially vulnerable to such practices, because they must be awarded to the lowest qualified bidder. Further, by excluding bids from contractors who would use lower-wage, less-skilled workers, Davis-Bacon may aid federal agencies in choosing contractors who will do high quality work. Finally, by helping to stabilize wage rates in the inherently volatile construction labor market, Davis-Bacon may aid the industry in recruiting and training workers, thereby helping to maintain the long-term supply of skilled labor.

Careful academic research has shown again and again<sup>1</sup> that the Davis-Bacon Act achieves these goals without significantly raising the federal government's cost of construction. By protecting the wages of higher-skilled workers from low-wage, less-skilled competition, Davis-Bacon raises employee productivity and offsets the cost of paying higher hourly rates. Better-managed firms and more skilled employees also tend to work more safely, reducing the number of accidents, lowering workers compensation costs, and preventing damage to materials and equipment.

How the U.S. Department of Labor implements the Davis-Bacon Act and makes wage determinations has been the subject of many congressional hearings and GAO reports over the years, going back as far as 1932, when Congress first passed amendments to the Act, only to have President Hoover veto the bill. The idea embodied in Rep. Gosar's H.R. 448 is not new, either: Hearings were held in this committee 16 years ago to explore the merits of substituting the Bureau of Labor Statistics for the Wage and Hour Division as the responsible agency.

The idea was rejected in 1997 and must be rejected now, for the simple reason that BLS surveys are incapable of accomplishing Davis-Bacon's statutory mandate. H.R. 448 does not prescribe how BLS should meet the Davis-Bacon Act's statutory requirements while using "scientific methods," but it is clear that the suggestion offered by the Heritage Foundation and others—that the Occupational Employment Statistics (OES) data be substituted for the current system—is unacceptable. First, OES data do not include fringe benefits, which the Act has required since 1964. Any determination that ignores 20% or more of the typical construction worker's compensation would obviously not protect the locally prevailing compensation, would undermine the local labor market, and would make it easier for migrant contractors to underbid local firms.

The OES does not capture and report exact wage rates and is incapable of determining a single rate paid to a majority of workers in a given classification and locality. Unlike the Wage and Hour Division survey, the OES measures 12 wage intervals or ranges for wages, not the actual rate. For example, wages falling in Range D in the May 2012 survey could vary by as much as \$3.74 an hour, from \$14.50 to \$18.24, or \$30,160 to \$37,959 on an annual basis. From the OES it is virtually impossible to know whether a single rate is being paid to a majority of workers in any classification in a local area.

Terry Yellig, a Washington, D.C., lawyer representing the AFL-CIO Building and Construction Trades Department, gave very thorough testimony in 1997 about the many other ways that BLS surveys are designed for purposes that make them unsuitable as a substitute for DOL's current survey process.

First, the Davis-Bacon Act specifies that wage determinations on federal construction projects should be based on locally prevailing wages paid "on projects of a character similar to the contract work." This poses several hurdles for BLS, whose data collection does not distinguish between different locations and types of projects. As Mr. Yellig testified,

This legislative requirement will not be met by the proposed use of BLS-developed wage information. BLS surveys gather information from establishments, not projects. An "establishment" is defined in Chapter 3 of the BLS Handbook of Methods as "an economic unit which processes goods or provides services, such as a factory, mine, or store." The 1992 Census of Construction explains how the establishment concept is applied to the construction industry as follows:

A "construction establishment" is defined as a relatively permanent office or other place of business where the usual business activities related to construction are conducted. With some exceptions, a relatively permanent office is one which has been

<sup>1</sup> <http://constructionacademy.org/wp-content/uploads/downloads/2012/09/2012-10-Industrial-Relations-Philips-et-al-Effect-of-Prevailing-Wage-Regulations-on-Contractor-Bid-Participation-and-Behavior-Palo-Alto-Etc.pdf>; <http://constructionacademy.org/wp-content/uploads/downloads/2012/09/Davis-Bacon-CO-highway-june11.pdf>

established for the management of more than one project or job and which is expected to be maintained on a continuing basis. Such “establishment” activities include, but are not limited to estimating, bidding, purchasing, supervising, and operation of the actual construction work being conducted at one or more construction sites. (1992 Census of Construction at V-VI.)

Unlike most other industries, in the building and construction industry, where the work is actually performed does not correspond with the BLS concept of an “establishment,” which is primarily a location for managerial activity. Thus, for example, the operations headquarters of a construction contractor may very well be in one county, but the contractor may not have performed any construction work in that locality during a survey period, yet performed a substantial amount of work on projects in other localities. Consequently, the laborers and mechanics reported in a survey of construction “establishments” by that contractor might not be counted as employed in the localities where they were actually employed, as required by the Davis-Bacon Act.

More important, perhaps, collecting compensation data segregated according to projects of a similar character precludes the kind of general collection BLS does for the OES and other surveys. BLS does not collect data separately for residential, heavy, highway, and building construction, even though the skills and pay rates for any craft can vary dramatically depending on the type of project involved. But as Mr. Yellig explained, to carry out the Act’s requirements, “if laborers and mechanics working on highway projects are paid different rates than are laborers and mechanics working on building projects in the same locality, then the Secretary of Labor’s wage determinations must also differentiate between laborers and mechanics working on highway projects and building projects.”

As currently administered, Davis-Bacon wage determinations reflect these distinctions. In order to accurately carry out the Secretary of Labor’s mandate under the Davis-Bacon Act, DOL’s Wage and Hour Division uses four basic categories to classify construction work of a “character similar.” The categories are (1) building construction (exclusive of single-family homes and garden-style apartments up to and including four stories); (2) residential construction (including single-family homes and garden-style apartments up to and including four stories); (3) heavy, water, sewer, and utility construction; and (4) highway construction.

But, as Yellig noted:

On the other hand, the BLS uses Standard Occupational Classifications (“SOC”) to define “classes” of workers. Use of standard occupational classifications assumes that the occupational structure of the construction industry is nationally homogeneous. This is not consistent with the requirements of the Davis-Bacon Act because the variety of classifications of laborers and mechanics in the local building and construction industry will vary depending on the nature of work in the area and the predominance, or lack thereof, of collectively-bargained practices.

For example, BLS’s large national surveys cannot distinguish between an urban area with a lot of high-rise construction that might have three ironworker classifications, each with a corresponding skill and wage level, and a rural area that has only one classification.

The Davis-Bacon Act also instructs the Secretary of Labor to set project wages based on the wages prevailing in “the city, town, village, or other civil subdivision of the State in which the work is to be performed.” The Wage and Hour Division generally meets this requirement by collecting data on a county-by-county basis. BLS, however, does not collect its data according to civil subdivisions. Once again quoting Terry Yellig’s 1997 testimony:

BLS surveys Metropolitan Statistical Areas (“MSA”) and the balance-of-state. Construction markets are organized around types of work, volumes of work, prevalence of differing models of employer organization, and the nature and availability of labor supply. A BLS survey would not capture these wage variations because it assumes that construction markets are homogeneous within MSA’s and within vast rural areas. On the other hand, the current Wage and Hour Davis-Bacon wage survey system can and does recognize this variation.

The biggest problems with the current survey process—the low response rates when contractors are solicited to voluntarily submit wage information during a prevailing wage survey and the inaccuracy of the wage information the contractors actually provide—will not be solved by a switch to the OES. It, too, is a voluntary survey, and I see no reason a contractor that refuses to respond to the Wage and



Hour Division would be more enthusiastic about responding to BLS, given that the purpose of the former agency's request and that of the latter are identical.

The need to keep the federal government from depressing construction industry wages, the need to support the development of the next generation of skilled workers in the construction trades, and the need to ensure the highest quality work on federal construction projects are just as great today as they were 30 years ago or even 80 years ago. The Davis-Bacon Act has served the public well, and nothing should be done that might undermine the effectiveness of the Act in achieving these important purposes. Therefore, I recommend against shifting the responsibility for gathering wage information supporting Davis-Bacon prevailing wage determinations from the Wage and Hour Division to the BLS. Instead, I recommend increased support for the Wage and Hour Division's efforts to improve and streamline the current Davis-Bacon wage determination process.

Chairman WALBERG. Thank you, Mr. Eisenbrey. And I am sure that our next witness is looking forward to addressing your concerns.

And so, Mr. Baskin, I recognize you for 5 minutes?

**STATEMENT OF MAURY BASKIN, SHAREHOLDER,  
LITTLER MENDELSON P.C.**

Mr. BASKIN. Thank you, Mr. Chairman.

My name is Maury Baskin. I am a shareholder with the law firm Littler Mendelson. I serve as general counsel to Associated Builders and Contractors, on whom behalf I am appearing before you today.

ABC is a national trade association of both union and nonunion firms who share a commitment to the merit shop philosophy. It's based on the principles of nondiscrimination and fairness in the award of construction contracts through competitive bidding regardless of labor affiliation.

Now, the focus of my testimony today is the department's dysfunctional wage survey process, which is where the problems all start. And as an aside, I testified before this committee on Davis-Bacon in 1997, the hearing that has been referred to. We had Mr. Yelig here with us then saying many of the same thing that Mr. Eisenbrey is saying.

And we also had Dr. Thieblot with us, but he is—Dr. Thieblot is with us in spirit because he has written the latest summary of all the literature. It is objectively titled, "The Case Against the Davis-Bacon Act: 54 Reasons for Repeal." It reviews all the studies that have been just referred to; it rebuts them and refutes them completely, including the statements in Mr. Eisenbrey's testimony, and in Mr. Gijo's testimony in 1997 and in the hearing of 2011.

In particular, studies by GAO and the Department of Labor's own inspector general have confirmed that DOL's wage determinations are grossly inaccurate and are simply not credible. Frankly, almost anything would be better than the situation we are in now. And yet, we are told, "Well, we can't switch to the BLS even though it might be better because there is this or that problem," instead of working on some minor tweaks that would take care of those circumstances.

And that is our complaint about this whole process and the failure—if anything, a bipartisan failure—to make the changes that are needed to make this act work the way it was supposed to work all those years ago.

The evidence of the failed survey methodology of DOL is best illustrated by comparing two key numbers. These are not my numbers; these are from the Government Accountability Office: 13 percent of construction workers in the United States are covered by union agreement, yet according to the latest GAO report, 63 percent of all DOL wage determinations report wages set by union agreements to be somehow prevailing.

As Professor Thieblot says in his most recent study, this outcome is statistically impossible for DOL to have achieved by any fair survey method. There are many reasons for this that have been reviewed in past hearings but it just hasn't changed.

The department relies on wage surveys containing ridiculously low response rates instead of using sound statistical samples, which is what the BLS does. And even when the adequate responses are received, the department's survey rules are biased in favor of uniformity and this notion of to-the-penny the single rate that is adopted. Of course, that can only be found in collective bargaining agreements because nonunion contractors are more flexible in their rates and in their job duties and so it is never going to match up with the way they pay their workers.

The department has also in recent years violated its own rules by importing wage rates from labor markets hundreds of miles apart, and I was interested to hear the concern expressed that BLS does—only measures in SMSAs, but in fact, the Labor Department—if that is the standard the Labor Department has been violating it. The GAO reported 40 percent of their wage surveys now are done on a statewide basis, and we have got a challenge going right now where they are importing data from Northern Virginia and applying it to Southern Virginia, hundreds of miles away. That should not be allowed but it would not have to be allowed if they had adequate responses or if they did proper statistical sampling, which is what the Bureau of Labor Statistics does.

I have challenged a number of wage surveys on behalf of ABC chapters and various other coalitions of frustrated contractors and developers. The deck is stacked in the department's favor. They seem to be totally impervious to the most common sense reforms, and that is why we welcome this hearing as long as it takes to get the job done.

It is why ABC has come out saying repeal is the only answer, because the Labor Department simply refuses to make the most common sense changes. Something I think everyone in this room would agree to is that the prevailing wage, if that is the standard, should be arrived at by the fairest and most accurate method possible. The Labor Department has refused to do what needs to be done.

We believe the BLS system would be better. It is not perfect, but certainly things could be done to make it work better than the current system.

I think that concludes my formal remarks, and I am happy to answer any questions.

[The statement of Mr. Baskin follows:]

**Prepared Statement of Maurice Baskin, Esq., Shareholder,  
Littler Mendelson P.C.**

CHAIRMAN WALBERG, RANKING MEMBER COURTNEY AND MEMBERS OF THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS: Good morning and thank you for the opportunity to testify before you today on “Promoting the Accuracy and Accountability of the Davis-Bacon Act.”

My name is Maurice Baskin. I am a shareholder with the law firm Littler Mendelson, P.C. and serve as general counsel to Associated Builders and Contractors (ABC), on whose behalf I am appearing before you today. ABC is a national trade association with 72 chapters representing nearly 22,000 members from more than 19,000 construction and industry-related firms in the commercial and industrial sectors of the industry. ABC’s membership is bound by a shared commitment to the merit shop philosophy, based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through competitive bidding. ABC helps its members win work and deliver it safely, ethically and profitably for the betterment of the communities in which they do business.

*The Davis-Bacon Act*

The Davis-Bacon Act is an 80-year-old wage subsidy law administered by the U.S. Department of Labor (DOL). The law mandates so-called “prevailing” wages for employees of contractors and subcontractors performing work on federally financed construction projects. ABC has long advocated for Davis-Bacon reforms that, if adopted in years past, could have mitigated some of its damage to our economy. But because all attempts at meaningful reform have failed over the years—despite repeated criticisms from the Government Accountability Office (GAO),<sup>1</sup> DOL’s own Office of Inspector General (OIG)<sup>2</sup> and numerous congressional hearings<sup>3</sup>—ABC supports the repeal of the Davis-Bacon Act.

As administered by DOL, Davis-Bacon unnecessarily hinders economic growth, increases the federal deficit, and imposes an enormous paperwork burden on both contractors and the federal government. It stifles contractor productivity by raising costs, ignores skill differences for different jobs, and imposes rigid craft work rules. In addition, complexities in Davis-Bacon’s implementation make it nearly impossible for many small, qualified merit shop firms to compete on publicly funded projects. At the same time, other laws like the Fair Labor Standards Act, Occupational Safety and Health Act and National Labor Relations Act have superseded the original stated purpose of the Davis-Bacon Act: protecting local workers from unscrupulous “itinerant” contractors. In addition, an elaborate government procurement system already ensures government work is awarded only to responsible bidders.

