DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

29 CFR Part 4

RIN 1215–AA78

Service Contract Act; Labor Standards for Federal Service Contracts

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

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Department of Labor (DOL or the Department) is proposing alternative approaches for procedures to establish minimum health and welfare benefits requirements in the regulations issued under the McNamara-O'Hara Service Contract Act (SCA). Pursuant to § 4(b) of the SCA, a variance from the SCA's locality and occupational requirements for determining prevailing health and welfare fringe benefits is also proposed to reflect the limitations of available fringe benefit data. Comments are also requested on revisions to timeframes for section 4(c) substantial variance proceedings.

The United States District Court for the District of Columbia has set a deadline for the Department of July 31, 1996, to complete this rulemaking process. *SEIU* v. *Reich*, CA No. 91–0605 (D.D.C. January 29, 1996). To aid in the selection of the most appropriate methodology, the Department is in the process of developing data on the occupational mix of service contract employees. This data will help provide a basis for the regulatory impact analysis. Due to the time constraints imposed by the district court, however, it is not feasible to publish the impact analysis for comment with the proposed rule. Instead, the analysis will be published as soon as possible for comment. Comments on the analysis will be reviewed prior to promulgation of a final rule.

DATES: Comments are due on or before July 1, 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 NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped postcard, or to submit them by certified mail, return receipt requested. As a convenience to commenters, comments may be transmitted by facsimile (''FAX'') machine to (202) 219–5122 (this is not a toll-free number). If transmitted by facsimile and a hard copy is also submitted by mail, please indicate on the hard copy that it is a duplicate copy of the facsimile transmission.

FOR FURTHER INFORMATION CONTACT: William Gross, Director, Division of Wage Determinations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3506, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 219–8353. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

The Department is proposing alternative procedures for determining prevailing health and welfare fringe benefits under SCA and seeks comments on each alternative. The Department does not intend, with this notice, to introduce new or added reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1980 (Pub. L. 96–511). The existing information collection requirements contained in Regulations, 29 CFR Part 4 were previously approved by the Office of Management and Budget under OMB control number 1215–0150. The general Fair Labor Standards Act (FLSA) recordkeeping requirements which are restated in Part 4 were approved by the Office of Management and Budget under OMB control number 1215–0017.

II. Background

The McNamara-O'Hara Service Contract Act of 1965 (SCA) (41 U.S.C. 351, *et seq.*) applies to Federal contracts with the principal purpose of furnishing services through the use of service employees. For service contracts in excess of $2,500, the Department of Labor is required to make determinations of prevailing wage rates and fringe benefits that must be paid as a minimum by contractors and subcontractors to employees employed on covered contacts ''* * * in accordance with prevailing rates for such employees in the locality, * * *'' (see sections 2 (a)(1) and 2(a)(2) of the Act).[1]

Section 4(b) of the Act as amended in 1972 authorizes the Secretary of Labor to ''provide such reasonable limitations'' and to ''make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (other than § 10), but only in special circumstances where * * * necessary and proper in the public interest or to avoid the serious impairment of Government business, and is in accord with the remedial purposes of this Act to protect prevailing labor standards.''

Federal agencies award contracts for a large variety of services which are performed for a specific period, typically one year with options for additional years.[2] Upon the expiration of such contracts, through new solicitations for bids or requests for proposals, follow-on contracts are commonly awarded to continue the services at the same locality or localities. When new contracts are awarded, the employees of predecessor contractors often routinely go to work for the new contractors.[3] Continuity of services and, generally, employees from year to year makes consistency in wage and fringe benefit determinations a key concern of contracting agencies, contractors, and service employees. Although the statutory requirements for issuing both prevailing wage rate and fringe benefit determinations are the same, different procedures have been used since the Act's enactment in 1965 to implement them. These procedures have been shaped by the availability of wage and fringe benefit data, the need for consistency and continuity over time, and the common practice of employers in the service contracting industry to provide uniform fringe benefit packages to all workers.

Prevailing wage rates are based primarily on cross-industry surveys

[1] The prevailing wage and fringe benefit determination scheme provided by sections 2 (a)(1) and 2(a)(2) of the Act was modified by amendments to the Act in 1972. As a result of a new § 2(a)(5), the Department, in making prevailing determinations, is also required to give due consideration to the rates that would be paid to the various classes of service employees if directly hired by the Federal agency. In addition, prevailing determinations are not applicable where the employees of a predecessor contractor are covered by a collective bargaining agreement. In such cases, collectively bargained wages and fringe benefits are specified in determinations pursuant to section 4(c) of the Act.

[2] Option periods are deemed wholly new contracts for wage determination purposes and must include new or updated wage determinations (see 29 CFR 4.145).

[3] Experience with this general practice underlies Executive Order 12933, signed by President Clinton on October 20, 1994. While successor contractors on service contracts for the maintenance of public buildings typically hire the majority of the predecessor's employees, the executive order seeks to minimize the disruption in services that otherwise would occur if a successor contractor hires a totally new work force. The executive order, among other things, requires solicitations for building service contracts for public buildings to include a clause that requires the successor contractor to offer certain employees of the predecessor a right of first refusal to employment on the new, follow-on contract.

conducted by the Bureau of Labor Statistics (BLS), either under its own Area Wage Survey program (currently under review) or under contract with the Department's Employment Standards Administration. These surveys are designed to provide earnings data for selected occupations common to many manufacturing and nonmanufacturing industries, using a standard set of job descriptions, within a particular local labor market usually described in terms of a metropolitan area. Since 1965, the Department has routinely issued locality-based, occupation-specific prevailing wage rate determinations.

Since 1965, the fringe benefit levels specified in prevailing determinations have been applicable to all of the listed occupational classes in a particular determination. The locality surveys conducted by BLS, in addition to data on the wages paid to workers in selected occupations, provide information on the overall prevalence of certain fringe benefits, such as life insurance, sickness and accident insurance plans, hospitalization, surgical and medical insurance plans, accidental death and dismemberment insurance, long-term disability insurance, sick leave, retirement plans, civic and personal leave, and other benefits. These surveys also provide information on the numbers of holidays and vacation days provided by the surveyed employers. Unlike wage data, the fringe benefit information from these surveys is not currently collected on an occupation-by-occupation basis; nor is data on the cost of such benefits collected. In the past, the Department has found that reliable data by locality or by occupation could not be obtained due to prohibitive costs.

