

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9C, Airspace Designations and Reporting Points, dated August 17, 1995, and effective September 16, 1995, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

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ACE MO E5 Mosby, MO [New]

Clay County Regional Airport

(Lat 39°19'50" N., long. 94°18'36" W.)

Mosby NDB

(Lat. 39°20'46" N., long. 94°18'27" W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Clay County Regional Airport and within 2.5 miles each side of the 007° bearing from the Mosby NDB extending from the 6.4-mile radius to 7.9 miles north of the airport.

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Issued in Kansas City, MO, on July 17, 1996.

Herman J. Lyons, Jr.,

Manager, Air Traffic Division Central Region.

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DEPARTMENT OF LABOR

Employment Standards Administration; Wage and Hour Division

Office of the Secretary

29 CFR Parts 1 and 5

Procedures for Predetermination of Wage Rates (29 CFR Part 1); Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts (29 CFR Part 5)

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

ACTION: Proposed rule.

SUMMARY: This document seeks comment on the Department's proposal to continue the suspension of the implementation of regulations previously issued under the Davis-Bacon and Related Acts while the Department conducts additional rulemaking proceedings to determine whether further amendments should be made to those regulations. These regulations govern the employment of "semi-skilled helpers" on federally-

financed and federally-assisted construction contracts subject to the prevailing wage standards of the Davis-Bacon and Related Acts (DBRA).

DATES: Comments are due September 3, 1996.

ADDRESSES: Submit written comments to Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, DC 20210. Any commenters desiring notification of receipt of comments should include a self-addressed, stamped post card.

FOR FURTHER INFORMATION CONTACT: William W. Gross, Director, Office of Wage Determinations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3028, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone (202) 219-8353. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION

I. Paperwork Reduction Act

This rule does not contain any new information collection requirements and does not modify any existing requirements.

Thus, the rule contains no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1995.

II. Background

On May 28, 1982, the Department published revised final Regulations, 29 CFR Part 1, Procedures for Predetermination of Wage Rates, and 29 CFR Part 5, Subpart A—Davis-Bacon and Related Acts Provisions and Procedures (47 FR 23644 and 23658, respectively), which, among other things, would have allowed contractors to use semi-skilled helpers on Davis-Bacon projects at wages lower than those paid to skilled journeymen, wherever the helper classification, as defined in the regulations, was "identifiable" in the area. These rules represented a reversal of a longstanding Department of Labor practice by allowing some overlap between the duties of helpers, and journeymen and laborers. To protect against possible abuse, a provision was included limiting the number of helpers which could be used on a covered project to a maximum of two helpers for every three journeymen. See 29 CFR 1.7(d), 29 CFR 5.2(n)(4), 29 CFR 5.5(a)(1)(ii)(A), and 29 CFR 5.5(a)(4)(iv).

As a result of a lawsuit brought by the Building and Construction Trades Department, AFL-CIO, and a number of individual unions, implementation of

the regulations was enjoined. *Building and Construction Trades Department, AFL-CIO, et al. v. Donovan, et al.*, 553 F. Supp. 352 (D.D.C. 1982). The U.S. Court of Appeals for the District of Columbia issued a decision upholding the Department's authority to allow increased use of helpers and approving the regulatory definition of a helper's duties, but struck down the provision for issuing a helper wage rate where helpers were "identifiable," thereby requiring a modification to the regulations to provide that the helper classification be "prevailing" in the area before it may be used. *Building and Construction Trades Department, AFL-CIO, et al. v. Donovan, et al.*, 712 F.2d 611 (D.C. Cir. 1983), cert. denied, 464 U.S. 1069 (1984).

On January 27, 1989, DOL published a final rule in the Federal Register (54 FR 4234) to add the requirement that the use of a particular helper classification must prevail in an area in order to be recognized, and to define the circumstances in which the use of helpers would be deemed to prevail. (54 FR 4234). Following the Court's lifting of the injunction by Order dated September 24, 1990, the Department published a Federal Register notice on December 4, 1990, implementing the helper regulations effective February 4, 1991 (55 FR 50148).