From a fiscal standpoint, the Congressional Budget Office has estimated that the Davis-Bacon Act raises federal construction costs by \$15.7 billion over ten years, which ABC believes to be a conservative estimate.<sup>4</sup> Numerous studies have shown that repealing Davis-Bacon would create real and substantial savings to the government without affecting workplace productivity, safety or market wages.<sup>5</sup> The contrary view expressed by the minority witness on today’s panel has been refuted by numerous studies and Congressional witnesses.<sup>6</sup>

By any objective measure, DOL’s wage determinations are vastly inflated above the market rates for private sector construction projects. Evidence of DOL’s failed wage survey method is best illustrated by comparing two key numbers. According to the Bureau of Labor Statistics (BLS), only 13.2 percent of construction workers in the United States are covered by any union agreement;<sup>7</sup> yet, according to the latest GAO report, 63 percent of all DOL wage determinations report that wages set by union agreements are “prevailing.”<sup>8</sup> In Dr. Thieblot’s words, such a result is a “statistical impossibility” for DOL to have achieved by any fair survey method.<sup>9</sup> Despite these facts and findings, Davis-Bacon remains in effect and continues to inflate the cost of federal construction by more than 20 percent.<sup>10</sup>

In the remainder of my testimony, I would like to highlight some of the specific ways in which DOL has failed to properly carry out its statutory mandate to determine truly “prevailing” wages, with particular emphasis on the deeply flawed wage survey process.

*Wage Rates and Surveys*

The methodology by which DOL determines Davis-Bacon Act wage rates has repeatedly been shown to be inaccurate and unscientific. Yet, the agency continues to rely on voluntary wage surveys with ridiculously low response rates instead of using sound statistical samples already made available through other government data collections.

The resulting wage determinations bear little relation to actual local wages in the areas surveyed. The problems associated with Davis-Bacon wage calculations have

been well documented in previous congressional testimony from ABC and, more importantly, reports by GAO and DOL's OIG.<sup>11</sup> In addition, due to the systematic delays associated with the final publication of many Davis-Bacon rates, wage surveys conducted during the economic "boom" in construction during the previous decade are now being applied to a "bust" economy.

The last GAO report concluded that efforts to improve the Davis-Bacon wage survey process—both with respect to data collection and internal processing—have not addressed key issues with wage rate accuracy, timeliness and overall quality.<sup>12</sup> The report also found that DOL "cannot determine whether its wage determinations accurately reflect prevailing wages," and "does not currently have a program to systematically follow up with or analyze all non-respondents."

The 2004 OIG report revealed that nearly 100 percent of the wage determinations that were analyzed contained errors. In 2011, GAO found that "most survey forms verified against payroll data had errors." In addition, the report stated that more than "one-quarter of the final wage rates for key job classifications were based on wages reported for six or fewer workers."

Reaffirming yet another longtime ABC concern, GAO found that "contractors have little or no incentive to participate in the Davis-Bacon wage survey" as it is currently administered. Contractors that are struggling to stay in business have no time or resources to fill out reports to the government. Furthermore, they don't trust the government to keep this sensitive wage data confidential, and are justifiably worried about being targeted for DOL audits and inspections.

GAO also recommended that DOL get "technical guidance from experts" on statistical sampling techniques; to ABC's knowledge, DOL has done nothing to implement this recommendation.

I have personal knowledge of the dysfunctional DOL wage survey process, having challenged a number of wage surveys on behalf of ABC chapters and various coalitions of frustrated contractors and developers in recent years.<sup>13</sup> In case after case, DOL has relied upon completely inadequate survey response numbers (a small handful of unrepresentative wage reports setting the wage rates for thousands of workers). In addition, the agency has violated its own rules for calculating which rates should prevail in a region. DOL has improperly counted union workers who were paid different wage rates, as if they were all paid the same wages, and has improperly imported flawed data from state government wage surveys. Most recently, the agency has expanded its reliance on statewide wage surveys in which data collected in large urban areas is applied to smaller labor markets hundreds of miles away.

Challenging these improper wage determinations takes years and the deck is stacked in DOL's favor at every turn. When we do "win" one of these cases—and we have actually won some of them—DOL simply conducts the survey again and usually reaches similarly wrong results by other means.

#### *Job Classifications*

Once the wage determinations are inaccurately made (as previously described), the errors in setting the prevailing wage are magnified by DOL's handling of work assignments for individual job classifications. When DOL determines that the prevailing wage rate for a classification should be based on a union collective bargaining agreement, the job duties for that classification also likely will be governed by the union's work rules in that agreement. Generally, union work rules are much more restrictive than nonunion job assignments.

Even worse, DOL wage determinations routinely fail to give contractors enough information to decide which trade should perform a given set of job duties. Unlike many state prevailing wage laws, DOL does not require the union bargaining agreements or jurisdictional rules to be published. DOL's failure to provide this information makes it almost impossible for merit shop contractors to figure out the correct wage rate for many construction-related jobs.

#### *Certified Payrolls and Fringe Benefits*

Another burden on small business compliance with the Davis-Bacon Act (and also the related Copeland Act) is the requirement that contractors submit weekly certified payroll reports to the government. This is a paperwork nightmare for many contractors and a significant administrative cost factor for every contractor. DOL's recent system upgrades to include electronic filing are a small step in the right direction, but they do nothing to solve the complexities of the certified payroll form itself, and in particular the confusion surrounding the proper credits allowed to non-union contractors for their bona fide fringe benefit costs.

*Repeated Failure to Implement Reforms*

ABC and others have repeatedly called on DOL to explore using alternative data to determine wage rates—such as data collected through the BLS Occupational Employment Statistics (OES) program. DOL has refused to pursue this reform to the wage survey process, and has failed to provide a corresponding rationale. Contrary to previous claims by some, there is no statutory obstacle to having BLS conduct Davis-Bacon wage surveys.

ABC also has requested that DOL provide better clarity about job duties that correspond to each wage rate. Again, DOL has refused to give contractors fair notice of what the job assignment rules are on the published wage determinations. Finally, DOL has failed to make publicly available many of the rulings and interpretations addressing Davis-Bacon issues that have accumulated over the years.

*Pending Legislation to Reform the Act*

ABC supports full repeal of the Davis-Bacon Act, in favor of wage and benefit rates that actually reflect the current construction market. Accordingly, we support the Davis-Bacon Repeal Act (H.R. 2013), introduced by Rep. Steve King (R-Iowa). In the absence of full repeal, however, ABC also supports legislative efforts designed to improve federal wage determinations and limit the negative impacts of DOL's current policies, including the Responsibility in Federal Contracting Act (H.R. 448), introduced by Rep. Paul Gosar (R-Ariz.). H.R. 448 would require federal construction wage rates be determined scientifically by BLS.

On behalf of ABC, I'd like to again thank you for holding today's hearing. ABC is pleased to see the Education and the Workforce Committee take a renewed interest in the problems associated with the Davis-Bacon Act. Ensuring accurate wage rates that reflect open and competitive bidding is a top priority for our members. We look forward to working with the Subcommittee on Workforce Protections on this issue. Mr. Chairman, this concludes my formal remarks; I am prepared to answer any questions that you may have.

ENDNOTES

<sup>1</sup> Government Accountability Office, Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey, April 6, 2011, at <http://www.gao.gov/new.items/d11152.pdf>; See also, Government Accountability Office, Davis-Bacon Act: Process Changes Could Raise Confidence That Wage Rates Are Based on Accurate Data, May 1996, at <http://www.gao.gov/archive/1996/he96130.pdf>.

<sup>2</sup> U.S. Department of Labor, Office of the Inspector General, Concerns Persist with the Integrity of Davis-Bacon Prevailing Wage Determinations, Audit Report No. 04-04-003-04-420, 2004, at <http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf>.

<sup>3</sup> See, e.g., "Examining the Department of Labor's Implementation of the Davis-Bacon Act," Hearing before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce, April 14, 2011, available at <http://1.usa.gov/11Bhvuz>; see also "Joint Hearing to Review the Davis-Bacon Act," Joint Hearing before the Subcommittee on Oversight and Investigations and the Subcommittee on Workforce Protections of the Committee on Education and the Workforce, July 30, 1997 (Serial No. 105-68).

<sup>4</sup> Congressional Budget Office, Discretionary Savings from Repeal of the Davis Bacon Act, April 2011, at <http://bit.ly/11Iox3>. Compare Sherk, Repealing the Davis-Bacon Act Would Save Taxpayers \$10.9 Billion, Heritage Foundation Webmemo No. 3145, Feb. 14, 2011, available at <http://www.heritage.org/research/reports/2011>.

<sup>5</sup> Thieblot, The Case Against the Davis-Bacon Act: 54 Reasons For Repeal (Transaction Publishers 2013); see also Leef, Prevailing Wage Laws: Public Interest or Special Interest Legislation?, 30 Cato Journal 137 (Winter 2010); Glassman, Head, Tuerck, and Bachman, The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages, (Beacon Hill Inst. 2008), available at [www.beaconhill.org/BHISudies/PrevWage08](http://www.beaconhill.org/BHISudies/PrevWage08); Thieblot, The Twenty-Percent Majority: Pro-Union Bias in Prevailing Rate Determinations, 26 J. Lab. Research 99 (2005).

<sup>6</sup> See, e.g., Leef, *supra*, n.5, at 146-152 (refuting claims that prevailing wage laws somehow save money through increased productivity or that workers are safer or better trained on prevailing wage projects). See also Kersey, The Effects of Michigan's Prevailing Wage Law, Mackinac Center for Public Policy (2007), available at [www.mackinac.org/article](http://www.mackinac.org/article); Ohio Legislative Service Commission, S.B. 102 Report: the Effects of the Exemption of School Construction Projects from Ohio's Prevailing Wage Law, Staff Research Report #149 (2002); Thieblot, A New Evaluation of Impacts of Prevailing Wage Law Repeal, Journal of Labor Research 17 (1996). See also Testimony of James Sherk before the Education and Workforce Committee, April 14, 2011 and Sherk's June 3, 2011 letter responding to supplemental statement of the Economic Policy Institute, available at <http://1.usa.gov/11Bhvuz>.

<sup>7</sup> U.S. Department of Labor, Bureau of Labor Statistics, Economic News Release: Union Members Summary, Jan. 2013, at <http://www.bls.gov/news.release/union2.nr0.htm>.

<sup>8</sup> Government Accountability Office, Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey, April 6, 2011, at <http://www.gao.gov/new.items/d11152.pdf>.

<sup>9</sup> Thieblot, The Case Against the Davis-Bacon Act: 54 Reasons For Repeal, at 36 (Transaction Publishers 2013). In supplemental answers to questions following the April 14, 2011 hearing before this Subcommittee, DOL claimed that the 63 percent figure was "misleading" because it is based on the number of individual wage categories surveyed. See Response of John Fraser,

available at <http://1.usa.gov/11Bhvz>. To the contrary, GAO's finding of 63 percent union rates is the most accurate measure of the results of DOL's wage survey process, and DOL's response is itself misleading. By way of example, DOL would apparently identify the Washington, D.C. building construction wage determination as a "mixed" wage determination. But whereas the percentage of unionized construction workers in the District is less than 10 percent, DOL has found that union rates prevail in 32 out of 36 categories, including all of the major trades.

<sup>10</sup>The Beacon Hill Institute at Suffolk University, *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages*, February 2008, at <http://www.beaconhill.org/bhistudies/prevwage08/davisbaconprevwage080207final.pdf>.

<sup>11</sup>Cited at notes 1-2 above.

<sup>12</sup>Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, at <http://www.gao.gov/new.items/d11152.pdf>.

<sup>13</sup>See, e.g., *Mistick Construction, Inc.*, No. 04-051 (ARB 2006); *Chesapeake Coalition*, No. 12-010 (ARB petition pending).

Chairman WALBERG. I appreciate the gentleman.

In fact, I guess I would like to see it extended—the comments—but we will hear more with the questions that come on.

Gives me pleasure to recognize the gentleman from North Carolina here on time, ready to go, and you have 5 minutes?

Mr. HUDSON. Thank you, Mr. Chairman. I appreciate this opportunity. And it is a pleasure to be here on the top row; usually I am down a little further. I still can't see you very well from here, but—

Chairman WALBERG. That is a benefit to you.

Mr. HUDSON. Sir. I don't know about that—but anyway, thank you.

I thank the witnesses. I believe I will start with Mr. Baskin.

You know, the Davis-Bacon is not just about setting wages for construction projects. Can you outline some of the administrative issues that contractors must address in order to be in compliance with such items like work rules and certified payroll?

Mr. BASKIN. Sure, because the wage survey is just the beginning of the flawed process. Once the department establishes the inaccurate rates that established union rates as prevailing, the union work rules come along with those.

These rules are almost always unwritten. Even though many state prevailing wage laws require job descriptions to be published, the federal government has not done that. So the nonunion contractors really have no way of determining, except through perhaps contacting the right person at DOL if they even know there is a question to ask and what the question is. Instead of doing things the way they normally do on private work they are told, "Totally re-jigger your workforce to meet these very rigid and arbitrary work rule assignments from the unions."

On top of that you have the certified payroll paperwork requirement, which is very burdensome, particularly for the smaller contractors. And again, be able to incorporate these different—totally different terminology on many of these projects.

And then you have the fact that the opinions are unpublished from the Labor Department on some of the grey areas. They used to be on their Web site, and in the name of transparency at the beginning of the Obama administration they were taken off the Web site, never given an explanation as to why that has occurred.

And many requests have been made to put it back as well as to put on there opinions that were never published from the Wage Hour administrator's office and those still are not available except by laborious inquiry. They are usually discovered when someone at

the Department of Labor—an investigator—pulls it out of his pocket—total shock of the contractor—to tell them they owe \$1 million, and that is when people find out about one of these opinions.

All of those things are wrong and should be fixed.

Mr. HUDSON. I appreciate that explanation.

Federal construction contracts require Davis-Bacon wages for all projects costing more than \$2,000. That threshold hasn't changed since 1931. Is there merit to raising that threshold to remove the administrative burden for smaller contractors? If so, what do you think the threshold should be?

Mr. BASKIN. There certainly is merit. There were reforms suggested back in the 1990s, as I recall; it should have gone to \$1 million back then and so that means it should go higher now.