It has been the Department's general practice to include *locality-based* holiday and vacation benefits in determinations, based on information obtained from the locality surveys. However, due to the absence of locality-based data up to this time, health and welfare fringe benefits[4] have always been specified in a determination as a monetary amount based on survey data collected on a *nationwide* basis.[5] Until 1976, the Department routinely issued a single, national ''insurance'' benefit level for all occupations of service employees throughout the country,[6] based primarily on data from the BLS' *Biennial Survey of Employee Compensation in the Private Nonfarm Economy*.[7] This ''insurance'' benefit level was limited to the average cost per hour of providing life, accident, and health insurance in all industries, based on available information which indicated that this fringe benefit package was the most prevalent of the various benefits provided by employers, particularly small employers, and was stated in determinations as a fixed hourly payment amount due for each hour paid (up to a maximum of 40 hours per week and 2,080 per year) on behalf of each service employee.

In the early 1970s, several large Federal service contractors and some contracting agencies asked the Department to consider an alternative methodology because the contractors were having difficulty hiring and retaining highly skilled workers, and remaining competitive, at the ''insurance'' only benefit level. In response, a second health and welfare benefit level was developed that took into account not only insurance, but all types of benefits not legally required, since these were commonly provided to employees by larger employers. This ''total benefits'' level has since been applied primarily to solicitations for large base support service contracts, solicitations (for OMB Circular A–76 actions) with potential for displacement of federal civilian workers, and solicitations that require bidders to be large, national corporations, or providers of highly technical services. The ''total benefits'' level includes the all-industry average hourly cost of not only life, accident, and health insurance, but also sick leave, pension plans, civic and personal leave, other leave, severance pay, and savings and thrift plans. Rather than a fixed payment for each hour worked, the ''total benefit'' level is expressed in terms of average cost—which allows variable contributions to employees (e.g., contributions to a health insurance plan typically vary depending upon the individual employee's marital or employment status)—so long as total contributions for all service employees average at least the specified amount per hour for each service employee. (See 29 CFR 4.175(b).)

From 1966 to 1979, the BLS *Biennial Survey of Employee Compensation in the Private Nonfarm Economy* was the primary source for the nationwide cost data on the health and welfare benefit level, for both the ''insurance'' and the ''total benefit'' levels. However, in 1979, BLS discontinued this survey. Absent a new survey data base, benefit levels were not adjusted between 1980 and 1986. In 1986, updated fringe benefit levels were based on BLS Employment Cost Index (ECI) data showing the percentage increase in benefit costs between 1980 and 1986, which was applied to the 1980 base rates. At that time, the ''insurance'' benefit level was increased from $0.32 to $0.59 per hour, and the ''total benefit'' level from $1.08 to $1.84 per hour.

When BLS published ECI survey data on fringe benefit levels for the first time in 1987,[8] the average employer's cost of the various fringe benefit components did not correspond with the SCA health and welfare fringe benefit levels then being issued (i.e., the ECI data would have significantly increased the ''insurance'' benefit level and comparably decreased the ''total benefit'' level). It was decided to evaluate alternative methodologies which might better reflect the practices of the type of employers who perform contracts subject to SCA. As a consequence, health and welfare fringe benefits levels again were not adjusted until 1991 (see below).

On March 21, 1991, the Service Employees International Union (SEIU) filed a lawsuit against the Department in the U.S. District Court for the District of Columbia, seeking to compel the Secretary of Labor to immediately raise

[4] The term ''health and welfare'' fringe benefits refers to all benefits provided to workers not required by law *except* vacation and holiday benefits.

[5] BLS is currently in the process of redesigning its system for collecting fringe benefit data to potentially allow for the collection and publication of health and welfare benefit information for several of the country's largest metropolitan areas. The number of localities for which such data will be published is uncertain at this point and clearly would not include all localities for which the Department issues wage determinations under the SCA. Such data is currently not available and may be several years from publication.

[6] This did *not* include pension or other benefits because BLS locality surveys indicated that such benefits did not ordinarily prevail.

[7] When information available for a geographic area indicated that collectively bargained wage rates and fringe benefits were furnished to a majority of the employees in a particular occupation, such wage rates and fringe benefits were adopted as prevailing. Studies of employee compensation practices in particular industries, in contrast to those conducted as cross-industry area wage studies, were also sometimes used in the past for determinations issued for service contracts in that industry, e.g., mail hauling.

[8] Employer costs for employee compensation are developed from data collected for the Bureau of Labor Statistics Employment Cost Index (ECI) during a March sample. The report, ''Employer Costs for Employee Compensation,'' is published once a year, and covers all occupations in private industry (excluding farms and households) and state and local governments. It is a measure of the average cost to employers per employee hour worked for wages and salaries and employee benefits. *See* BLS Handbook of Methods, Bulletin 2414, for a full background discussion concerning the ECI. The ECI has been designated as a principal Federal economic indicator by the Office of Management and Budget and ''is the only measure of labor costs that treats wages and salaries and total compensation consistently, and provides consistent subseries by occupation and industry.'' *Id.*, p. 63.

the fringe benefit amounts specified in prevailing wage determinations.

At the time, the Department was completing the development of a new methodology for setting health and welfare fringe benefit levels utilizing newly published ECI size-of-establishment breakouts. In evaluating the new BLS ECI fringe benefit cost data, the Department concluded that cost distributions by size-of-firm best approximated fringe benefit levels and practices among the types of establishments that performed SCA-covered contracts, and would preserve continuity and consistency for Federal agencies, service contractors, and service employees. Accordingly, the health and wealth fringe benefit level issued for most service contracts, which was based only on the ''insurance'' component, was raised from $0.59 to $0.74 per hour in September 1991, based on 1990 data for employers with less-than-100 employees. The new BLS ECI data on total benefits for firms with 100-or-more employees was used to increase the ''total benefits'' level from $1.84 to $2.07 per hour.

Actual BLS ECI fringe benefit cost data by size-of-firm was also used as a basis for updating the health and welfare levels in 1992, 1993, and 1994. Applying the same principles adopted for the 1991 updates, the ''insurance'' level was raised to $0.83 per hour in July 1992, to $0.89 in August 1993, and to $0.90 in August 1994. Correspondingly, the ''total benefit'' package was raised to $2.23 per hour in July 1992, to $2.39 in August 1993, and to $2.56 in August 1994.[9]

After the issuance of updated health and welfare fringe benefit levels in September 1991, SEIU amended its complaint to seek review of the Department's fringe benefit methodology, in particular the use of BLS ECI fringe benefit data for employers with less-than-100 employees for the ''insurance'' level. In addition to challenging the size-of-establishment methodology, SEIU also challenged a number of other aspects of the existing methodology, including the issuance of nationwide rather than locality-based health and welfare fringe benefit determinations, the use of private industry data only (the ECI covers private industry and also state and local governments), and the lack of consideration of fringe benefit costs in the Federal sector. Because no administrative review within the Department was sought by SEIU relating to the size-of-establishment methodology adopted for the September 1991 updates, the District Court dismissed the case without prejudice, directing SEIU to exhaust its administrative remedies before the Department of Labor. See *SEIU* v. *Martin*, CA No. 91–0605 (JFP) (D.D.C. April 1, 1992).