In April 1991, Congress passed the Dire Emergency Supplemental Appropriations Act of 1991, Public Law 102-27 (105 Stat. 130), which was signed into law on April 10, 1991. Section 303 of Public Law 102-27 (105 Stat. 152) prohibited the Department of Labor from spending any funds to implement or administer the helper regulations. In support of the prohibition, Chairman Ford of the House Education and Labor Committee stated that "Congress should insist that the administration recognize that authorizing legislation is the only appropriate vehicle for dealing with fundamental changes in the operation of the Davis-Bacon Act." In compliance with the Congressional directive, the Department did not implement or administer the helper regulations for the remainder of fiscal year 1991.

After fiscal year 1991 concluded and subsequent continuing resolutions expired, a new appropriations act was passed which did not include a ban restricting the implementation of the helper regulations. The Department issued All Agency Memorandum No. 161 on January 29, 1992, instructing the contracting agencies to include the helper contract in contracts for which bids were solicited or negotiations were concluded after that date.

During the course of the ongoing litigation in this matter, the U.S. Court of Appeals for the District of Columbia (by decision dated April 21, 1992) upheld the rule defining the circumstances in which helpers would be found to prevail and the remaining helper provisions, but invalidated the provision of the regulations that prescribed a maximum ratio governing the use of helpers (*Building and Construction Trades Department, AFL-CIO v. Martin*, 961 F.2d 269 (D.C. Cir. 1992)). To comply with this ruling, on June 26, 1992, the Department issued a Federal Register notice removing 29 CFR 5.5(a)(4)(iv) from the Code of Federal Regulations. (57 FR 28776).

Subsequently, Section 103 of the 1994 Department of Labor Appropriations Act, Public Law 103-112, prohibited the Department of Labor from expending funds to implement or administer the helper regulations during fiscal year 1994. Accordingly, on November 5, 1993, the Department published a Federal Register notice (58 FR 58954) suspending the helper regulations and reinstating the Department's prior policy regarding the use of helpers. The 1995 Department of Labor Appropriations Act again barred the Department from expending funds to implement the helper regulations (Section 102, Pub. L. 103-333); this prohibition extended into fiscal 1996 through several continuing resolutions. There is no such prohibition in the Department of Labor's Appropriations Act for fiscal year 1996, Public Law 104-134, signed into law by President Clinton on April 26, 1996.

III. Discussion

During the brief period since the passage of the appropriations act for fiscal year 1996, the Department has carefully considered whether the suspended regulation governing the use of helpers should be modified. Fourteen years have passed since the Department first promulgated the regulation, and more than four years have passed since the Department last attempted to put a revised version of that regulation in effect. During the extended period of time in which the regulation was suspended, additional information has become available which warrants review of the suspended rule.

The suspended helper regulation was proposed and adopted principally because it was believed that it would result in a construction workforce on Federal construction projects that more closely mirrored the private construction workforce's widespread use of helpers and, at the same time, effect significant cost savings in federal

construction costs. However, data developed from the Department's experience implementing the helper regulation (which was not available during the rulemaking proceedings and upon which the public has had no opportunity to comment) reveals that the use of helpers might not be as widespread as previously thought. The Department conducted 78 prevailing wage surveys during the period January 29, 1992, through October 21, 1993, when the (now suspended) semi-skilled helper regulations were in effect. In 45 of the 78 areas surveyed, the Department determined that the use of helpers was not the prevailing practice in any of the job classifications analyzed. In the remaining 33 areas, the use of helpers was the prevailing practice in only about 7 percent (*i.e.*, 65 of 888) of job classifications surveyed. The Department is preparing a preliminary regulatory impact analysis to accompany a proposed rule which will discuss the Department's updated estimate of costs savings which would be realized from the suspended helper rule.