I think Dr. Thieblot in his book, which I hope has been submitted for the record but we will, he indicates that the \$1 million is somewhat approximate to the inflation since the 1930s and so that is a start.

Mr. HUDSON. I appreciate that.

One of the issues that has sort of come up in your testimony as well as the previous witness was talking about barriers for folks to bid on contracts and get—receive contracts. Could you talk a little more specifically about that? Especially want to talk about small businesses.

Mr. BASKIN. Yes. And I don't know what studies Mr. Eisenbrey is referring to. I just have personal experience as well as seeing other studies that do say that it hinders economic growth and does interfere with bidding.

I have people—contractors—small contractors—who I work with all the time who say they refuse to bid on this work because it is so impossible to deal with. They can't have their company placed in the hands of bureaucrats who can shock them at the end of the job—and that is often when it happens—and say that everything they did was wrong, they had no way of knowing it was wrong, and that they owe a crippling amount of money. And we see this happen a lot and I have people tell me this a lot.

You know, the average ABC member is only 5 to 10 employees. The vast majority of ABC members are small businesses, and they are extremely discouraged—many of them—about doing it—the government work.

Many of them do continue and do take the chance and go for it and do the government work only to be frustrated by what they find there and always asking, "How can this make sense in this country," that we have this—even—it is crazy in a way that you have wages set by the government, but if you are going to set them and you are going to say they are going to be the prevailing wages then why is the effort never made to fix what everyone has said was wrong? I think the GAO said it was 100 percent wrong with the Wage and Hour Division was doing in their surveys, and that is a pretty high standard of wrongness.

So it is baffling to the contractors why this hasn't been fixed in all these years and they are discouraged from bidding on the work.

Mr. HUDSON. Thank you, Mr. Chairman. My time is expired.

Chairman WALBERG. I thank the gentleman.

I now recognize my colleague and the ranking member, Mr. Courtney?

Mr. COURTNEY. Thank you, Mr. Chairman. Again, I want to yield my time to Mr. Andrews from New Jersey, who has an appointment he has to reach—get to.

Mr. ANDREWS. I thank my friend for his indulgence.

Mr. BASKIN, I know that you favor the repeal of Davis-Bacon. Many of us do not, as you can see from the chart—majority of us do not.

But let's say that we still had Davis-Bacon in place and your claim is that the wages that we are using as prevailing wage are incorrectly calculated by the Labor Department. How would you calculate the prevailing wage? How would you figure that out?

Mr. BASKIN. Well, we have no particular standard in mind, but the Bureau of Labor Statistics has been offered as an alternative and we are willing to see how it works out. We are not here to certify—

Mr. ANDREWS. How does that alternative—tell me mechanically how that alternative works.

Mr. BASKIN. Well, they use statistical sampling methods, they come up with a representative sampling of the numbers—

Mr. ANDREWS. So I assume the way that would work is that contractors out in the field would get a form they would have to fill out telling the government how much they are paying their workers for different jobs, right?

Mr. BASKIN. Not necessarily. A lot of the occupational employment data is already being submitted to the unemployment agencies, number one. There is also a lot more telephone contact that is used.

Mr. ANDREWS. Well let me just quarrel with that one for a second about unemployment data. Don't you think it would produce a skewed result if you only surveyed the wages that people were making before they were laid off? I mean, doesn't that sort of inherently suggest that that is a labor market where there is not much demand?

Mr. BASKIN. Well, you don't want to measure them after they are laid off.

Mr. ANDREWS. No, you don't—

Mr. BASKIN. What is wrong with measuring before they are laid off?

Mr. ANDREWS. Well, because if you are trying for an accurate measurement, which I know that you are, if you are trying for an accurate measurement you would want a representative sample of the whole workforce, right? And if you oversample people who are likely to get laid off it probably means there is a glut of that labor in the marketplace; wouldn't that understate those wages, logically?

Mr. BASKIN. Not necessarily, but, you know, it is a relative thing. Is it better than having two projects and three workers set the standard for the entire community? Yes, I think that would be better.

Mr. ANDREWS. But tell me what would be better, though. We know what you think is wrong with the present method. How would you go about finding the right answer?



Mr. BASKIN. So it is our duty to defend this indefensible law?

Mr. ANDREWS. No.

Mr. BASKIN. Well, I don't rise to that, I am afraid.

Mr. ANDREWS. I didn't—

Mr. BASKIN. Well, it is an important question, though, because—and it is addressed—

Mr. ANDREWS. Excuse me. It is my time. You didn't hear my question.

I said I know that you favor repeal, but you criticize the method but you also make another claim that the method by which the wage is calculated is wrong. Tell me the right way to do it, in your opinion.

Mr. BASKIN. Right. And you have asked us to tell you what is the way to enforce a law that we don't think is a valid measure.

But I will say that there are many different methods that would be preferable. Dr. Thiebolt does—you are getting at, I guess, should it be the mean, the median, the mode? There are many alternatives. What we would say at the start is that it should be as statistically representative as possible and not relying on inaccurate and biased samples—

Mr. ANDREWS. To be statistically representative you have to collect a lot of samples. I mean, I assume that the larger the sample is, the smaller the standard deviation, the lower the—part of the error. Wouldn't that mean you would have to ask a lot of contractors to report to the government what they are paying people?

Mr. BASKIN. And you would get—not necessarily. That is all I can tell you. It does not mean that. It does not mean that.

Mr. ANDREWS. I don't know how you couldn't, that if you are trying to get an accurate sample of what construction contractors are paying people you have to ask construction contractors what they are paying people.

Mr. BASKIN. And ask them—and I may have misheard what you said, ask them—yes, but we are not in favor of mandating, if that is what we are leading up to.

Mr. ANDREWS. So you are in favor of a voluntary survey?

Mr. BASKIN. A voluntary service has a better chance at response, and here is why BLS does better there. BLS does better because they are independent.

Mr. ANDREWS. I thought in your testimony, though, you specifically criticized the present method because it was voluntary. You sound to me like—let me ask you another question.

I want to reconcile two facts in your testimony. You cite that Davis-Bacon costs inflate federal construction by 20 percent. You then cite a CBO study that says that there is a \$15.7 billion increase over 10 years. The amount of federal construction over a 10-year period is about \$250 billion, so that is 6 percent. Which of your two numbers is wrong?

Mr. BASKIN. The CBO number, I believe we said, is conservative. There are other studies. Another study cited in that same footnote says it is \$8 billion a year in inflated costs. The summary of studies ranges between—generally between 10 percent and 20 percent.

Mr. ANDREWS. Do you think it is 20 percent or you think it is 6 percent?

Mr. BASKIN. I am not an economist. I am just reporting what the economists say, and there is a range of—

Mr. ANDREWS. No, but you say both.

Mr. BASKIN. Yes.

Mr. ANDREWS. In the beginning of your testimony you say it is 20, then you say it is 6. Which is it?

Mr. BASKIN. No. I don't believe that is the way it is stated. I will stand by what the testimony says and what I will say to you now is that there are many studies which have confirmed that there is a cost increase—a substantial cost increase—from Davis-Bacon.

Mr. ANDREWS. Well, you picked two of them.

Thank you.

Chairman WALBERG. I thank the gentleman.

Now I recognize for 5 minutes of questioning the chairman of the Ed and Workforce Committee, Mr. Kline?

Mr. KLINE. Thank you, Mr. Chairman.

And thank you to the witnesses for being here, for your testimony, and for engaging in the question and answer. A lot of sort of pieces here we are trying to put together.

Dr. Groshen, the BLS provides data, as I understand it, for locality pay for federal workers. Is that right?

Ms. GROSHEN. We provide some information that that is used for that purpose, yes.

Mr. KLINE. That is data for that.

Ms. GROSHEN. Yes.

Mr. KLINE. So what is involved in this wage category when you are providing this data?

Ms. GROSHEN. I am new enough that I don't actually know the answer to that. We provide a special tabulation for the committee, a special tabulation that is used for that purpose, but I can get back to you and give you the information about what it is that is in that.

Mr. KLINE. Okay. I am just trying to understand how you—

Ms. GROSHEN. Basically, it is occupation information by locality.

Mr. KLINE. By locality—

Ms. GROSHEN. Wage—yes—

Mr. KLINE [continuing]. For federal workers, but we are having some difficulty getting it by locality for private workers. I am just trying to understand what is involved in your process of getting that data for federal workers and why isn't it applicable to private workers.

Mr. Baskin—

Ms. GROSHEN. No, I think we provide private sector data that is used for the public's—that is used to set the federal wages.

Mr. KLINE. Right.

Ms. GROSHEN. Right.

Mr. KLINE. So you are able to do that and it is applicable to federal workers. I am trying to figure out why it wouldn't be applicable to private workers.

Ms. GROSHEN. That is a policy decision.

Mr. KLINE. We will continue to explore that. Right.

Mr. Baskin, I think in Dr. Groshen's testimony there are several hourly wage rates for counties in Minnesota. The BLS rate is \$32.08 while the county numbers vary from \$36.59 to \$39.84. This

figure does not include the fringe benefits that increase the actual wage rate to approximately \$60.

Do you think that the Department of Labor numbers demonstrate a prevailing wage for these counties?

Mr. BASKIN. The Wage and Hour Division clearly seems to be an inaccurate count that is causing the taxpayers to pay more than they should.

Mr. KLINE. Right. So, I mean, that is at the heart of the discussion here is trying to figure out what this should be, and clearly there are differences.

I appreciate very much Chairman Walberg holding this hearing as we try to dig to the bottom of this and figure out what the right numbers would be because it clearly has an effect on the cost of these projects.

I will yield back my time, Mr. Chairman.

Mr. BASKIN. If I may just finish the response by answering a question that was previously asked about something in our written testimony, it was represented that we said that we picked the number \$15.7 billion. What we said was the Congressional Budget Office has estimated that it raises costs by that amount, which ABC believes to be a conservative estimate. And then we cited the higher numbers that we also believe to be more accurate. Thank you.

Chairman WALBERG. Would the gentleman yield?

Mr. KLINE. Happy to yield.

Chairman WALBERG. Thank you. Always need more time.

Let me go back, Mr. Baskin. One often overlooked issue related to Davis-Bacon is that fringe benefits. Can you explain how fringe benefits are paid to workers under the Davis-Bacon work rules?

Mr. BASKIN. Well, it is a very complicated process that no time limit would save us today—

Chairman WALBERG. Give us our best shot.

Mr. BASKIN. Well, to begin with, they try to measure what the union trades are paying, and then nonunion contractors, who have totally different structures to their benefits program, are told they can pay costs of bona fide fringes themselves. Only the definition of bona fide fringes is very grey and murky and how it is going to be matched up with the nonunion benefits has led to litigation and rulings that, again, are unclear to many contractors. So a game of gotcha is played with many of them around the country.

Now, in terms of the survey to determine that, it is the same garbage in, garbage out method, is what the Wage Hour Division currently uses. It asks contractors to say what their fringe benefits are, and on an inadequate basis they do, with the unions doing a better job of getting their responses in because the nonunion contractors don't know why it is important. Many of them are not working on the public sector in the first place so they don't want to have anything to do with the government.

And others are worried about being targeted. They have seen in the news that sometimes people are targeted by federal agencies so they are reluctant to give their private personnel information to the Labor Department.

Chairman WALBERG. Thanks for giving a stab at answering.

Thanks.

I now recognize Mr. Bishop for 5 minutes of questioning?

Mr. BISHOP. Thank you very much, Mr. Chairman, and thank you for holding this hearing.

I guess I want to start by observing that the name of this committee is the Workforce Protections Subcommittee, and I can't think of anything more fundamental to protecting a workforce than seeing to it that they are paid a fair wage. And that seems to me to be at least one of the goals of Davis-Bacon. And yet, we are here having a hearing that certainly is not protective of Davis-Bacon and we have a record of at least nine votes on the floor of the House that would strip Davis-Bacon protections from various appropriations bills.

Let me ask you, Mr. Eisenbrey, let's just look—let's take from the bottom up. We just had a vote 2 weeks ago that would strip prevailing wage requirements from military construction projects. If that were to take on the force of law is it reasonable to assume that workers on those military construction projects would be paid less for the same work?

Mr. EISENBREY. Well, if you believe Mr. Baskin, you know, the prevailing—even under his version of the prevailing wage, he would have their wages cut by somewhere between 65 and 80 percent. He thinks that the—if his version of how the wages were set were to be put into place, he is saying that the wages should be cut by 65 to 80 percent. So, I mean, that is a starting point—that is assuming you even have a Davis-Bacon Act. If you didn't have the Davis-Bacon Act it would be, you know, anything goes, and we saw what that is like after Katrina, when the Davis-Bacon Act was suspended. Wages went down to the minimum wage.

Mr. BISHOP. Mr. Baskin, I am going to give you an opportunity to—because I see—

Mr. BASKIN. I—

Mr. BISHOP. Let me just speak for a—

Mr. BASKIN. I am sorry. Go ahead.

Mr. BISHOP. I see you shaking your head, but the question I am going to ask is not whether or not the citation Mr. Eisenbrey made—65 to 80 percent—I am not going to ask you to determine whether that is fair or unfair. But is it reasonable to assume that if we were to take away Davis-Bacon protections from military construction jobs or—let's look at the list—Department of Defense jobs, or energy and water related jobs, is it reasonable to assume that the wages paid to those workers on those jobs would be less than what they are paid now with Davis-Bacon protections? Is that a reasonable assumption?

Mr. BASKIN. It would certainly not be 65 to 80 percent. We just talked about 20 percent—

Mr. BISHOP. I am going to take that as a yes, that it is a reasonable presumption.

Mr. BASKIN. That the taxpayers would no longer pay a premium bonus—

Mr. BISHOP. I am talking about the worker—all right.

Mr. BASKIN. That is the point.

Mr. BISHOP. But the point that I am making is that you have said that Davis-Bacon hinders economic growth. Seventy percent of our economy is consumer spending. Now, I don't think you need to be a Nobel laureate in economics to figure out that if you pay peo-

ple less they are going to spend less, and if 70 percent of our economy is rooted in what people spend, if we pay them less that is going to hurt our economy.

Would you agree to that, Mr. Eisenbrey?

Mr. BASKIN. And what if you build 20 percent more projects and employ 20 percent more people?

Mr. BISHOP. I haven't asked you a question.

Mr. Eisenbrey, would you agree that if we pay people less, chances are they are going to spend less?