The size-of-establishment procedures were subsequently reaffirmed by the Acting Administrator of the Wage and Hour Division on July 8, 1992, and SEIU appealed the decision to the Department's Board of Service Contract Appeals (BSCA). In a decision dated August 28, 1992, the BSCA generally affirmed fringe benefit practices, including the issuance of fringe benefits on a nationwide basis, but remanded the issue of using size-of-establishment data as a basis for fringe benefit rates.[10] The BSCA directed Wage and Hour to either better support the use of the size-of-establishment data or develop an alternative methodology for setting fringe benefit rates. On remand, Wage and Hour conducted a study of service contracts subject to the SCA and examined other available data. This research indicated that the great preponderance of service establishments employs fewer than 100 workers, and the Acting Administrator, by letter to SEIU dated May 28, 1993, reaffirmed the use of BLS ECI size-of-establishment data in the development of prevailing fringe benefits under the Act.[11]

In response to SEIU's review petition, the BSCA decided on September 23, 1993, that Wage and Hour had not provided sufficient justification for its departure from the practice of basing the ''insurance'' and ''total benefit'' components on all industry data (prior to 1991) without regard to size-of-establishments. While the BSCA acknowledged that the size-of-establishment methodology addressed certain concerns such as consistency, ease of administration, and the ability to update on a regular basis, it was not convinced that these attributes and objectives were ''characteristic only of a system that utilizes size-of-establishment data or whether those same objectives can be also achieved by using other data to set the SCA rates.'' While the BSCA upheld the use of BLS ECI data in general and concluded that the lack of reliable locality data was reasonable justification for issuing nationwide benefit rates, it again remanded the matter to Wage and Hour for reconsideration; the Board was not satisfied that the size-of-establishment data justified departure from the previous practice of basing the fringe benefit rates on all-industry data, or that other data might not achieve the desired objectives.[12]

Because of the variety of alternatives that could be used to determine prevailing fringe benefits, and the potential effects of each of these alternatives, the Department concluded that resolution of the issues in the pending litigation would be best accomplished through rulemaking.

In the meantime, SEIU moved in district court to reopen its case against the Department. SEIU asked the court to enjoin the use of the 1991 methodology and direct DOL to immediately begin setting minimum fringe benefit rates in accordance with the methodology used prior to 1991. The district court, by Order dated January 29, 1996, dismissed the case without prejudice to SEIU's right to reopen for reconsideration upon a showing that DOL has not adopted a final rule in this matter by July 31, 1996. The court declined to order reinstatement of the Department's pre-1991 methodology, stating that it would not ''impose a disruptive interim rule that will itself be displaced by the full participation exercise of rulemaking.'' *SEIU* v. *Reich*, CA No. 91–0605 (CRR) (D.D.C. January 19, 1996)

The Department has given careful consideration to a number of alternative methodologies involving the use of BLS ECI fringe benefit cost data (as the best currently available data source) and, accordingly, is proposing to use one of the approaches described below in determining prevailing health and welfare benefits under the SCA in the

[9] The following year (1995), Wage and Hour decided to keep the health and welfare benefits levels the same as were issued in August 1994, even though the BLS ECI fringe benefit cost data, published in March 1995, showed decreases in both the ''insurance'' and ''total benefits'' levels (to $0.82 and $2.32, respectively). The rationale behind this decision was three-fold. First was the concern that issuance of decreased health and welfare benefit rates would be disruptive to the federal services procurement community. Second, it was perceived to be inappropriate to decrease health and welfare benefit rates based on a methodology which was uncertain to continue in light of the Board's remand order (see below) and the pending litigation which challenged the methodology. Third, Wage-Hour was aware that BLS was considering significant revisions to its survey methodology.

[10] *SEIU re Nationwide Fringe Benefit Determinations*, BSCA Case No. 92–01 (August 23, 1992).

[11] Wage and Hour reasoned that cost data for firms with fewer than 100 employees approximated the cost of providing health and welfare benefits to employees furnishing services of the kind required under the vast majority of SCA-covered contracts, and that data for firms with 100 or more employees best approximated the cost experience of employers with SCA-covered contracts involving large base support contracts and other contracts involving competition among major corporations or for highly technical tasks.

[12] See *SEIU re Nationwide Fringe Benefit Determinations*, BSCA Case No. 93–08 (September 23, 1993).

future. In order to assist the Department in establishing the most appropriate method, the Department requests commenters to consider the optional fringe benefit methodologies discussed below and seeks information on ease or difficulty of compliance; administrative and/or recordkeeping burdens; economic and budgetary impact from the point of view of service contractors, service employees and Federal procurement agencies; transitional difficulties in departing from the current methodology, including the appropriateness of a phase-in alternative for such methodologies; the nature of SCA-covered contracts and the fringe benefit practices typical of service contractors; the effects on contracting activity and employment; and any other areas of concern that the Department should take into consideration in deciding this matter.

If commenters favor continued use of the current methodology based on size-of-establishment data, comments should include data or other evidence that the methodology in fact is consistent with industry practices. Commenters are also invited to comment on any alternative approach for which reliable fringe benefit cost data are available through the ECI or otherwise, including a discussion of how the approach would result in fringe benefits which would better indicate prevailing fringes on SCA contracts, as well as the other issues raised below.

Commenters are also requested to comment on whether they would favor utilization of locality-based fringe benefit data for certain selected metropolitan areas, should such data become available in the future (see note 5, *supra*), within the framework of any of the following proposed methodologies favored by the commenter.

III. Alternative Proposed Methodologies

Alternative I: Issue a Single Benefit Level Based Upon ECI Data for Workers in Private Industry

This methodology would utilize employer costs per hour worked for all benefits (excluding holidays, vacations, and benefits otherwise required by law, such as social security, unemployment insurance, and workers' compensation payments) as reported annually by the BLS ECI study of employer costs for employee compensation in the private sector (all workers, all industries, all establishment sizes, and all occupations). Under this ''total benefits'' approach, the Department would issue a single nationwide health and welfare fringe benefit level applicable to all employees engaged in the performance of SCA-covered contracts, based on the average cost [13] for the following compensation components:

(1) Sick and other leave (excluding vacation and holiday leave);

(2) Insurance, consisting of life, health, and sickness and accident insurance plans;

(3) Retirement and savings, consisting of pension and savings and thrift plans; and

(4) Other benefits not otherwise required by law.