The Department is concerned that the helper regulation may create an unwarranted potential for abuse of the helper classification to justify payment of wages which are less than the prevailing wage in the area. As initially proposed, the 1982 helper regulation imposed a numerical limitation on the use of helpers under which there could be no more than two helpers for every three journeymen. 47 FR 23655. As the Court of Appeals stressed in its 1983 decision, this limitation "increased the likelihood that gross violations will be caught, or at least that evasion will not get too far out of line." However, the specific ratio adopted by the Department was subsequently invalidated by the Court in 1992. The Department's subsequent efforts to develop enforcement guidelines led it to conclude that administration of the revised helper criteria would be much more difficult than anticipated, particularly in light of the court-ordered abandonment of the ratio provision. When the Department implemented the Court's decision in 1992, it did not conduct notice and comment rulemaking proceedings on the regulation as revised. Instead, the Court's order was implemented by publication of a notice in the Federal Register removing the numerical ratio from the regulation. Consequently, the public has never had an opportunity to comment on the regulation in its current form.

The Department is also concerned about the possible impact of the helper

regulations on formal apprenticeship and training programs. These factors, and the obvious Congressional controversy over the regulation, have led the Department to conclude that the basis and effect of the semi-skilled helper regulation should be reexamined. Accordingly, the Department intends to propose, and seek public comment on, a rule that would amend the currently suspended helper regulations, 29 C.F.R. 1.7(d), 29 C.F.R. 5.2(n)(4), and 29 C.F.R. 5.5(a)(1)(ii). The Department anticipates that these rulemaking proceedings will be concluded, and any final amendment to the regulations promulgated, within one year.

The Department has carefully considered whether the regulations which have been in effect during the past three years, while the suspension has been in effect, should continue to apply during the interim period or, alternatively, whether the suspended helper regulation in its current form should be made effective during that period. Given the information now available, the fact that the public has never had an opportunity to comment on the suspended regulation in its present form, and the Department's decision to initiate proceedings proposing further amendments to the rule, the Department has decided to seek public comment concerning whether or not to continue the suspension of the helper regulation while further action is being taken with respect to possibly amending the rule.

In addition to the problems with the suspended helper regulation discussed above, the Department is preliminarily of the view that implementation of the regulation on a short-term basis would create unwarranted disruption and uncertainty for both federal agencies and the contracting community. Accordingly, the rule proposed here would make no change to the regulations currently in effect, and thereby continue the suspension of the helper regulations that has been in effect since October 1993, while the Department engages in substantive rulemaking concerning the helper regulations.

The Department's past experience indicates that implementation of the suspended helper regulations, even on an interim basis, would likely require a substantial period of time. When the Department promulgated the helper regulations in 1982 (47 FR 23658, May 28, 1982) and in 1990 (55 FR 50149, December 4, 1990), it provided a 60-day effective date, applicable to bids advertised or negotiations concluded after the date, to allow agencies an opportunity to amend their

implementing regulations and their contract clause forms to incorporate the new provisions. Solicitations for bids are ordinarily advertised for at least 30 to 60 days before a contract may be awarded. In accordance with the Department's usual practice, an effective date at least 60 days after publication would be afforded if the Department were to begin implementation of the suspended rule today.

Conforming changes then have to be made by the appropriate responsible federal agencies to the Federal Acquisition Regulations (FAR) and the Defense Acquisition Regulations (DAR), which are applicable to contracts subject to the Davis-Bacon Act. It is likely that such changes would also have an effective date 60 days after their publication, as did amendments to the FAR and DAR following the Department's 1992 notice of implementation (September 1992–November 1992). In fact, when the Department implemented the helper rule in January 1992, conforming changes in the FAR and the DAR did not actually become effective until November 1992, approximately ten months after the Department issued its notice implementing the rule.