Mr. EISENBREY. Absolutely.

Mr. BISHOP. And chances are that that is going to have a detrimental impact on our economic growth?

Mr. EISENBREY. Absolutely. That is one of the things that is holding back the recovery right now is low wages.

Mr. BISHOP. Okay.

What I would like to see this committee focus on is how we really can protect wages. We have Davis-Bacon, which is under assault.

We have the minimum wage, which has not changed in 4 years. Minimum wage worker makes \$15,000 a year. That qualifies that person for food stamps. That qualifies that person for Medicaid.

And yet, here we are having a hearing to determine how it is we can pay people even less than we are paying them now when we have a demonstrated need to pay—to hopefully see to it that people can make more, have lives of dignity, have jobs of dignity.

Mr. EISENBREY. Mr. Bishop, I couldn't agree with you more. If the minimum wage were raised to \$10.10 an hour, as you have proposed and as Mr. Miller, I think, has the bill, we estimate that that would increase consumer spending enough to generate another 140,000 jobs.

Mr. BISHOP. Thank you very much.

I yield back, Mr. Chairman. Thank you.

Chairman WALBERG. I thank the gentleman.

And these hearings all hope that we will ultimately produce more spenders capable of spending.

Let me ask a question: Dr. Groshen, Davis-Bacon wage rates include fringe benefits. You note that the Occupational Employment Statistics Survey does not measure these benefits but the National Compensation Survey does. Do you believe this survey could be used by Wage and Hour to set fringe benefit rates?

Ms. GROSHEN. The BLS takes no position on what data should be used for Davis-Bacon or other policy purposes, so we would not take—

Chairman WALBERG. Could they be used?

Ms. GROSHEN. It depends on what—that wouldn't be up to us to make the decision whether or not to use them. We produce them and tell people exactly what is in them.

Chairman WALBERG. Mr. Sumner, just to rehearse—it has been a little while since your testimony—17 months lapsed between the time the International Union of Operating Engineers wrote to the Department of Labor and the issuance of All Agency Memorandum 212. In all that time did the surveyors not receive an inquiry about the changes contemplated by AAM 212?

Mr. SUMNER. We certainly were not informed or were—we were not part of the discussion, that is for sure. And to our knowledge, surveyors were not informed until it was completed.

Chairman WALBERG. So no knowledge. Again, an example of after the fact of implementation you receive information.

Your testimony highlights that the industry was unaware of the policy change applying Davis-Bacon to your industry until a contracting officer sent an e-mail. The e-mail also indicated that the application of the act would be retroactive—fairly significant. Can you describe how disruptive this is to surveying businesses?

Mr. SUMNER. It is disruptive to surveying businesses because by and large surveying businesses, as I mentioned earlier, are small businesses. So dealing with the change, retroactive or not, but in particular retroactively, certainly puts a burden on that business to, as I mentioned earlier, go back and try to determine when a particular person was doing a particular activity.

If you look at the ruling, it talks about in particular the position called “instrument man.” In today’s world that is called “instrument person,” by the way.

But if that person is performing duties on the project when the party chief or the head person is not there then that person is being considered to be exempt. But if they do the same duties when the party chief is there then they are considered to be laborers. And so our disagreement with this really has to do with the fact that survey crew members in today’s world are totally inappropriately categorized by this ruling.

Chairman WALBERG. Not a traditional desk job, certainly.

Mr. SUMNER. Pardon me?

Chairman WALBERG. Not a traditional desk job.

Mr. SUMNER. It is not.

Chairman WALBERG. As your testimony illustrates and comments you have just made, surveyors are moving between projects on a daily basis, sometimes crossing streams, not flyfishing on the way I don’t think. Will it be easy for a survey company to allocate an employee’s time between Davis-Bacon work and non-Davis-Bacon work?

Mr. SUMNER. It is a very difficult task to do, and again, partially because of the nature of survey crews today. As I pointed out, sometimes survey crews are one person because of the technology we have today. So that person is going to be doing a lot of different things.

Many of the tasks that have been cited that have been specifically cited for a particular person are now interchangeable. And running my surveying company over the years, more times than not on construction projects I was the person, as the licensed professional, driving the pins in the ground because I wanted to be out front to see if everything lined up when we were doing it. The equipment allowed somebody else to do the angle-turning and that kind of thing.

So it confuses the whole issue as to who is doing what and at what point in time.

Chairman WALBERG. Okay. I appreciate that.

Mr. Baskin, CityCenter D.C. is an innovative development project injecting jobs, housing, and economic development into the

heart of Washington, D.C., and we see it happening in other parts of the country, as well. If the Lapenk ruling applies, Davis-Bacon stands, how likely will other cities be able to use this private sector development model based on the cost increase?

Mr. BASKIN. It would seem to inhibit it, and certainly at least in situations where it is using federal government land it would be a—

Chairman WALBERG. Could it stop what is taking place here in Washington, D.C. in a very positive project?

Mr. BASKIN. Oh, yes. The district is very concerned about it. That is why the district has sued the administration over this ruling, which departs from—well, it has never been done before in the 80-year history of the act, apply it to a project that has no government money or ownership or occupancy.

Chairman WALBERG. Thank you. I see my time is expired.

I now recognize Ms. Fudge?

Ms. FUDGE. Thank you, Mr. Chairman.

And thank all of you for your testimony today.

Mr. Eisenbrey, the Davis-Bacon act specifies that wage determinations be based on the local prevailing wages paid on projects of a character similar to the contract work, which you know. As a result, the Wage and Hour Division of the Department of Labor surveys four separate and distinct segments of the construction market, including residential, heavy, highway, and building segments, to ensure that workers are paid based upon their skill level and productivity.

Do you believe that everyone in the construction industry should be paid the same prevailing wage no matter the construction work they perform? And should workers in residential construction be paid the same as those in highway construction? And what about workers in highway construction and building construction? Should they be paid the same?

Mr. EISENBREY. They should not. And one reason—the most obvious reason is that the skills required are very different. The skills for a carpenter doing residential construction versus the skills required of a carpenter on bridge construction—highway bridge construction are very different.

Everyone in the industry pays differently for those. Even though they are both called carpenters, they are paid very differently. And the Davis-Bacon wage rates reflect that. I don't think that Mr. Baskin would disagree with that, as a matter of fact.

Ms. FUDGE. You sure?

Mr. EISENBREY. I am pretty sure—

Ms. FUDGE. Next question to you: The Davis-Bacon Act instructs the secretary of labor to set the prevailing wage in the city, town, village, or other civil division of the state in which the work is being performed. The Wage and Hour Division generally meets this requirement by collecting data on a county-by-county basis.

In Commissioner Groshen's testimony she uses the example of the metropolitan areas of Minneapolis-St. Paul, Minnesota, and Bloomington, Wisconsin, which include 11 counties in one state and two counties in another at the local area for the purposes of the bureau's data collection. Do you think the bureau's standards of defining a local area meets Davis-Bacon's standard of setting wages

based on the city, town, or village, or other civil division of the state?

Mr. EISENBREY. No. It clearly doesn't, and I think BLS recognizes that. The, you know, an SMSA goes through, you know, it includes many—sometimes many counties, many cities, villages, and so forth. They don't claim to have and they don't in fact have the ability to provide the granularity that the act requires, you know, to get down to a local area and say what is actually happening in that local community in terms of how people are paid.

Ms. FUDGE. And then lastly to you, sir: Since 1964 the act has required construction contractors to pay workers the prevailing wage, which often include health and retirement benefits. As you know, the Bureau of Labor Statistics does not include the calculation of fringe benefits in its standards. Do you think it is fair to ignore 20 percent or more of a construction worker's compensation when determining the prevailing wage?

Mr. EISENBREY. Obviously it—the Congress made the right decision in requiring that fringe benefits be included in the prevailing wage, since that is such an important part of people's compensation. And the Bureau of Labor Statistics does collect fringe benefit information in another survey—not in the OES, as you said; in the National Compensation Survey.

But trying to marry this up and get to the point where they could tell you what the project—what the wages are on a given project, or, you know, a series of projects in a local area—it is a very expensive proposition. As I said earlier, trying—they ran four tests back in 1997 to do this and the cost estimates were for just these four test areas for 3 years it was almost \$3 million.

So if you, you know, imagine what the cost would be for the entire nation trying to get that fringe benefit information. There is nothing you can't do if you spend enough money. The Wage and Hour Division could go out and knock on the doors of contractors and, you know, and get responses from them if they had enough money to do it, but there is—I just think it is not a practical solution to suggest that BLS collect that information for the wage surveys.

Ms. FUDGE. Thank you, Mr. Chairman. I yield back.

Chairman WALBERG. I thank the gentlelady.

And now I recognize the gentlelady from Oregon, Ms. Bonamici?

Ms. BONAMICI. Thank you very much, Mr. Chairman.

And thank you all for your testimony. I want to follow up a bit on Mr. Bishop's comments during his questioning about the importance of enacting policies and maintaining policies that actually help rising wages and help get people back to work. And I certainly have seen very good policy reasons why Davis-Bacon was passed decades ago and some of the benefits of Davis-Bacon, including ensuring that contractors compete based on who can best train, best equip, and best manage a construction crew.

And if you look at the examples at the state level when prevailing wage laws have been repealed, which, of course, some here have advocated, it has led to fewer apprenticeship programs, especially affecting minority communities, pressure to lower wages and benefits, and declines in quality, increases in injuries. That seems like the wrong direction.



Certainly prevailing wage regulations have had positive effects, including better-skilled workers and increased productivity, which is what we should be looking for. These are the types of policies we should be considering, promoting, and supporting in addition to policies like the Healthy Families Act that establishes national paid sick days standard; the Fair Minimum Wage Act, raising the minimum wage and linking it to inflation—something my state of Oregon has already done.

So, Mr. Eisenbrey, I want to ask you if you could expand on some of the benefits of Davis-Bacon and maybe respond to some of the issues that have been raised here criticizing the act and calling for repeal. Can you respond to why this Davis-Bacon and prevailing wage have been beneficial, especially when we are trying to build the economy? Thank you.

Mr. EISENBREY. Well, we saw what happened when Davis-Bacon was suspended in New Orleans and the Gulf Coast after Katrina. That is the best way to get a sense of what the world would be like without Davis-Bacon.

And really, for the workers there it was a disaster. Companies came in—non-local companies—bringing workforces of, you know, varying skills and quality, and they underbid all the local contractors. Here was the time for that community to rebuild and for the local people to join in rebuilding and they were underbid and the result was a lot of heartache in the area and wages that were, you know, pushed down to rock bottom. So that is the world without Davis-Bacon.

We also know—and, you know, we have our competing studies, but I have a book here that includes a review of states with and without prevailing wages that does economic regressions to tease out what is the effect of prevailing wage on safety and health, and the prevailing wage laws are associated with a 10 percent decline in significant injuries. That is a significant difference in a nation where we have about 6 million injuries on the job each year.

As you say, training is a huge component of this because the—it is the unions who provide the bulk—even though they may represent a smaller segment of the construction industry now than they used to—they are maybe only 20 percent—they train people in a way that nonunion construction firms do not, and the federal government could learn a lot from the building trades and their programs.

We spend millions of dollars—and I think this committee has jurisdiction—billions of dollars on training programs, the results of which are really pretty pathetic. By and large, those programs are not successful. You look at the building trades programs, they turn out journeymen, the most skilled workers in this industry, and you know, Davis-Bacon helps make that possible by protecting the wages and fringe benefits and the apprenticeship programs of those skilled trades.

Ms. BONAMICI. Thank you. And I want to add that—and actually reiterate the importance of those training programs, especially as schools across this country have cut career and technical education programs. Our friends in Labor have provided those apprenticeship opportunities and those training programs that really fill a need for

those who are looking for a good-paying job to support a family, and they have filled that need.

So thank you very much, and I yield back, Mr. Chairman.

Chairman WALBERG. I thank the gentlelady.

Now recognize my good friend from Indiana, Mr. Rokita?

Mr. ROKITA. Thank you, Mr. Chairman. I appreciate the time and also thank you for the wonderful compliment. Not sure what I did to deserve that this morning.

I want to say good morning and welcome to our witnesses. And my apologies, quite frankly. And I am not happy but slightly embarrassed to say on the record that I am—I apologize for not being able to hear all your testimony, but I am glad to be here at least for the end of this hearing.

I have done a little bit of work in preparing for this hearing and reviewing your written testimony, and I have a few questions. And again, my apologies if some of this has been covered.

First of all, Mr. Baskin, if I can start with you: The criticism that has been leveled against contractors for not actively participating in the Davis-Bacon wage surveys versus some of the other surveys that they get a higher participation rate in seems to lead to the conclusion that DOL—Department of Labor—is hampered when collecting the survey data, resulting in a flawed wage rate. Do you agree, disagree, and what solutions do you have?

Mr. BASKIN. I agree they are hampered, and although there was some crosstalk about it, just to be clear—might not have been completely in the previous discussion—one reason why BLS would be a more effective resource, we think, is that they are not the enforcers, as you have heard today. It is intimidating for contractors to be told by the agency that is going to audit them on other—

Mr. ROKITA. Yes.

Mr. BASKIN [continuing]. Projects that they should submit this wage data.

Mr. ROKITA. But what to do, what to do?

Mr. BASKIN. Well, the suggestion has been made that BLS could do a better job. The issue has been brought up about fringe benefits, but I would refer the committee to the testimony and the supplemental testimony from the last hearing on this subject, in which Mr. Shirk refuted the statements made by Mr. Eisenbrey today and pointed out several different ways that fringe benefit data could be economically added to the BLS surveys or, alternatively, what about this: The BLS does the part that they are better at and leave to the Wage and Hour Division to fill in the gaps with the fringe benefits? Still better than doing it all wrong, which is what is going on today.

Mr. ROKITA. Thank you.

Dr. Groshen, would you like—is it Groshen or Groshen? I am sorry. Groshen.

Ms. GROSHEN. Excuse me. Yes.

Mr. ROKITA. Would you like to respond to that?

Ms. GROSHEN. Response that is most important here is that we, of course, do not make—we do not make policy recommendations and we do not make any judgments about how wages should be determined for Davis-Bacon purposes. With a clear set of instructions for what was needed the BLS could provide an estimate into how

much it would cost to produce those data and we would be happy to do that.