Based on March 1995 BLS ECI data, this alternative would result in a single fringe benefit rate of $1.89 per hour. This alternative would increase the current benefit level (from $0.90 to $1.89 per hour) for those SCA-covered contracts now subject to prevailing determinations containing the ''insurance'' fringe benefit level, and would result in a benefit level reduction (from $2.56 to $1.89 per hour) for SCA-covered contracts currently subject to the ''total benefit'' fringe benefit level.

In basing the fringe benefit level on the average compensation level for all employees, this alternative is consistent with the approach generally used in determining prevailing wages in that it does not differentiate by size of firm, and in determining prevailing fringe benefits in the past. It would eliminate the two-tier benefit levels that have been difficult to defend in the legal proceedings before the BSCA described above. This approach would apply the same minimum hourly benefit level for all service employees and would not require any subjective judgments as to which benefit level to apply based on the type of contract or employee. This determination method would be simple to understand and to comply with, and relatively simple to administer and enforce by the Department. It would allow all service contractors to offer health benefits for their employees, whereas at present some employers cannot purchase health benefits at the current ''insurance'' benefit level.

Service employees currently employed on contracts subject to the ''total benefit'' level could experience a reduction in fringe benefits and not return to the current level for several years. Further, this approach does not recognize the real differences in types of SCA-covered contracts that are apparent from the occupational data. As demonstrated by the data by occupational groupings, discussed below, privately-employed service employees in relatively low-skilled, low-wage service occupations do not generally receive this level of fringe benefits. On the other hand, privately-employed high-skilled service workers, such as aircraft mechanics, generally receive fringe benefits above this level.

In addressing this alternative, comments are specifically sought on the appropriateness of mitigating any disruption (and the short-term costs) caused by the increase in the current ''insurance'' level by phasing in the changes during a transition period; whether or not the current ''total benefit'' level should be grandfathered at its present level until it is overtaken by the all-industry, all-occupation average rate; and, whether such actions would be consistent with statutory requirements.

Alternative II–A: Issue a Single Benefit Level for Each of Six Major Occupational Groupings Based on ECI Data for All Workers in Each Grouping in Private Industry

The BLS ECI reports employer fringe benefit costs for employees in broad occupational groups compatible with the ''Standard Occupational Classification Manual.'' Of these occupational groupings, six account for most of the classifications used in the performance of SCA-covered contracts: (1) Professional, specialty and technical; (2) Administrative support, including clerical; (3) Precision production, craft and repair; (4) Transportation and material moving; (5) Handlers, cleaners, helpers, laborers; and (6) Service workers.

Under this alternative, the ''total benefit'' level for each of these six occupational groupings would be specified in prevailing determinations. Thus, a benefit amount would be specified for each occupation listed on an SCA-determination with the amount applicable to a particular occupation determined by the occupational grouping of that occupation. Based on the data reported by the March 1995 BLS ECI study, the hourly ''total benefit'' amounts for the six basic

[13] The cost of the benefit components in the BLS ECI study are an average based on data of all employers in the survey, including employers that do not provide the particular benefit. Because averaging in the ''zeros'' is another way of showing prevalence, the proposal is not limited to only those benefits that prevail. Data is not currently available that computes the cost of benefits provided by only employers with benefit plans. The Department is currently exploring the possibility of obtaining such data, and if it can be obtained, will consider its use under the various alternatives for those benefits that prevail.

occupational groupings would be as follows: [14]

1. Professional, specialty and technical (nurses, computer systems analysts, etc.)	$3.15
2. Administrative support including clerical (computer operators, secretaries, typists, clerks, etc.)	1.96
3. Precision production, craft and repair (vehicle mechanics, heavy equipment operators, automotive mechanics, aircraft mechanics, machinery repairers, electrical and electronic equipment repairers, heating/air-conditioning/refrigeration mechanics, etc.)	2.73
4. Transportation and material moving (motor vehicle operators, truck drivers, material moving equipment operators, operating engineers, etc.)	2.22
5. Handlers, equipment cleaners, helpers and laborers (helpers, handlers, equipment cleaners, laborers, etc.)	1.24
6. Service occupations (guards, food/beverage preparation and service occupations, health service occupations, janitors and cleaners, barbers, hairdressers, amusement/recreation facility attendants, etc.)	0.62

Utilizing this approach would permit the Department to issue prevailing health and welfare fringe benefit determinations for various ''classes of service employees'' as contemplated by the Act, thereby permitting health and welfare benefits to correspond more closely to the benefits such classes of employees actually receive in the private sector. Because many service contracts do not involve a broad mix of different occupations, the administrative difficulty with multiple fringe benefit determinations for those contracts would be minimized. Further, it would not result in large differences for highly skilled employees on many technical service contracts that currently receive the ''total benefit'' level.

Certain administrative concerns arise under this alternative, however, especially regarding those SCA-covered contracts that do involve a mix of employees from different occupational groups. This alternative envisions that employers would provide different fringe benefit plans to employees in each occupational group, and thus would be contrary to what we understand to be the common employer practice of providing the same benefits to all employees. Not only might it be difficult for a carrier to provide, and for the employer or the carrier to administer, up to six different benefit plans, but labor-management problems would be likely where employees realize that their co-workers are entitled to different benefits than they are receiving. Furthermore, an employer administering self-funded plans may be restricted in providing different benefit plans because of non-discrimination rules of the Internal Revenue Code which prevent providing higher-paid employees with better health benefits. See 26 U.S.C. 105(h); 26 CFR § 1.105–11. An employer's alternative, if it did not want to, or could not, provide different plans, would be to (1) provide all employees benefits at the lowest level and pay the difference to other classes of employees in cash; (2) provide all employees higher benefits and absorb the difference from the employer's profit margin; or (3) provide employees the same health benefits at the lowest level, but provide other benefits, such as pension benefits, to employees in the other classifications.

Therefore, some mechanism such as the use of an average cost concept, discussed below, with which most small service contractors and employees are not familiar, or providing benefits to all employees in accordance with the predominant class, may be advisable. On the other hand, such a mechanism would entail significant administrative difficulties for contractors and for the Department in determining compliance. Further, it would result in a substantial decrease in benefits for large numbers of service employees in ''service'' occupations, e.g., janitors, guards, food service workers.

Therefore, in particular, comments are sought regarding whether in fact employers normally provide the same level of fringe benefits to all classes of employees; on the administrative feasibility of this alternative; whether or not the current ''insurance'' level should be grandfathered at its present level until it is overtaken by the ''service'' occupation average rate; and on the practicality of assigning a single rate to a particular service contract based on the benefit rate applicable to the predominant occupational group performing the contract services.