Moreover, under the suspended rule, helpers could be used on a given contract only after the Department determines that the use of helpers is the prevailing practice in a particular job classification in the area in which the work will be performed. Thus, the time necessary for the Department to perform surveys in response to requests to use helper classifications adds further delay before contractors may lawfully pay their workers at helper rates.

Thus, the suspended regulation would be fully effective for only a brief period, if at all, before the Department expects it would complete substantive rulemaking proceedings to consider amending the regulation. Given the pendency of those proceedings, and the history of the regulation, contractors would be uncertain to reconfigure their staffing patterns and work site procedures for the purpose of submitting bids in reliance upon a regulation which they are aware the Department may amend shortly thereafter. Similarly, repeated changes in the regulations within a short period of time would create unwarranted disruption in the contracting process of federal agencies which would be required to amend their regulations and contract forms on an interim basis only to repeat the entire process if proposed amendments to the helper regulation are finalized. Finally, the Department of Labor would have to postpone or

abandon planned surveys needed to update prevailing wage determinations in order to divert resources to the collection and analysis of prevailing practice and wage data under helper regulations which may be modified shortly thereafter.

In short, the Department believes that the disruption and uncertainty associated with implementation of the suspended helper regulations for such a brief period would be unwarranted. The Department expects to complete its analysis of public comments on this proposed rule to continue the suspension of the helper regulations, and publish a final rule within 120 days after the date of publication.

IV. Executive Order 12866; § 202 of the Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act

This proposed rule is not "economically significant" within the meaning of Executive Order 12866; nor does it require a statement under § 202 of the Unfunded Mandates Reform Act of 1995. This rule merely continues the suspension of the helper regulations that has been in effect since November 1993 in order that the Department may proceed with rulemaking while avoiding the unnecessary disruption and confusion that would result from implementation of the helper regulations during the interim. Therefore, there would be no cost or savings that would result from continuing the suspension since this would merely preserve the status quo. Moreover, as discussed above, a substantial period of time is required before the regulations would be implemented by their incorporation in contracts, and the Department's experience in the brief period in 1992 and 1993 when the suspended regulation was in effect was that relatively few surveys were completed in which helpers were found to prevail.

Thus, any theoretical savings that would be lost from a failure to implement the helper regulations during the rulemaking period would be minimal. Accordingly, it is expected that this proposal will not result in a rule that may have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy or a sector of the economy. Because this rule will not have a significant economic impact, no economic analysis is required. For the same reason, this rule does not constitute a "major rule" within the meaning of section 804(2) of the Small Business Regulatory Enforcement Fairness Act.

Because the alternative to the proposed rule—lifting of the suspension and implementing the helper regulations while rulemaking is ongoing—could possibly interfere with actions planned or taken by other government agencies, the Department has concluded that it will treat the proposed rule as a "significant regulatory action" within the meaning of section 3(f)(2) of Executive Order 12866.

V. Regulatory Flexibility Act

The Department has determined that the proposed rule will not have a significant economic impact on a substantial number of small entities. As a continuation of the status quo, there is no economic impact. Furthermore, the Department has determined that if the suspension were lifted and the regulation implemented, there would not be a significant economic impact on a substantial number of small entities during the interim period prior to completion of rulemaking action on the helper regulations—expected to be completed within a year. Because of the lag times in agency procedures to amend their regulations and incorporate the contract clauses, and the relatively small number of helper classifications which the Department found prevailing in its surveys in 1992 and 1993, it is unlikely that a substantial number of small entities would have the opportunity to use helper classifications during the period before the rulemaking is completed. Accordingly, the proposed rules are not expected to have a "significant economic impact on a substantial number of small entities" within the meaning of the Regulatory Flexibility Act, and the Department has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. Thus, a regulatory flexibility analysis is not required.

VII. Document Preparation

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

Signed at Washington, D.C., this 29th day of July 1996.

John R. Fraser,

Deputy Administrator, Wage and Hour Division.

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