Mr. ROKITA. Okay. Just remember, we are broke.

As you have heard—Dr. Groshen, continuing on with you—GAO found that the Wage and Hour Division's wage rates were often outdated, and in one notable instance, 10 years out of date. Your testimony noted that it takes approximately 1 year for you to gather the data. How often do you update the survey? To gather data for the Occupational Employment Statistics Survey. How often do you update that survey?

Ms. GROSHEN. We put out estimates annually but we are in the field collecting the data continually, so we have—our latest statistics came out for May 2012.

Mr. ROKITA. So are you familiar with this in one instance being 10 years out of date? Do you know what I am talking about?

Ms. GROSHEN. No. I am not sure what that refers to.

Mr. ROKITA. Okay. You mind if I follow up with you in writing?

Ms. GROSHEN. Absolutely not. Please.

Mr. ROKITA. Okay. Great. Thank you.

Over the last—still with you, Doctor—over the last 15 years the Department of Labor has suggested it is working to improve the timeliness, quality, and accuracy of the wage data. It has been suggested that using the BLS data would be more representative of prevailing wages. Can the BLS data be used as a more representative prevailing wage or not?

Ms. GROSHEN. That wouldn't be up to us to decide.

Mr. ROKITA. But what is your opinion?

Ms. GROSHEN. The BLS has no opinion on this matter.

Mr. ROKITA. But what is your opinion?

Ms. GROSHEN. I am here testifying as the commissioner of the BLS, so I have no opinion.

Mr. ROKITA. That is a bad way to go through life. [Laughter.]

I yield back.

Mr. BASKIN. Congressman, is it too late for me to respond?

Mr. ROKITA. No. I take back my time, Chairman.

Mr. BASKIN. Only to point out that it has been stated that it is somehow incompatible with the statute but the Wage and Hour Division itself, where the Employment Standards Administration back in 2001 said that it was feasible for the BLS data to be used for this purpose. It was feasible from the statutory perspective.

You also asked about 10-year-old data, and since the District of Columbia was brought up it should be pointed out that the current wage survey for building construction in the District of Columbia is based on data that was collected in 2004 and 2005.

Mr. ROKITA. I thank the witnesses.

I yield back.

Chairman WALBERG. I thank the gentleman.

And now I recognize the ranking member, who helped to prove that we as chairmen and ranking members don't always go ahead of our own committee members—

Mr. COURTNEY. That is right.

Chairman WALBERG [continuing]. But defer for better purposes. So I recognize you now.

Mr. COURTNEY. Great. Thank you, Mr. Chairman.

Dr. Groshen, I would actually like to ask you a couple questions that I think you can answer, which is the—some of the reports that you have issued recently. And what is the unemployment rate in the construction sector right now in the U.S.?

Ms. GROSHEN. The unemployment rate in the construction sector. Let's see. Actually—

Mr. COURTNEY. I will go back to my old deposition where I used to lead the witness. It is 10.8 percent. Is that correct?

Ms. GROSHEN. There we go. Okay. I am sorry. Yes, it is 10.8 percent.

Mr. COURTNEY. Correct. Thank you.

And right now the—let's see here. The hourly pay for non-farm workers in the first quarter of 2013—again, if you could just give us the latest numbers, did it go up or down?

Ms. GROSHEN. It went down.

Mr. COURTNEY. And it went down significantly. Is that correct?

Ms. GROSHEN. Yes. At a 3.8 percent annualized rate, and it is the largest quarterly decline on record.

Mr. COURTNEY. In terms of labor productivity since 2007, has that also declined or has that gone up?

Ms. GROSHEN. Labor productivity has risen. I am sorry, you asked for 2000 from—

Mr. COURTNEY. Well, just in recent years.

Ms. GROSHEN. Yes. So 1.6 percent in—since 2007 it is productivity grow.

Mr. COURTNEY. So, and normally—I mean, in the past, historically, I mean, productivity—when productivity goes up wages usually are somewhat follow or track that trend. Is that correct?

Ms. GROSHEN. That is right. That is right. From 1947 through the 1970s productivity and real hourly compensation tracked each other rather closely. Specifically from 1947 to 1973 there was just a 0.2 percent percentage point difference between the two. The two series continued to track each other rather closely from 1973 to 1979, again differing by just 0.2 percentage points.

However, since then the series have begun to diverge by much greater amounts. The disparities between the two series amounted to 0.9 percentage points in the 1980s, 0.6 percentage points in the 1990s, and 1.4 percentage points both from 2000 to 2007 and also from 2007 to 2012.

Mr. COURTNEY. Great. Thank you.

Mr. Chairman, I am going to summarize now and then yield back to you as we are getting close to the end here.

And again, I just want to jump off from the testimony, which, in my opinion, should be the real focus of Congress and our country right now, is that, you know, we are seeing, again, a decoupling of productivity and wages in this country at a time when median income—middle class income in this country has been stagnant over the last 10 or 20 years. And to be sitting here today and talking about bureaucratic churning over, you know, who is going to calculate the Davis-Bacon rates, frankly, misses the point.

Your members were in my office, Mr. Baskin, last week. And we walked together through a lot of the stimulus projects and the MILCON projects. Again, I have the largest operating military base in New England with the Groton Sub Base. Over \$100 million of

work over the last few years since the last BRAC round—every penny of it to nonunion ABC contractors who, again, had to comply with Davis-Bacon.

The fact of the matter is they were stampeding towards those projects. I mean, the notion that there is some kind of an obstruction or an obstacle that is forcing nonunion contractors to shy away because of Davis-Bacon, again, the experience over the last 2 or 3 years in terms of the Recovery Act and MILCON has been completely the opposite. And again, I can walk you through sewer treatment plants, surface projects, streetscape projects—even the small ones—where again, you know, that is not the problem out there right now.

The problem is we need more work. And what we need is a 5-year surface transportation bill. We need a WRTA bill to—I mean, we know that water systems in this country are in just outrageous state of disrepair.

And we have an 11 percent unemployment rate in the construction sector. That is the problem that construction firms in my district and in my state are really worried about.

And again, if you look at the experience of the Recovery Act, where again, in a bad economy the bidding that was taking place, again, by your members on a lot of these projects resulted in actually surpluses that went back to the state DOT and they were able to recirculate that money back into other projects because, again, the state of the economy was giving the taxpayers probably the best deal they could have every gotten in decades.

Thank God, in my opinion, the Recovery Act was there. I realize that failed stimulus is, you know, the majority party's talking point, but the fact of the matter is we have sewer treatment plants which were sitting on the shelf for decades; we have, again, road projects and the rail project, which I mentioned earlier, as well as building up a Navy base that, again, was frozen by the BRAC process back in 2005. And your members benefitted from that and Davis-Bacon was not the problem.

And again, that is not the problem here today. We have, again, an economy that is still not engaged in terms of growth, and we have this austerity belief that is crippling the country.

And sequester, by the way, is exhibit A in that. I mean, you want to look at what is holding back maintenance and repair and construction work at the Navy base in Connecticut and Navy—and military bases all across the country? It is sequester. The operation and maintenance account of DOD is frozen right now because of sequester and your members are the ones who are paying the price because of that, in my opinion, idiocy that this Congress is just ignoring and not taking up and turning off, which again, there is many ways we can do that just as we did with sequester back in the 1980s and 1990s with Gramm-Rudman.

So again, you know, it was a good hearing, we had lots of good exchanges, fun exchanges here today. But the fact of the matter is, for people who are in the construction trades today this is not the issue. This is not the issue that we should be focusing on today.

And I hope as we move forward with this subcommittee we are going to focus on what really matters, which is making sure that

we get robust infrastructure investment and turn off sequester. And with that, I yield back.

Chairman WALBERG. I thank the gentleman.

I also ask unanimous consent that the following statements be entered into the hearing record: from the Associated General Contractors of America, Management Association of Private Photogrammetric Surveyors, and Stop Davis-Bacon Act Expansion Coalition.

[The information follows:]

*June 18, 2013.*

Hon. TIM WALBERG, *Chairman,*  
*Subcommittee on Workforce Protections, Education and the Workforce Committee,*  
*Washington, DC 20515.*

Re: *Promoting the Accuracy and Accountability of the Davis-Bacon Act*

DEAR CHAIRMAN WALBERG: On behalf of the Associated General Contractors of America (AGC), I want to thank you for holding a hearing on “Promoting the Accuracy and Accountability of the Davis-Bacon Act”. AGC represents both union and open shop firms and has long-term experience with the Davis-Bacon Act. While many AGC members participate in Davis-Bacon wage surveys and regularly perform work subject to the Act, there are several concerns and recommendations that AGC would like to share regarding Davis-Bacon wage determinations.

*Sudden Increases in Davis-Bacon Wage Rates*

For the purpose of establishing wages and fringe benefits to be listed in Davis-Bacon wage determinations, the U.S. Department of Labor’s Wage and Hour Division (WHD) periodically sends out Davis-Bacon wage surveys. These surveys are sent to both federal and nonfederal contractors and interested third parties to request information on wages and fringe benefits paid for various types of work performed. Until recently, surveys were not conducted in some areas for several years. While AGC appreciates WHD’s attempt to post wage determinations that reflect current market conditions, some areas are experiencing sudden and dramatic increases in wage rates for which many contractors and contracting agencies are not prepared. Furthermore, contractors are not given an adequate amount of time to adjust to newly increased rates.

*Concerns about Survey Participation*

Survey participation continues to be an issue for contractors, and participation is vital to WHD’s success with effectively establishing market-based wage rates. A report prepared by the U.S. Government Accountability Office (GAO) on methodological changes needed to improve wage surveys states that according to the labor department’s Office of Inspector General (OIG), some contractors may be reluctant to provide information to the government because they view it as proprietary or fear that doing so will subject them to audits.

*Wages and Classifications Not from Local Area*

AGC has also seen cases in which wage rates and classification practices were improperly adopted from adjacent states. In some cases, the wage determinations rely on wage rates from collective bargaining agreements that do not cover the area of the wage determination. In another recent case, we found a wage determination that incorporated the wage rate from a collective bargaining agreement that did cover the area of the wage determination but only “on paper.” That is, the union was no longer active in the state in which the wage determination applied—it no longer represented workers there and no longer maintained a local there—but had merely assigned jurisdiction to the local in the adjacent state, whose rates were adopted in the wage determination.

*Missing or Inaccurate Classifications*

AGC is also concerned with the increased number of missing and/or inaccurate classifications listed in wage determinations. For example, classifications and wage rates may be included for one type of construction, such as Heavy, but may not be included for another type, such as Building. This is just one example. Contractors and contracting agencies are then required to go through the burdensome process of requesting a conformance to have the missing or inaccurate information updated in the wage determination. While WHD is reviewing the request, contractors are often unsure of the rate to pay workers until a response is received.

*Conclusion*

AGC believes the current Davis-Bacon wage determination system is severely broken. AGC recommends further exploration into using Bureau of Labor Statistics (BLS) data, specifically data from BLS's Occupational Employment Statistics survey and National Compensation Survey, as the primary basis for Davis-Bacon wage determinations. If, however, the present reliance on WHD-conducted surveys and on collective bargaining agreements is maintained, substantial changes must be made to the process and practices so that the outcome is more accurate and reliable. The recommendations set forth in the March 2011 GAO report should be further explored. These include:

- amending the requirement that WHD issue wage rates by civil subdivision;
- obtaining objective expert advice on WHD's survey design and methodology;
- and, taking steps to improve the transparency of wage determinations.

AGC also believes that WHD should, if it maintains the current process:

- accord contractors a reasonable amount of time before new wage rates go into effect and, where the change is particularly substantial, phasing in the increase;
- include on the survey form language that prevents respondents' information from being used for enforcement purposes; make survey forms faster and easier for contractors to complete;
- create a standard practice of conducting pre-survey briefings for contractors with each new survey, and doing so electronically to allow all interested contractors the opportunity to participate without time away from the office; and,
- clarify to survey recipients who may not work on public projects that data is particularly needed from them in order to capture the most accurate prevailing wages in each area.

AGC believes that the recommended modifications will enhance the quantity and quality of the data and produce more accurate and timely wage determinations.

Sincerely,

JEFFREY D. SHOAF,  
*Senior Executive Director Government Affairs.*

June 18, 2013.

Hon. TIM WALBERG, *Chairman,*  
*Subcommittee on Workforce Protections, Education and the Workforce Committee,*  
*Washington, DC 20515.*

DEAR MR. CHAIRMAN: MAPPs ([www.mapps.org](http://www.mapps.org)), the national association of private sector geospatial firms, commends you for holding an oversight hearing on the Davis-Bacon Act and respectfully requests that this letter be entered into the record of the hearing.

MAPPs strongly opposes the recent Davis-Bacon Act expansion into the professional surveying community by the Department of Labor. Our membership includes firms with professional survey crews in the field and thus subject to the change in regulations. We object not only to the Department of Labor's change in policy, but also as to the process utilized.

In March of this year, the Labor Department reversed more than 50 years of policy and determined that members of survey crews working on Federal construction projects are "laborers and mechanics" as that term is used in the Davis-Bacon Act, making those workers subject to the Act. The Labor Department did no public notice that it was considering a change in its regulations, made no request for public input or comments, and did not notify or seek advice, comment or input from the surveying profession and employers/management.

Since Arthur Goldberg was Secretary of Labor under President John F. Kennedy, in 1962, it has been policy and understood practice that members of survey crews were EXEMPT from the Davis-Bacon Act. He noted that such workers are covered ONLY to the extent to which they "perform manual work, such as clearing brush and sharpening stakes" which he said "are not commonplace". The recent Department of Labor change in policy is inconsistent with more than 50 years of settled law.

The Department of Labor has identified the geospatial field as one of the high growth sectors of the U.S. economy and has invested hundreds of thousands of dollars in workforce development programs to attract new employees to this field. Imposing a "prevailing rate" on wages in the geospatial field is not needed. Moreover, this regulation will impose a paperwork burden for our members, and increase the costs of these firms as well as the government agencies that contract for such services.

We look forward to working with Congress and the Administration to reverse this unnecessary and unwise policy. For more information, please contact me or John Byrd, MAPPS Government Affairs Manager.