Alternative II–B: Issue a Single Benefit Rate Adjusted To Reflect the Difference Between the BLS ECI Occupational Universe and the Actual Mix of Comparable Occupations on SCA-Covered Contracts

As noted above, the BLS ECI data provide a breakout of fringe benefit costs by broad occupational groupings. The fringe benefit costs for employees in each of these occupational categories is a component factor of the all-industry, all-occupation ''total benefit'' costs calculated for the universe of employees. The distribution of employees within the six occupational categories in the BLS ECI data (above) may not correspond proportionately to the actual mix of employees performing work on SCA-covered contracts in the same occupational categories, i.e., it is likely that the number of SCA-covered employees within the BLS ECI service occupation category is proportionately larger than the number of such employees in the overall BLS ECI occupational universe. Under this proposed alternative approach, the distribution of benefit levels in the six BLS ECI occupational categories would be weighted by the corresponding distribution of SCA-covered employees in the same occupational categories to arrive at an adjusted ''total benefit'' level that may better reflect actual employment experience on SCA-covered service contracts, rather than the overall employment mix among these occupational groups in the general economy.

While the benefit level under this approach would be expected to be somewhat less than the March 1995 BLS ECI ''total benefit'' level of $1.89, data to compute an actual rate for this level is not yet available. The Department is in the process of developing information on the occupational mix of service contract employees utilizing procurement data in the Federal Procurement Data System (FPDS), and a survey of SCA-covered contracts is being conducted.

Because the actual mix of occupations on SCA-covered contracts generally would be a factor in the determination, the benefit determination would be more reflective of the prevailing benefit level on SCA-type contracts than the all-industry, all-employee average. Moreover, the single benefit level that would be established avoids many of the administrative and compliance complexities associated with separate levels for each of the occupational groupings, is a simple determination for contractors to understand and comply with, and, because the same benefit level would be applied to all employees, does not require subjective judgment as to which benefit level to use.

On the other hand, this alternative would not be consistent with past practice of using all-industry, all-employee data for wages and, until 1991, benefits. Furthermore, this alternative would apply a lower fringe benefit level to those service employees currently receiving the ''total benefit''

[14] The listed amounts represent close approximations based on Wage-Hour's reading of 1995 BLS ECI cost data and may not be exact.

level, and, thus, requires consideration of what, if any, transition procedure would be appropriate.

Because the alternative, unlike the others, does not directly apply BLS ECI data to SCA-covered contracts, the Department is particularly interested in receiving public comments on its appropriateness. In commenting on this alternative, comments are also sought on the appropriateness of mitigating any disruption caused by any increase in the current ''insurance'' level by phasing in the changes during a transition period; whether or not the current ''total benefit'' level should be grandfathered at its present level until it is overtaken by the new fringe benefit rate; and whether such actions would be consistent with statutory requirements.

Alternative II–C: Issue Two Benefit Levels Based on a Combination of the Occupational Groupings

This alternative combines some aspects of both Alternatives II–A and II–B. Rather than using six occupational groupings as proposed in Alternative II–A, occupational groups would be combined to result in only two groupings (or some other number). For example, the ECI ''professional, specialty and technical'' occupational group could be combined with the ''administrative support, including clerical'' group to develop a single rate for ''white-collar'' occupations. Similarly, the ''precision production, craft and repair;'' ''transportation and material moving;'' ''handlers, cleaners, helpers, laborers;'' and ''service worker'' groupings could be combined to develop a single rate for production occupations, both skilled and unskilled.

Like the approach proposed under Alternative II–B, Alternative II–C might weight the ECI data based on the corresponding distribution of SCA-covered employees in the same occupational categories to arrive at an adjusted ''total benefit'' level for each of the two occupational groupings. In the alternative, the ECI data could be weighted in accordance with the national incidence of the various occupational groups.

Although this alternative would reduce the potential number of different benefit levels that might be required on a single contract from six to two, Alternative II–C still has the potential for applying different benefit levels to employees working on the same contract. Therefore, many of the questions and issues identified under Alternative II–A are also applicable to this alternative. By reducing the number of occupational groupings, however, the probability of having all workers employed on the contract fall within the same occupational grouping increases greatly. Thus, for many contracts the problem of multiple benefit levels would be unlikely because the employees performing the contract will be clustered within a single, broad occupational grouping.

In commenting on the feasibility and desirability of this alternative, commenters are asked to comment on the appropriate number of occupational groupings, how the occupational groups should be combined, and the weighting methodology which should be used. Commenters are asked to give particular attention to whether this smaller number of groups would significantly decrease any administrative and compliance difficulties which might be entailed in using the six groups.

Alternative III: Issue a Single Benefit Rate for Each of Four Geographic Regions Based on ECI Data for All Workers in Private Industry

The BLS ECI data includes average costs for benefit categories in four broad regions: Northeast, South, Midwest, and West.[15] This alternative would result in four benefit levels that would be reflected in SCA-determinations issued for contracts within each of these geographic regions. Based on the March 1995 BLS ECI data, the benefit amount for each area would be as follows:

1. Northeast—$2.30
2. South—$1.57
3. Midwest—$1.99
4. West—$1.90

The BLS ECI data base does not cross-correlate fringe benefit costs by occupational groupings within the four geographic areas, and this limitation precludes any options that would combine this alternative with the above occupational approaches, absent a large increase in sample size and thus survey costs. Utilizing this alternative would permit the Department to issue prevailing fringe benefit determinations on a ''locality'' basis, as contemplated by the Act. The single benefit level for each geographic region would be simple to administer, and is relatively easy for contractors to understand and comply with.

This option fails to reflect variations within a region, which we believe may be more significant than variations among regions. Furthermore, like the occupational approach, this option is in potential conflict with our understanding of the common practice that employers, including service contractors, provide similar fringe benefits to all employees without regard to either occupation or geographic location. This alternative also raises unique administrative questions because some service contracts require performance in a number of different locations and some service contractors bid on contracts for similar services at various facilities and installations throughout the country. Finally, while the option permits all service contractors to offer meaningful health benefits, it could result in reduced benefits for those service employees currently employed on contracts subject to the ''total benefit'' level.

Commenters are asked to address whether service contractors typically provide similar fringe benefits to all employees without regard to geographic location, and the administrative feasibility of this alternative. In particular, comments are sought on what adjustments, if any, would be appropriate in the case of a service contract that requires performance in more than one of the four regions, or in those cases where service contractors customarily bid on contracts for similar services at various facilities and installations throughout the country.