Respectfully,

JOHN M. PALATIELLO,  
*Executive Director.*

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*Stop Davis-Bacon Act Expansion, June 12, 2013.*

SETH D. HARRIS, *Acting Secretary,*  
*U.S. Department of Labor, Frances Perkins Building, 200 Constitution Ave., NW,*  
*Washington, DC 20210.*

DEAR SECRETARY HARRIS: The undersigned organizations strongly oppose the Department of Labor's expansion of the Davis-Bacon Act to members of survey crews. All Agency Memorandum (AAM) 212, issued by the Wage and Hour Division on March 23, 2013, is a costly and unnecessary change in more than 50 years of accepted and settled policy. The Department of Labor has unilaterally expanded the application of the Act to a class of workers who have never been heretofore considered "laborers and mechanics". Rather, survey crews work under the responsible charge of licensed, professional surveyors and their services are not directly involved in construction.

There is no rationale for this change in policy. There has been no action by Congress, no ruling by a court, and no other recent development to change a 50+ year policy.

At a time of record deficit and debt, sequestration, and unemployment, expanding wasteful and controversial laws like the Davis-Bacon Act is ill-advised.

Finally, we are deeply concerned the Department of Labor changed its policy and expanded the coverage of the Davis-Bacon without public notice, hearings, or notification and engagement of affected stakeholders.

We respectfully recommend the immediate rescission of AAM 212.

Sincerely,

JAMES VALVO, *Director of Policy,*  
*Americans for Prosperity.*

IVAN OSORIO, *Editorial Director,*  
*Competitive Enterprise Institute.*

TOM SCHATZ, *President,*  
*Council for Citizens Against Government Waste.*

DICK PATTEN, *President,*  
*Family Business Defense Council.*

MARIO H. LOPEZ, *President,*  
*Hispanic Leadership Fund.*

HADLEY HEATH, *Senior Policy Analyst,*  
*Independent Women's Forum.*

BRANDON ARNOLD, *Vice President of Government Affairs,*  
*National Taxpayers Union.*

DAVID DENHOLM, *President,*  
*Public Service Research Foundation.*

ELI LEHRER, *President,*  
*R Street.*

DAVID WILLIAMS, *President,*  
*Taxpayers Protection Alliance.*

ANDREW ROTH, *Vice President of Government Affairs,*  
*The Club for Growth.*

TIMOTHY F. JOHNSON, PH.D., *Founder and President,*  
*The Frederick Douglass Foundation.*

PHILIP J. ROMERO, *Professor of Business Administration and*  
*Dean Emeritus, University of Oregon; Author, "Your Macroeconomic Edge."*

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Chairman WALBERG. Without objection, so ordered.

I also appreciate this hearing very much. I appreciate the passion that was brought to the table from the witnesses, and thank you so much for taking your time and sharing your positions, your



expertise, your studies, your books. And that information will, of course, be part of our record.

I certainly thank our committee members.

And, Mr. Courtney, I appreciate the involvement on both sides on this hearing today. And I know there are philosophical differences about what will produce an economy, but that is what we want. I think both sides want that.

There is a disagreement how that approach—what approach works best, but we are talking here about a law put in place back in 1931. Different time, different places.

We talk about transparency issues that are of great concern related to this. We talk about different states and localities impact coming from Davis-Bacon. At a premier submarine construction base there are concerns, there are issues somewhat different from my experience back in Michigan, the motor capital of the world, and I am glad to see it redeveloping itself, but a state far different with issues far different.

And great concerns from my small businesses that deal with Davis-Bacon. If they had the opportunity to have a choice it would be a far different outcome that they would want.

We want jobs. We want to grow those jobs. As I mentioned, we would like to see more spenders out there, and more spenders certainly come from a growing economy and the workforce where there are more workers. And with more workers and a more stable economy we will see wages and benefits seek their levels, as well.

We also will see the opportunity when we don't have an almost \$17 trillion debt and deficit spending that continues on and taxpayers frustrated still further, will see economy that grows. I don't like sequester either, and that is why I supported the alternative to sequester that we passed through the House that would have given more flexibility to our military contracts and military spending. But those are philosophical differences that we continue to fight.

We want to see the opportunity for realistic wages and benefits to be in place. When we see that 46 percent of the prevailing wages for nonunion workers were based on wages reported more than a decade ago, that is a concern to me and I think a concern to many. When we have a record with BLS using well established statistical procedures to make estimates for a single year and publishes those estimates about 10 months from those—10 years versus 10 months.

Seems like it is worth looking at as to be the data sources that would be—if we are going to continue Davis-Bacon, and it appears we will for at least a period, I would guess, living in the world of reality, that we ought to have the best record sources available, as well.

Mr. Eisenbrey, I think you made a statement that was close to accurate, in my perception, where you said, "There is nothing you can't do if you spend enough money." Well, I would amend that: There is nothing you can't do if you have enough money to spend. And I think that is the little difference I would say.

We have to get to a point in this growing economy that will give us enough money to spend on legitimate issues in growing our wages, growing our benefits as they seek the level that meets the

needs as opposed to frustrating an economy. And so I think this is all about jobs, and I think this is about growing the economy.

And we will have other hearings, but I certainly appreciate the attention, the detail put to this hearing today on both sides of the aisle and at the witness table. And from this information I guess we will develop processes forward and hopefully all together as Americans for the good of this country and the greatest workers, the greatest productivity, the greatest efficiency we can produce in this country to defeat any competition that is brought to us.

I think I have spoken enough at this point in time. And with no further—

Mr. SUMNER. Mr. Chairman? I apologize. May I ask permission to enter into the record two rulings, one from the state of Connecticut and one from Indiana, both of which indicate that surveyors are not included in either federal or state Davis-Bacon Act? [The information follows:]

INDIANA DEPARTMENT OF TRANSPORTATION  
*Driving Indiana's Economic Growth*

**Memorandum**

*January 24, 2007*

TO: *District Deputy Commissioners; District Highway Operation Directors; District Construction Engineers; District Testing Engineers; District Area Engineers; Project Engineers/Supervisors*

FROM: MARK A. MILLER, *Director, Division of Construction Management*

SUBJECT: *Procedures for Determining When the Davis Bacon Act (DBA) Applies*

The guidelines contained in this memorandum were provided by the Divisions of Economic Opportunity and Legal Services to address questions concerning which workers on a jobsite must be paid prevailing wages pursuant to the Davis-Bacon Act. Please use these guidelines in consultation with the District EEO Officer in making a determination for workers on your project. Further assistance will be provided for situations encountered that are not clearly defined in these guidelines.

The determination of whether Davis Bacon applies to a particular employee is based on the specific facts and circumstances of the contract and the employee's work.

The following list of questions is a guide to help determine whether a particular employee should be paid prevailing wages pursuant to the Davis-Bacon Act (DBA). This guide does not cover all situations but attempts to cover the most common situations encountered at the Districts:

1. Is the employee working on a federal-aid contract in excess of \$2000 for the actual construction, alteration and/or repair of a building or work?

a. If yes, go to next question.

b. If no, DBA does not apply, but also ask:

1. Is the contract in excess of \$100,000? If so, the Contract Work Hours and Safety Standards Act applies. (This includes federally financed and assisted non-construction contracts.)

1. If yes, the contractor or subcontractor shall not require or permit a laborer or mechanic to work over forty hours a week without paying one and a half times the basic pay rate. Also the contractor must maintain payrolls and payroll records for three years for all laborers and mechanics.

2. Is the employee doing work on the site of the construction?

"Site of the work" is the physical place or places where the work called for in the contract will remain; and any other site where a significant portion of the work is constructed, provided that such a site is established specifically for the performance of the contract or project. If the time spent on the site of the work is de minimus (less than 20% of that employee's particular work week), then the time is not covered under Davis-Bacon.

a. If yes, go to next question.

b. If no, DBA does not apply.

3. Is the work that the employee is performing required by the contract specifications?

- a. If yes, go to the next question.
  - b. If no, DBA likely does not apply.
4. Is the employee a laborer or mechanic as defined in the DBA? To determine this, ask the following questions:
- a. What are the employee's primary duties? (i.e. How does the employee spend 20% or more of his or her particular work week?)
    - I. If the employee's primary duties are manual or physical in nature (e.g. he or she uses tools or performs the work of a trade), then the employee is a laborer or mechanic and DBA applies.
    - II. If the employee's primary duties are mental or managerial, the employee is not a laborer or mechanic, and DBA does not apply.
    - III. If the employee's primary duties are administrative, executive, or clerical rather than manual, then the DBA does not apply.
    - IV. Is the worker a working foreman who devotes more than twenty percent of time during a particular work week to mechanic or laborer duties?
      - 1. If yes, then the foreman is a laborer or mechanic for the time so spent, and the DBA applies for that time.
      - 2. If no, then the DBA does not apply.

#### *Davis Bacon Act Q&A*

##### *Additional Resources to Davis-Bacon Act / Davis-Bacon Related Acts*

The U.S. Department of Labor Davis-Bacon Resource Book (dated 1112002), which can be accessed at: <http://www.wdol.gov/docs/WRB2002.pdf>

Q 1. Does it matter who employs the truck driver for the application of Davis Bacon?

Answer:

No. In the decision reached in *Building and Construction Trades Dept. v. Midway*, decided on May 17, 1991, the Court of Appeals for the District of Columbia Circuit held that language in Department of Labor (DOL) regulation was inconsistent with the Davis-Bacon Act. That case involved truck driver employees of the prime contractor's wholly owned subsidiary, who were delivering materials from a commercial supplier to the construction site. The material delivery truck drivers spent ninety percent of their workday on the highway driving to and from the commercial supply sources, ranging up to 50 miles round trip and stayed on the site of the work only long enough to drop off their loads, usually for not more than ten minutes at a time. At issue before the D.C. Circuit was whether the "material delivery truck drivers" were within the scope of construction as defined by the regulatory provision then in effect. The Court of Appeals ruled that material delivery truck drivers, who come onto the site of the work merely to drop off construction materials, are not covered by the Davis-Bacon Act even if they are employed by the government contractor, because they are not "employed directly upon the site of the work." Subsequent Appeals Court rulings in two other cases further addressed the scope of the "site of the work." In a Final Rule published in the Federal Register on December 20, 2000, the Department of Labor issued revised regulatory definitions of the terms "site of the work" and "construction."

Q 2. Are truck drivers employed by a construction prime contractor to transport materials from the contractor plant or yard to a Davis-Bacon covered project, or from a Davis-Bacon covered project to the contractor's plant or yard covered?

Answer:

Yes. If the contractor/subcontractor's plant or yard is part of the "site of the work," the drivers are covered. If the contractor/subcontractor's plant or yard is not part of the "site of the work," the drivers are generally not covered. The travel time between the plant or yard and the site of work in this instance is never covered. However, if the time spent unloading the material or equipment on the site of work is more than de minimis (20%), then this time is covered.

Q 3. Is the time drivers spend transporting materials or equipment from one Davis-Bacon project to another Davis-Bacon project covered?

Answer:

Generally, no. Again the regulatory definition of "construction \* \* \*" specifically states that the transportation of materials or supplies to or from the "site of the work" is not considered construction. Nevertheless, there may be some instances where the two sections of highway construction are contiguous and the transportation of materials or equipment is all on the "site of the work" of both sections that constitute a combined covered project.

Q 4. Are drivers transporting material or equipment away from a Davis-Bacon project or another project of the contractor which is not a Davis-Bacon project covered?

Answer:

No. Unless the transportation of such materials or equipment is to a dedicated facility located adjacent or virtually adjacent to the construction area.

Q 5a. When truck drivers are engaged in hauling excavated material, debris, dirt, asphalt, etc., for recycling away from a Davis-Bacon covered construction site, is the time spent loading at the site covered?

Answer:

Assuming that the location or facility to which the excavated material or debris will be transported is not a facility that is part of the "site of the work" (adjacent or virtually adjacent to the construction work area and dedicated exclusively or nearly so to the performance of the contract or project): If the time spent on the site is not more than de minimis, then loading the debris, dirt, asphalt, etc., is not covered.

Q 5b. When truck drivers are engaged in hauling excavated material, debris, dirt, asphalt, etc., for recycling away from a Davis-Bacon covered construction site, is the time transporting the material away from the site covered?

Answer:

The time transporting the material away from the covered site is not covered. The regulation specifically states that the transportation of materials or supplies to or from the "site of the work" is not considered construction.

Q 5c. When truck drivers are engaged in hauling excavated material, debris, dirt, asphalt, etc., for recycling away from a Davis-Bacon covered construction site, is the time unloading the material covered?

Answer:

The time unloading the material off site is not covered. Davis-Bacon only applies to work done on the "site of the work".

Q 6. Are truck drivers who are employed by an independent contractor or bona fide material man to haul material to a covered project from a non-covered supply source (i.e., sand or gravel pit, asphalt plant serving the public in general) covered?

Answer:

No. If the material source is commercial in nature and supplies the general public, then the drivers are generally not covered. However if the time spent on the site of work is more than de-minimis (20% of the truck driver's work week), the driver would be covered (regardless of whether they are employed by the contractor or subcontractor, or by an independent contractor or bona fide material man/supplier).

Q 7. Are truck drivers covered for the delivery of materials to the "site of work" from covered supply sources (e.g., batch plants or borrow pits, stockpiles, etc.) which have been established to serve exclusively, or nearly so, the covered project?

Answer:

Yes. If the supply facility is part of the "site of the work" because it is dedicated (exclusively or nearly so) to performance of the contract or the project and located within or near the project limits—"adjacent or virtually adjacent" to the actual construction site.

Note: DOL has an enforcement position with respect to bona fide owner-operators of trucks who own and drive their own trucks. Certified payrolls including the names of such owner-operators do not need to show the hours worked or rates paid, only the notation "owner-operator". This position does not apply to owner-operators of other equipment such as bulldozers, backhoes, cranes, welding machines, etc.

Q 8. A barricading company supplies traffic control products for 20 Davis-Bacon projects. The devices are dropped off and picked up at the contractor's yard for each project. No setup work is involved. Are the employees of this company covered?

Answer:

Generally no. If the contractor's yard is not deemed a part of the "site of work," the employees are not covered. However, if the contractor's yard is deemed a part of the "site of work," then the employees would be covered if the time spent on each project is more than 20% of their work week.

Q 9. Would these workers be covered if they are not only involved in drop off/pick up, but are also involved in setting up and servicing the traffic control products?