Alternative IV: Issue a Single Fringe Benefit Rate (as a Percent of Wages) Based on the Relationship Between the ECI All-Private Industry ''Total Benefit'' Rate and the ECI All-Private Industry Average Wage Rate

The BLS ECI data correlates employer fringe benefit expenditures as a percent of overall compensation. Under this alternative, a single, nationwide fringe benefit percentage level, determined as the percent that all industry ''total benefit'' costs represent of total average wages, would be established. The March 1995 BLS ECI data reports average straight-time wages and salaries for *all* workers in private industry at $12.25 per hour. Based on a ''total benefit'' level of $1.89, the ratio of the fringe benefit amount to the wage rate under this methodology would be 15.4 percent, which would be specified in all SCA-determinations. If the prevailing wage for an occupation were $8.00 per hour, for example, the applicable fringe benefit amount under this alternative

[15] These four regions correspond to the four Census regions. The State composition of the regions is as follows: *Northeast*—Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont; *South*—Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia; *Midwest*—Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin; and *West*—Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

would be 15.4 percent of that amount, or $1.23 an hour; a prevailing wage of $11.00 an hour would require a fringe benefit obligation of $1.69 an hour; and a prevailing wage of $15.00 an hour would compute to a fringe benefit obligation of $2.31 an hour.

Because fringe benefits are directly related to locality-based wage rates, this alternative results in fringe benefit levels that vary by occupation and location (wages listed in a prevailing determination for particular occupations are survey-based by locality) and, therefore, has the advantage of being more consistent with the statutory provision that contemplates determining prevailing fringe benefits for classes of service workers in localities than are the other alternatives under consideration. The ratio of benefits to wages is easy to determine from BLS ECI data, and should remain relatively consistent over time; many employers, particularly Federal service contractors, have familiarity with the concept in connection with contract costing practices.

The alternative is a significant departure from current practices, and many contractors, particularly smaller ones, may have difficulty with its administrative requirements, which will be similar to the problems with separate benefit levels for occupational groupings. It will also require a more extensive revision of the current regulations to explain the compliance requirements. Moreover, the methodology assumes a straight line relationship between wages and benefits. Finally, the option could be problematic under IRS rules discussed above and would be inconsistent with the common practice of offering the same health benefits to all employees without variation based on individual employees' wage rates.

Because the wage rates paid and the number of workers used to perform SCA-covered contracts can fluctuate considerably, comments are requested on the administrative and recordkeeping burdens associated with this alternative, and how compliance would be determined. Comments are also sought on whether this alternative should be applied on an individual employee basis (applying the ratio to the individual's rate of pay to determine the fringe amount that must be furnished) or on a payroll basis (for example, by applying the percentage to the total payroll and dividing by total employment to determine the fringe benefit amount that must be furnished to each service employee).

Alternative V: Issue Two Fringe Benefit Levels Based on BLS ECI Size-of-Establishment Data for All Workers in Private Industry

This alternative is essentially the same as the current methodology that has been used since 1991. In addition, the Department seeks public comments on the appropriateness and feasibility of a variation of the current methodology, which also is under consideration:

A. Currently, the ''insurance'' benefit level is issued based on employers' average cost for providing insurance benefits in establishments with fewer than 100 employees. The ''total benefit'' level is based on the average cost for providing all benefits in establishments with 100 employees or more. Although size-of-establishment data are used to determine the different benefit levels, in practice the two levels are applied based primarily upon the *nature* rather than the size of the contract.[16] Based on the March 1994 BLS ECI data, the ''insurance'' benefit level, as established in August 1994, is $.90 per hour, and the ''total benefit'' level is currently $2.56 per hour.[17]

B. A variation of this methodology would continue the issuance of two levels but, instead, use the BLS ECI all industry ''total benefit'' data for (1) firms with fewer than 100 employees and (2) firms with 100 or more employees—perhaps to be applied, respectively, to SCA-covered contracts performed by fewer than 100 employees and those performed by 100 or more employees. On the basis of the March 1995 BLS ECI data, the ''fewer than 100'' level would be established at $1.28 per hour, and the ''100 or more'' level would be $2.32 per hour. This alternative, thus, differs from the methodology applied from 1991 through 1994 in that an amount comprising ''total benefits'' is used instead of an amount limited to the cost disclosed for ''insurance,'' and the applicable rate would possibly be applied by the size (rather than the nature) of the contract.

Both versions of this alternative are consistent with the longstanding procedure of generally applying a lower fringe benefit level to *small* contractors and a total benefit level to *large contractors*. Under Alternative A, in accordance with current practice, the lower fringe benefit rate would be based only on the ''insurance'' component, derived from data from employers with fewer than 100 employees. Under Alternative B, the lower fringe benefit rate would be based on the ''total benefit'' level, also derived from data from employers with fewer than 100 employees. In both cases, in accordance with current practice, the ''total benefit'' level is derived from data from employers with 100 or more employees. These are the only alternatives which would not appear to be greatly disruptive to contractors and employees in that current practices would generally be continued. Neither would result in any significant reduction of benefits for employees currently working on SCA-covered contracts—or significant increase in costs to contractors and to the Government—and there would be continuity with the benefit levels that have been issued for the last twenty years.

The major disadvantage of both versions of this alternative is that there is little evidence to support the rationale for two fringe benefit levels: i.e., assumptions that the average benefit level for small firms corresponds best to benefits paid by private employers on contracts similar to most SCA contracts, and that the level paid by large firms corresponds to employers which perform contracts to which the ''total benefit'' package is applied. Although most SCA-covered contracts involve performance by fewer than 100 employees, there is not a direct relationship in all cases between the size of an SCA-covered contract and the fringe benefit package (''less than 100'' and ''100 or more'' size-of-establishment data divisions) which has been applied. The second variation ameliorates this problem, but instead would put small and large contractors on an unequal footing in bidding on contracts, unless estimated size of contract (instead of size of firm) is used. Also, both options require a sometimes subjective determination regarding which contracts are subject to the high level benefit and which the low level benefit.

In addition to the practical aspects of a two-level fringe benefit approach, commenters who favor this methodology are also requested to provide data to support its continued use, including any suggestions on how the available ECI data, or new data in the long term, could be used to provide a basis for its continued use consistent with the requirements of the SCA.

[16] Currently, the ''total benefit'' level is applied to large base support contracts, solicitations based on OMB Circular A–76 solicitations, solicitations for highly technical services typically provided by large corporations, and other selected solicitations without regard to size of contract. Such contracts are frequently awarded to large contractors, but not always. In practice, small contractors are most likely awarded contracts that contain the ''insurance'' level.

[17] As noted previously, these rates continue to remain in effect, even though 1995 BLS ECI data for size-of-establishment would have resulted in somewhat lower rates.

IV. Average Cost Approach

As noted above, the lower ''insurance'' level has traditionally been stated in determinations as a fixed payment due for all hours paid for (up to a maximum of 40 hours per week and 2,080 per year) on behalf of each service employee. The ''total benefits'' level, on the other hand, has traditionally been stated in terms of average cost which allows variable contributions among employees so long as total contributions for all service employees on a particular contract average at least the specified amount per hour per service employee. Explanation of the average cost concept is set forth in 29 CFR 4.175(b).