Answer:

Yes. If a material supplier, manufacturer, or carrier undertakes to perform part of a construction contract as a subcontractor, its laborers and mechanics employed at the site of the work are subject to the prevailing wage requirements under Davis-Bacon in the same manner as those employed by any other contractor or subcontractor.

Q 10. What prevailing wage rate would apply to the workers in the above example? Answer:

The employees driving the trucks would be paid truck drivers rates. The employees doing the servicing would be paid at the unskilled or miscellaneous laborers rate. If the driver is doing both activities, Davis-Bacon compliance can be achieved

by payment of the higher rate for all hours worked. However, laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked in each, provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed.

Q 11. A barricading company places the advance warning signs per contract, pounds posts, and places a sign cover which the prime contractor removes when construction begins. Is all the work performed by this company now subject to Davis Bacon?

Answer:

The USDOL position is that if this is a one-time incident, before construction begins, and the time spent on the site of work is minimal (less than 20% of the employee's work week) then in this instance, the installation of the advance warning signs will not be covered by Davis-Bacon.

Q 12. Prior to the start of construction, a barricading company places into position and turns on a portable changeable message sign per the contract. What Davis Bacon rules apply to this situation?

Answer:

Again if this is a one-time situation before construction begins, and the time spent on the site of work is minimal, (less than 20% of the employee's work week) then Davis-Bacon would not apply in this situation.

Q 13. On the same or the next day, this company sets the drums and temporary signs along the shoulder of the road for the prime to set into position when construction begins. What are the Davis-Bacon rules for this situation?

Answer:

When temporary signs and drums are placed along the shoulder of the road for later placement per the contract, Davis-Bacon does not apply, if the total time spent on the project is not more than 20%.

Q 14. Does it matter if the barricading company is working with a sub-contract or a purchase order, for the purposes of applying Davis-Bacon rules?

Answer:

No. Sub-contract status is irrelevant for the purposes of Davis-Bacon.

Q 15. The manufacturer of concrete box beams delivers 10 beams to a Davis-Bacon covered project. After beams are set the manufacturer sends a technician out to the project to post tension the beams. Is the post tensioning of the beams covered?

Answer:

For purposes of administration and enforcement of Davis-Bacon, under the applicable regulations issued by the Department of Labor, the regulatory definition of "construction" includes "[m]anufacturing or furnishing of materials, articles, supplies or equipment on the site \* \* \*", as well as the installation of items fabricated off-site. (See 29 CFR 5.2(1)). As discussed regarding item 8, if a material supplier, manufacturer, or carrier undertakes to perform part of a construction contract as a subcontractor, its laborers and mechanics employed at the site of the work are subject to the prevailing wage requirements under Davis-Bacon in the same manner as those employed by any other contractor or subcontractor. For example, employees of a materials supplier who are required to perform more than an incidental amount of construction work in any workweek at the site of the work would be covered by Davis-Bacon and due the applicable wage rate for the classification of work performed. For enforcement purposes, the Department of Labor adopts a policy that if such an employee spends more than 20% of his/her time in a workweek engaged in such activities on the site, he/she is covered by Davis-Bacon for all time spent on the site during the workweek.

Q 16. The contractor hires a company to provide inspection services for the contractor's quality control operations on a Davis-Bacon covered project. Are the inspectors subject to prevailing wages?

Answer:

In general, individuals who perform inspections and testing for quality control purposes are not considered laborers or mechanics within the meaning of the Davis-Bacon Act. However, if an employee spends more than 20% of a workweek performing manual, physical and mechanical functions that are normally performed by traditional craftsmen, he/she would be considered laborers and mechanics and covered by the DBRA and due the applicable wage rate for the classification of work performed.

Q 17. The contractor hires an engineering firm to provide surveying and staking activities for a Davis-Bacon covered project. Are these workers subject to prevailing wages?

Answer:

Where surveying is performed immediately prior to and during actual construction, in direct support of construction crews, such activity is covered by Davis-Bacon requirements for laborers and mechanics. The determination of whether certain members of survey crews are laborers or mechanics is a question of fact. Such a determination must take into account the actual duties performed. As a general matter, an instrument man or transit man, rod man, chainman, party chief, etc., are not considered laborers or mechanics. However, a crew member who primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent.

Q 18. Does Davis Bacon apply to warranty work?

Answer:

If a material supplier, manufacturer or carrier undertakes to perform a part of a construction contract as a subcontractor, its laborers and mechanics employed at the site of the work would be subject to DBRA requirements in the same manner as those employed by any other contractor or subcontractor. This would include warranty and/or repair work. Employees of a material supplier who are required to perform more than an incidental amount of construction work (20%) in any workweek at the site of the work would be covered by the DBRA and due the applicable wage rate for the classification of work performed.

Q 19. How are truck drivers covered on "split-trip" operations where a portion of the trip meets the DBRA coverage and the other portions of the trip do not.

DBRA coverage is for "laborers and mechanics" for time "employed on the site of the work." If the truck driver spends more than de-minimis (20%) of their work week on the site of work, the time he is on the site of work is covered by Davis-Bacon.

Q 20. Does Davis Bacon apply to employees hired by professional engineering firms?

Answer:

If an engineering firm is contracted to supply a professional opinion that is neither required by the contract nor is part of the construction, alteration and/or repair of the project, Davis Bacon does not apply.

If, however, an engineering firm is employed to perform work that is required by the contract, then whether or not Davis Bacon applies depends on the duties of the particular employee in question. Davis Bacon will apply only if the employee spends twenty percent or more of his or her work week doing physical or manual work; however, it will not apply to time spent transporting samples to a lab away from the construction site or to time spent in a lab doing testing.

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*James Fazzino v. State of Connecticut Department of Labor, Oct. 29, 2010.*

MEMORANDUM OF DECISION

This administrative appeal is brought pursuant to General Statutes §§ 4-176(h), 4-183(a) by the plaintiff, James Fazzino, from a declaratory ruling, and two explanatory rulings following the declaratory ruling, issued by the Connecticut department of labor (the department). The department issued a declaratory ruling that the plaintiff, as a land surveyor, was not entitled to a "prevailing wage" pursuant to General Statutes § 31-53(a) for performing his assigned tasks at state or local public works projects. The department subsequently issued a ruling that denied the plaintiff's motion to reconsider, and, after an agreed-upon remand for additional evidence, issued a ruling re-affirming the initial declaratory ruling.

On May 20, 2009, the commissioner of labor issued the declaratory ruling for the department and made the following relevant findings of fact:

1. The [plaintiff] is a land surveyor [under General Statutes § 20-299(2)].
2. The [plaintiff] has worked at various times since the mid 1990s on state construction jobs which have been characterized as public works projects within the meaning of [§ 31-53].
3. On each state public works project on which the [plaintiff] has worked as a land surveyor, the occupation known as "Land Surveyor" has not been listed on a State of Connecticut Prevailing Rate Schedule.
4. As part of his actual land surveyor duties on such public works projects, the [plaintiff] engaged in job duties described in [§ 20-299], including making measurements, mapping elevations and topography, determining positions of points with respect to appropriate horizontal or vertical datums and reproducing dimensions within specific property lines in accordance with zoning and setback minimums as required by local ordinances. The [plaintiff] also laid out a grid of column lines and corners which enabled workers engaged in the construction trades to accurately

place their work, e.g., concrete foundations, steel column lines, storm drainage and utility lines.

5. The job duties performed by the [plaintiff] on such public works projects are of a highly technical nature, and require significant mental and physical proficiencies. The physical components of the [plaintiff's] job duties include the ability to drive stakes and other markers, endure the elements and carry equipment.

6. All of the job duties engaged in by the [plaintiff] on such public works projects were performed as preliminary site work.

7. The [plaintiff] did not perform manual duties as an actual part of his land surveyor duties on any public work project.

\* \* \* \* \*

9. Pursuant to [§ 31-53(d)(2)], the [department] adopts and uses such appropriate and applicable prevailing wage rate determinations as have been made by the Secretary of Labor of the United States under the provisions of the Davis-Bacon Act, amended [40 U.S.C. § 276a et seq.].<sup>1</sup>

\* \* \* \* \*

Based on these findings of fact, the commissioner concluded first that the Davis-Bacon Act, a federal law, excluded a land surveyor from the prevailing wage law unless the surveyor had done work immediately prior to or during construction or was a "laborer or mechanic." The plaintiff had failed to provide such proof to the commissioner.

The commissioner secondly concluded that while the department under § 31-53(d)(1) was permitted to make an independent determination of whether land surveyors were subject to the prevailing wage law, it was equally permitted under § 31-53(d)(2) merely to follow the determination as made under the Davis-Bacon Act. Here the department had elected to follow the Davis-Bacon approach. Therefore the commissioner issued a declaratory ruling that the plaintiff was not entitled to a prevailing wage classification. (ROR, pp. 41-47.)

On June 30, 2009, in response to plaintiff's request for reconsideration, the commissioner upheld her prior decision. The commissioner first refused to consider the plaintiff's status under an amended job title, "construction layout technician." He had had full and fair consideration of the issue under his stated classification as "land surveyor."<sup>2</sup> Secondly, the commissioner stated that she had no proof that the plaintiff engaged in work immediately prior to and during actual construction, as opposed to preliminary work. Nor did he provide proof of any manual duties that he had engaged in. Finally, the commissioner disagreed with the plaintiff's contention that the department was required to develop a classification under § 31-53(d)(1) that covered the plaintiff's activities. Rather the department was permitted by § 31-53(d)(2) to rely solely on the Davis-Bacon Act classifications. (ROR, pp. 83-93.)

After an appeal was taken by the plaintiff, on April 15, 2010, the parties agreed to remand this matter to the department so that the plaintiff might submit to the department documentary proof supportive of his claims. As indicated above, the commissioner noted that this proof had not been forwarded to her at the time that she was determining her response to the declaratory ruling. The plaintiff subsequently submitted this material to the department.

On September 3, 2010, the acting commissioner of the department issued a "response to rebuttal evidence submitted by plaintiff-Fazzino." The acting commissioner stated: "After carefully reviewing the evidence submitted by [the plaintiff], the [department] remains unpersuaded that the surveying duties performed by [the plaintiff] on the projects submitted were of a manual nature within a prevailing rate classification, e.g., laborer, mechanic, carpenter, operating engineer, etc., so as to afford him coverage under the state prevailing wage statute." (ROR, p. 109.)

The commissioner reviewed one letter of a structural engineer, submitted by the plaintiff, that stated that placing markers by measuring and layout was an inherent component of new construction. The engineer analogized the plaintiff's activities to a plumber, electrician, or carpenter. (Supp.ROR, p. 100.) The commissioner, how-

<sup>1</sup> Land surveyors, as an occupation, are not recognized as a prevailing rate classification pursuant to the Davis-Bacon Act unless the land surveyor: (i) performs surveying work immediately prior to or during actual construction in support of construction crews; or (ii) primarily performs work in a prevailing rate classification recognized by the Davis-Bacon Act.

<sup>2</sup> It has been a longstanding position of the United States Department of Labor that preliminary survey work, such as preparation of boundary surveys and topographical maps, is not construction work covered by the Davis-Bacon Act, especially when performed pursuant to a separate contract of employment. (Return of Record, ROR, pp. 37-40.)

ever, stated that there was no showing that layout tasks were “materially different from typical land surveyor duties” as described in § 20-299(2). In addition, the plaintiff’s direct supervisor noted that the plaintiff was a Survey Crew Chief; therefore under the Davis-Bacon Act, the plaintiff could not be considered a mechanic or laborer. The supervisor stated that the plaintiff’s work was not “construction work.” (Supp.ROR, pp. 101-02.) The original declaratory ruling was therefore kept in place.<sup>3</sup>

The plaintiff seeks in this action a review of the department’s declaratory ruling and the subsequent follow-up rulings. His contentions are reviewed under standards set by our appellate courts. “Conclusions of law reached by the administrative agency [in a declaratory ruling] must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts.” Where the agency has rendered a declaratory ruling on a matter not previously reviewed by a court, the court must engage in plenary review to insure that governing principles of law were followed. See *Wallingford v. Dept. of Public Health*, 262 Conn. 758, 772, 817 A.2d 644 (2003).

As to questions of fact determined by the agency, “it is [not] the function of the trial court to retry the case or to substitute its judgment for that of the administrative agency.” *Goldstar Medical Services, Inc. v. Dept. of Social Services*, 288 Conn. 790, 800, 955 A.2d 15 (2008). See also *Dept. of Public Safety v. State Board of Labor Relations*, 296 Conn. 594, 598-99, 996 A.2d 729 (2010): “According to our well established standards, [r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency’s findings of basic fact and whether the conclusions drawn from those facts are reasonable. Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. It is well settled [however] that we do not defer to the board’s construction of a statute—a question of law—when the [provisions] at issue previously ha[ve] not been subjected to judicial scrutiny. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply.” (Citations omitted.)

The plaintiff contests as a matter of law that the department was permitted under § 31-53(d)(2) to rely on the Davis-Bacon Act classifications and not create a separate classification for land surveyors. He points out that under § 31-53(d)(1) the department may decide on the amount of the prevailing wage and create classifications, but § 31-53(d)(2) speaks only of following the prevailing wage determinations of the Davis-Bacon Act. Since subsection (d)(2) does not mention classifications, he argues that the department has the authority to consider developing a prevailing wage classification for land surveyors.

While this is one interpretation, the court approves as more logical the department’s interpretation that allows it to defer to the federal classifications as well. As our Supreme Court has stated: “[T]he Davis-Bacon Act is persuasive authority for our interpretation of what is required in regard to the payment of the prevailing rate of wage.” *Electrical Contractors, Inc. v. Tianti*, 223 Conn. 573, 586, 613 A.2d 281 (1992). As a matter of law, the court concludes that the legislature intended by § 31-53(d)(2) that the department have the right to elect to follow the Davis-Bacon Act and not develop a separate prevailing wage classification that applies in every instance to land surveyors.

The plaintiff, on the facts, argues that his layout responsibilities at a commercial premises include manual labor, such as driving spikes and clearing the ground of boulders. The plaintiff claims these activities are similar to actions taken by electricians and iron workers, who are covered by the state prevailing wage law. On the other hand, the department concluded that on this record, the plaintiff’s layout activities were ancillary to his special skill and training as a professional land surveyor; and he did not qualify for the prevailing wage. The court under the standard of review set forth above finds that there is substantial evidence in the record to support the department’s conclusions.