The average cost concept was intended to provide flexibility to accommodate variable employee benefit practices. It takes into account variable contributions based, for example, on an employee's election of single or family coverage under health insurance plans, or an employee's election not to participate in health insurance plans or other supplemental plans that may be offered like those for dental and eyeglass coverage. It also accommodates variable contributions to pension or other plans like life insurance that are commonly related to an employee's wages.[18] It is also recognized that certain employees may receive lesser or even no fringe benefits when the average cost approach is used by a service contractor, for example, because they are part-time and not eligible for certain benefits, are subject to a waiting period before becoming eligible, have elected not to participate, or for other reasons. Therefore this approach may be perceived as inequitable. The Department is seeking specific comments on the use of the average cost concept in conjunction with any of the above alternative methodologies, or other alternatives suggested by commenters, and what changes, if any, would be appropriate to facilitate compliance, reduce administrative burdens, and create fairness for service employees, consistent with the requirements of the SCA. In considering the average cost approach in connection with the above alternatives, or other alternatives suggested by commenters, comments are also sought on any recordkeeping requirements which would be necessary to document the average cost, and whether this would result in a greater burden on conractors, particularly smaller contractors.

V. Variance Under Section 4(b) of the Act

In connection with any fringe benefit methodology that may be adopted as a result of this rulemaking, the Department is further proposing to provide a corresponding variance pursuant to § 4(b) from the Act's provisions for making prevailing fringe benefit determinations for various classes of workers on a locality basis.[19] Under the Department's longstanding procedure, the vacation and holiday components of the fringe benefit determination vary based on the locality where the contract services are to be performed because locality data are available for these components. The health and welfare component has been issued only on a national basis due to the current absence of locality-based data (except the large regional groupings discussed above), and none of the available data sources on fringe benefits provides any occupational-based information (except the broad occupational groupings discussed above).

Moreover, the Department has researched all available data sources over the years to ascertain the existence of any reliable information that would permit the making of prevailing fringe benefit determinations on a locality and occupation basis. The Department has also initiated special pilot studies to test the feasibility of collecting fringe benefit cost data in specific geographic localities. Based on the results of these pilot studies by BLS, it has been the Department's conclusion that significant technical problems would have to be overcome before such data could be collected and utilized on a routine basis, and at probably very high cost.[20] At this time, the available BLS ECI fringe benefit cost data is the most comprehensive, and best information available that shows what employers spend for different types of fringe benefits furnished to their employees. While the annual ECI study provides some locality (four geographic regions) and occupational information (broad occupational groupings), it does not currently produce cost data by occupation within each of the geographic regions.

Under these circumstances, the variance discussed above is believed by the Department to be reasonable, necessary and proper in the public interest or to avoid the serious impairment of Government business. Furthermore, because it is our understanding that many employers normally provide the same fringe benefit package to employees in all locations and occupations, this variance is believed to be in accord with the remedial purposes of this Act to protect prevailing labor standards.

As discussed in footnote 5 above, BLS is currently redesigning its system for collecting fringe benefit data to potentially allow for collection and publication of health and welfare benefit information for several large metropolitan areas. Commenters are therefore specifically requested to comment on whether they would favor utilization of locality-based fringe benefit data for selected metropolitan areas, should such data become available in the future.

Public commenters are requested to specifically include in their comments particular views on any alternative ways to balance the Act's ''locality'' and ''class of service worker'' requirements with the practical problems of data availability; and the feasibility, expense, and burden of collecting fringe benefit cost data in occupational and locality-based surveys in relation to the benefits derived therefrom. Commenters are also requested to provide information regarding whether it is their practice to provide different benefit packages in different localities or to different classes of workers, and to address the burden on employers of providing different benefit packages.

VI. General

In considering the various alternatives discussed above, the Department also seeks comments on the requirement to give ''due consideration'' to the wage and fringe benefit rates being paid Federal employees in making wage determinations applicable to SCA-covered contracts, and what administrative procedure, if any, would be appropriate in factoring this information into fringe benefit determinations (see 29 CFR 4.51(d)). Also, see *AFGE* v. *Donovan,* 25 WH Cases (D.D.C. 1982), aff'd 694 F.2d 280 (D.C. Cir. 1982), which interpreted the SCA's ''due consideration'' clause.

The Department also seeks comments concerning whether state and local employee data should be included in data compiled in determining health

[18] Under current regulations, service contractors who elect to pay the specified benefit level as a cash equivalent to each employee for each hour worked, rather than administer particular health and welfare plans, are required to pay the amount specified in the wage determination to each employee. The regulations do not permit variable cash contributions.

[19] A variance from both provisions may not be necessary under some of the alternatives on which comments are solicited.

[20] A September 1987 BLS test survey of fringe benefit costs in the Madison, Wisconsin, locality, for example, used newly developed ECI concepts, manuals, and methods. The pilot did not produce publishable data, and the cost to upgrade the data collection effort to produce publishable data were viewed at the time as prohibitive.

and welfare benefits in the future. The BLS ECI data currently reports fringe benefit cost information for the civilian workforce which includes private industry and State and local governments. Under the current methodology, the ''insurance'' and the ''total benefit'' levels are based on private industry data. However, the Department has recently changed its methodology to include both private and public employee data in determining prevailing wage rates where the data is available. The insurance component (life, health, and sickness and accident insurance plans) for all workers in private industry, as reported by March 1995 BLS ECI data, is $1.15 an hour, whereas the comparable cost in the State and local government sector is $2.03; the combined insurance cost for private and governmental civilian workers is $1.29 an hour. The effect of including State and local governments cost data is similar in the other fringe benefit components.

Also, the Department requests comments on whether the Department should explore the cost and feasibility of expanding the ECI survey so that more refined data could be obtained, or in the alternative, developing other data bases. For example, should the Department consider expanding the survey to permit determination of prevailing fringe benefit levels by occupation within geographic regions; or to permit determination of whether the individual fringe benefit components prevail in each occupation? In commenting on whether expanding the survey should be pursued, commenters are specifically asked to comment on the value of the more refined data which might be obtained relative to the potential costs and burden of conducting such surveys, as well as to consider whether there would be a net benefit to the Government or to the contractors and service employees subject to the SCA from obtaining more refined data, thereby presumably permitting more accurate prevailing fringe benefit determinations.[21]

Finally, the Department seeks comment on whether it should continue to recognize different benefit levels for certain industries. Data limitations and the expense of conducting such surveys make their widespread use infeasible. Although some special surveys were conducted in the past, they are rarely used currently except for mail-haul contracts. The Department notes that these industries would be included in existing data, and that past practice has been to issue such special rates for low-benefit industries (and not vice-versa).