Therefore the appeal is dismissed.

HENRY S. COHN, *Judge*.

#### FOOTNOTES

1. FN1. The record in this case contains an analysis of the Davis-Bacon Act as it applies to land surveyors, issued by the U.S. Department of Labor, and this analysis served as the guideline followed by the commissioner. (ROR, pp. 33-35).



2. FN2. The commissioner did not abuse her discretion in refusing to reconsider her ruling on this ground as the plaintiff had clearly had the opportunity in the original proceeding to furnish his job title and job description. Cf. *Housing Authority v. State Board of Labor Relations*, 47 Conn.Sup. 624, 629, 820 A.2d 332 (2001) (allowing newly-discovered evidence on reconsideration to rectify a mistake that “went to heart of the matter”).

3. FN3. The plaintiff is aggrieved by the declaratory ruling and subsequent rulings for the purposes of § 4-183.

*Taken From: <http://caselaw.findlaw.com/ct-superior-court/1545698.html>*

Chairman WALBERG. Without objection, we will include those—  
Mr. SUMNER. Thank you.  
Chairman WALBERG [continuing]. Records.  
Having no further action come before the committee, I declare the committee adjourned.

[Questions submitted for the record and their responses follow:]

U.S. CONGRESS,  
Washington, DC, July 3, 2013.

Hon. ERICA GROSHEN, *Commissioner*,  
*Bureau of Labor Statistics, Postal Square Building, 2 Massachusetts Avenue, NE*  
*Washington, DC 20212.*

DEAR COMMISSIONER GROSHEN: Thank you for testifying at the June 18, 2013 Subcommittee on Workforce Protections hearing entitled, “Promoting the Accuracy and Accountability of the Davis-Bacon Act.” I appreciate your participation.

Enclosed are additional questions submitted by committee members following the hearing. Please provide written responses no later than July 17, 2013, for inclusion in the official hearing record. Responses should be sent to Owen Caine of the committee staff, who can be contacted at (202) 225-7101.

Thank you again for your contribution to the work of the committee.

Sincerely,

TIM WALBERG, *Chairman*,  
*Subcommittee on Workforce Protections.*

QUESTIONS FROM CONGRESSMAN ROKITA (IN-4)

1. In April 2011, the General Accountability Office found that the Wage and Hour Division’s wage rates were often very outdated. In one notable instance, ten years out of date. Your testimony notes that it takes approximately one year for you to gather data for the occupational employment statistics survey. How often do you update the survey?

2. Over the last 15 years DOL has suggested it is working to improve the timeliness, quality, and accuracy of wage data. It has been suggested that using BLS data would be more representative of prevailing wages. Can the BLS data be used as a more representative prevailing wage?

U.S. DEPARTMENT OF LABOR,  
COMMISSIONER, BUREAU OF LABOR STATISTICS,  
Washington, DC, July 23, 2013.

Hon. TIM WALBERG,  
*U.S. House of Representatives Washington, DC 20515-6100.*

DEAR CONGRESSMAN WALBERG: I appreciated the opportunity to participate in the hearing on June 18, entitled “Promoting the Accuracy and Accountability of the Davis-Bacon Act” before the Subcommittee on Workforce Protections. I am providing written responses to questions submitted by committee members following the hearing for inclusion in the official record.

I hope you find this information useful. If you have any questions, please do not hesitate to call me on 202-691-7800.

Sincerely,

ERICA L. GROSHEN, *Commissioner.*

Enclosures.

**Ms. Groshen's Response to Questions Submitted for the Record**

HON. TODD ROKITA

*1. In April 2011, the General Accounting Office found that the Wage and Hour Division's wage rates were often outdated. In one notable instance, ten years out of date. Your testimony notes that it takes approximately one year for you to gather data for the occupational employment statistics survey. How often do you update the survey?*

Answer: The Bureau of Labor Statistics publishes Occupational Employment Statistics (OES) estimates annually; they are based on a rolling three years of collected data from 1.2 million business establishments. As I indicated in my testimony, collection of the sample requires 3 years. Although the data are collected over a 3-year period, BLS uses established statistical procedures to make estimates for a single year and publishes those estimates about 10 months after the reference date. I cannot address concerns about the currency of Davis-Bacon prevailing wage rates.

*2. Over the last 15 years DOL has suggested it is working to improve the timeliness, quality, and accuracy of wage data. It has been suggested that using BLS data would be more representative of prevailing wages. Can the BLS data be used as a more representative prevailing wage?*

Answer: The OES wage estimates currently are designed to be representative of certain geographic areas and industries. BLS produces the mean, median, and 10th, 25th, 75th, and 90th percentile wages. We do not publish a wage that most workers are paid. The geographic areas we target are states, the District of Columbia, territories, metropolitan statistical areas (MSAs), metropolitan divisions (which are smaller parts of the 11 largest MSAs), and up to 6 nonmetropolitan areas in each state. We do not gather data for counties. We publish wage data by industry. However, for some geographic areas we would not have estimates for all the occupations in the construction industry because of limitations on the size of the survey's sample.

BLS has no role in determining what data are appropriate for establishing prevailing wages. As I cannot address that issue, you may wish to discuss those concerns with the Department's Wage and Hour Division which has responsibility for administering that statute.

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[An additional submission of Chairman Walberg follows:]

**Prepared Statement of Stanley E. Kolbe Jr., Director, Governmental Affairs, the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)**

The Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), is supported by more than 5,000 contributing construction firms engaged in industrial, commercial, residential, architectural, public and specialty sheet metal and air conditioning construction throughout the United States. SMACNA's membership has completed a wide variety of major and other public construction projects from coast to coast and would like to express our support for greater survey, administrative and enforcement resources for proper implementation of the Davis-Bacon Act. Further we support improved enforcement and enforcement sanctions against those unscrupulous contracting firms that violate the Act and related contracting statutes.

While we have long supported greater resources for Davis-Bacon Act survey activity to maintain prevailing wages as current as possible, it is well known that many in Congress have undercut the Act's potential effectiveness by knowingly underfunding Davis-Bacon Act administration staff and resources. Due to this often insufficient funding for prevailing wage surveys, a number of public construction projects have been completed at wage rates below those prevailing at the time of project commencement. If the purpose of this hearing is to actually improve the law's administration and enforcement effectiveness by providing necessary financial support for the Act's administration, we will applaud the effort. The Subcommittee should understand that when the prevailing wage rates are significantly less than the rates paid by the leading contracting firms in the market place the quality of the public construction project is at risk. When the rates are below the prevailing wages paid by those paid by average firms due to insufficient survey resources or outdated survey generated rates quality firms could be deterred from bidding.

Over the last decade many in the legislative and executive branch have sought to mischaracterize, undermine and decimate the administration and enforcement of the Davis-Bacon Act. We are hopeful this hearing, entitled, "Promoting the Accuracy

and Accountability of the Davis-Bacon Act”, will result in enhanced prevailing wage survey and administrative resources leading to superior implementation of the Act. We believe that is the intent behind the Obama Administration’s ongoing improvements to payroll surveys, wage rate analysis and program refinement efforts within the Department of Labor. While those opposed to the Act on ideological grounds will never support prevailing wage, benefit and skill training standards at any level of government, greater program support for Davis-Bacon’s administrative and survey functions will reduce the number critical of the Act on narrow, technical issues.

Additional enforcement resources will increase the likelihood that unscrupulous contractors skilled at cheating their workforce and the taxpayer will be caught and properly debarred from further federal bidding as was the clear legislative intent of the first enacted Davis-Bacon statute and so many other contracting laws on the books to protect the public. Recall that Davis-Bacon Act was signed into law in tandem with The Copeland Anti-Kickback Act to bring legal and financial integrity to the public construction marketplace as well as to increase the quality standards of federal construction projects. A quick search of construction project legal proceedings today would indicate no shortage of unscrupulous firms misstating wages paid on federal work, intentionally misclassifying workers as independent contractors and many more contract compliance documentation violations too numerous to mention. A brief Google search of federal and state contract violations should lead the Congress to increase resources to enforce the Davis-Bacon Act and public contract compliance in general.

The economic benefits of current wage rates and enforcing current prevailing wage standards as part of assistance to still suffering local and state economies protect the taxpayer and cannot be overstated.

Our suggestions:

- We would encourage the Subcommittee to provide greater administrative support for the Act, increase its survey budget and its enforcement. As a contractor organization most familiar with the Davis-Bacon statute and regulations we do not fear the voluntary payroll surveys, doubt technical wage determinations or seek to minimize the consequences for those deserving of heightened enforcement.

- We have long urged harsh penalties for the many unscrupulous contractors caught willfully cheating their workers, the local communities and the taxpayers each year.

- Enhanced DOL personnel and survey resources will guarantee that the ongoing refinement efforts for the Davis-Bacon Act within the Department of Labor Wage and Hour Division will succeed. Our members appreciate that the Department of Labor has a Secretary, Wage and Hour Division Administrator and Solicitor of Labor with years of experience in support of the Act. and

- Congress should provide sustained support for improved enforcement of the Davis-Bacon Act, including a bipartisan commitment to stricter penalties for contractors committing federal contract fraud.

Given adequate resources for needed additional wage surveys, administration and enforcement they will be better equipped to implement the Act for quality driven procurement outcomes benefitting the tax payer and the majority of firms following the Act to the letter of the law.

The Davis-Bacon Act has been in effect for more than 75 years. After on-line compliance reforms made over the last decade, compliance is fair and simple for any experienced public and/or private market contractors. Compliance takes just a minimum of administrative personnel for reporting and on-line instruction is available for those needing assistance. Remember, the vast majority of self-described construction contractors are very small with a one to three employees generally not equipped or staffed to bid or complete federal construction work.

Two-thirds of all firms have five or fewer employees, including the owner! Only a fraction will ever bid or work on a federal project. This is not due to Davis-Bacon surveys or prevailing rates but because they do not possess the necessary, minimal administrative resources, skilled workforce, experience or interest to do so. Rarely will the average small contractor with their few employees rule out bidding a large federal project due to the prevailing wage reporting requirements alone or the strict quality apprenticeship and training standards the Act is also designed to encourage.

After three-quarters of a century it is disappointing that so many mischaracterize the Act’s origins, valued policy goals and positive impact maintaining local wage, skill training and benefit standards. For educational reasons alone we appreciate the Committee’s focus on the Davis-Bacon Act and suggested refinements for greater effectiveness and enforcement. We hope the hearing results in a bipartisan appreciation and endorsement for the administrative support needed by the Department of Labor to implement and enforce the Act as intended. Even those in government hostile to the Act are responsible for seeing its enforcement facilitated as required by

statute and regulation. Lax enforcement of federal contracting standards serves only the unscrupulous firms too often drawn to an bidding environment where workforce quality and project integrity is secondary.

SMACNA and our thousands of infrastructure contracting member firms support legislation that recognizes the importance and merit in prevailing wages as part of any quality-based public procurement policy. Federal, state and local prevailing wage laws encourage employers to:

- Pay a locally prevailing wage
- Offer health care coverage to their employees and their families
- Provide for the future retirement of their employees and
- Make a significant investment in the future by training a skilled and safety conscious workforce.

Support of prevailing wages on direct or federally assisted public infrastructure represents a commitment to construction quality and the future. Without prevailing wage statutes, the competitive bid system will erode the wage and fringe benefit standards common in localities across the nation and dismantle proven training programs funded by private employers at more than \$700 million annually. Support for a prevailing wage policy fosters practices and programs lessening today and tomorrow's burden on the public sector. Our member firms DO NOT shift their health, pension and training costs to the local, state and federal government but include them in our contract bids on private and public work.

From decades of experience with Davis-Bacon, SMACNA member firms understand the Act's simple requirements, goals and the merit in a public procurement policy that encourages employers to provide quality wages, benefits and training. Further, we know that continuing federal commitment to requiring the payment of prevailing wages and benefits should not be cast as a union versus nonunion issue. According to Department of Labor reports, more than 75% of Davis-Bacon wage determinations for federal projects pay less than the union wage. In fact, most prevailing wage rates are far below union scale, most without fringe benefits of any kind. Prevailing wage laws seek to prevent the federal government from undermining local economies and prevailing local employment and training standards and practices by reflecting local conditions \* \* \* regardless of the level. Oddly, some members most hostile to Davis-Bacon come from areas with the lowest wage determinations.

We also ask that you carefully reconsider the critical role the Davis-Bacon Act plays in maintaining a well-trained, highly productive construction workforce. To date this important impact has been almost entirely overlooked. Study after study finds that when productivity, quality of workmanship and life cycles costs of construction are taken into consideration, it becomes apparent that prevailing wage laws are not only NOT costing the government money, but may actually be saving it money. More than half of major private construction is awarded based upon a negotiated rather than a low-bid basis for this very reason—first costs are not a true indication of the overall cost or quality of construction projects. Numerous studies have used actual Dodge Reports for thousands of construction projects to document lower costs for certain building types in prevailing wage states as compared to non-prevailing wage states due to the greater productivity of trained, skilled workforces utilizing advanced technological equipment and related management resources.

While Congress has received largely misleading, exaggerated and inaccurate information from anti prevailing wage forces on both the estimated savings and the policy consequences of using locally prevailing wages, we applaud the bipartisan support for the Davis Bacon Act already evidenced in recent House votes during the 113th Congress. First-rate construction industry firms should not be disadvantaged when bidding federal projects because they offer their employees locally prevailing wages, health care, pensions and skill training. This would be the impact if the prevailing wages were excluded from major federal infrastructure legislation regardless of the form of economic assistance. The Davis-Bacon Act does more than simply survey and publish locally prevailing wages—it reflects and supports prevailing employee training and benefit standards. These are critical to supporting local economies and guaranteeing that complex federal building standards for construction quality are met without fail.

Our contractor membership urges the Subcommittee's support of enhanced administrative resources for the Davis-Bacon Act and general prevailing wage coverage on federal and federally assisted construction. We also urge the Committee to recommend sufficient survey and general administrative Wage and Hour Division resources to assure enhanced implementation of the Act. The Davis-Bacon Act benefits local economies, taxpayer value and honest businesses seeking quality-driven procurement decisions. That can be the outcome of all federal contracting—if properly

empowered administrative and enforcement is endorsed by the Workforce Protections Subcommittee and by the 113th Congress.

[Whereupon, at 11:33 a.m., the subcommittee was adjourned.]