VII. Other Proposals

The Department is also seeking comments on the current procedures for the conduct of substantial variance hearings under Section 4(c) of the Act. Under existing regulations, the Administrator is required to respond to the party requesting a hearing within 30 days after receipt of a request for a hearing (29 CFR 4.10(b)(2)). Upon submission of an Order of Reference to the Chief Administrative Law Judge, interested parties must submit a written response to the Chief Administrative Law Judge within 20 days of the date on which the Order of Reference was mailed (29 CFR 6.51(b)), and the hearing is to take place within 60 days of the Order of Reference (29 CFR 6.52). The regulations further provide that an expedited transcript shall be made of the hearing (29 CFR 6.54(f)), and that the Administrative Law Judge's (ALJ) decision shall be issued within 15 days of receipt of the transcript. Any aggrieved party within 60 days of the ALJ's decision may appeal to the Board of Service Contract Appeals (the Board) (29 CFR 8.7(b)). No time frames are established for issuance of a decision by the Board.

The National Performance Review (NPR) has recommended that the regulations be revised to require that substantial variance hearings be held and decisions issued within 60 calendar days.[22] In view of the NPR recommendation, comments are requested on the existing time frames and how these time frames might be reduced to conform with the NPR recommendation. In particular, comments are sought on a 60-day time frame for the completion of substantial variance hearings, and whether or not this period accords interested parties adequate time to prepare for the proceeding, obtain a transcript, and file necessary briefs, and for the ALJ to issue a considered opinion on the merits.

Finally, it is proposed that the final rule will include certain minor, technical modifications necessitated by the 1989 Amendments to the Fair Labor Standards Act (FLSA), a 1985 court decision, a 1983 treaty, and a 1986 intergovernmental compact. Specifically, Section 4.2 would be revised to delete the reference to dated minimum wage rates, and the tip credit example in Section 4.6(q) would be modified to delete the example that is based on the minimum wage rates required by the 1978 Amendments to the FLSA. Furthermore, the text of Section 4.112, which was invalidated by a 1985 court decision in *AFL–CIO* v. *Donovan,* 757 F.2d 330 (D.C. Cir. 1985), would be modified to reinstate the previous regulations as they appeared in the July 1, 1983, edition of the CFR. In addition, necessary changes to address more recent enactments pertaining to the geographic scope of SCA would be included in the restored regulatory language.[23] Also, the reference ''See Section 4.6(m)(8)'' in the previously existing Section 4.112(b) would be deleted since this section was deleted from the regulations issued October 27, 1983. If commenters have any questions about these planned changes, information can be obtained as indicated above.

VIII. Executive Order 12866/Section 202 of the Unfunded Mandates Reform Act of 1995

The Department is seeking public comment on various optional fringe benefit methodologies and is not proposing any specific methodology. The anticipated cost of some alternatives to the existing methodology for updating SCA health and welfare fringe benefit rates may exceed the costs associated with the existing methodology. Therefore, adoption of an alternative methodology may result in increased procurement costs to Federal agencies who award SCA-covered service contracts, as well as higher fringe benefits for many of the affected service employees. To cover that possibility, the Department has reached the preliminary conclusion that this notice may likely result in a rule deemed an economically significant regulatory action within the meaning of Executive Order 12866. However, the rule will not include any Federal mandate requiring expenditures by State, local or tribal governments of $100 million or more in any one year. Preparation of the required analyses under the executive order and

[21] Of course any expansion of the surveys or development of more refined data bases would have to be funded and could not be accomplished immediately. Therefore, if pursued, a fringe benefit methodology for the short-term would continue to be required.

[22] Creating a Government That Works Better and Costs Less, Reinventing Federal Procurement (Accompanying Report of the National Performance Review), Office of the Vice President, September 1993, page 37.

[23] SCA covers contract services furnished ''in the United States.'' The geographical area included in this term, as defined in § 8(d), requires changes to conform to the Treaty of Friendship Between the United States and the Republic of Kiribati, T.I.A.S. No. 10777, ratified June 21, 19183, and the Compact of Free Association between the United States and the Governments of Marshall Islands and the Federated States of Micronesia which was placed into effect by the President on November 3, 1986, pursuant to Pub. L. 99–239.

Unfunded Mandates Reform Act must necessarily await the compilation of related economic data.

As noted in the discussion under Alternative II–B, the Department is in the process of developing data to establish more reliable information on the occupational mix of service employees engaged in the performance of SCA-covered contracts. Based on data collected by the Federal Procurement Data System for Fiscal Year 1994, a statistical survey will provide specific information on service contract employment by occupation within SIC industry classifications. The information collected should also provide a basis for more reliable estimates of the economic impact of the various proposed alternatives.

Due to the time constraints imposed by the district court, discussed above, it is not feasible to publish the impact analysis for comment with the proposed rule. Instead, the analysis will be published as soon as possible for comment. Comments will be reviewed prior to promulgation of a final rule. In the meantime, if commenters have empirical evidence which would assist in developing the analysis or evaluating the data, it would be welcome at this time.

IX. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, Public Law 96–354 (94 Stat. 1164; 5 U.S.C. 601 *et seq.*), Federal agencies are required to prepare and make available for public comment an initial regulatory flexibility analysis that describes the anticipated impact of proposed rules on small entities. The Department has prepared the following Regulatory Flexibility Analysis regarding this rule.

(1) Reasons Why Action Is Being Considered

The McNamara-O'Hara Service Contract Act of 1965 (SCA) requires that the Department of Labor (DOL) determine locally-prevailing wages and fringe benefits for the various classes of service employees performing contract work subject to the SCA. Contracts over $2,500 (if the predecessor contract was not subject to a collective bargaining agreement) are required to contain wage determinations issued by DOL that specify the minimum monetary wages and fringe benefits that must be paid to the various classes of workers who perform work on the service contract, based upon rates determined by DOL to be prevailing in the locality where the work is to be performed. As discussed previously, fringe benefit data are not generally available on an occupation-specific or on a locality basis, which prompted DOL to issue fringe benefit determinations for health and welfare based on nationwide data ever since SCA was enacted.

The Service Employees International Union (SEIU) sued DOL in March 1991 in the United States District Court for the District of Columbia over the longstanding administrative practice, since 1976, of issuing two nationwide rates for health and welfare fringe benefits, and for failure to periodically update SCA H&W fringe benefit levels which, at that time, had not been updated since 1986 (*SEIU* v. *Martin*, CA No. 91–0605 (JFP) (D.D.C. April 1, 1992)). In this court challenge, the district court remanded the case to DOL for exhaustion of administrative remedies and final agency action, which led to the decision of DOL's Board of Service Contract Appeals that remanded the matter to the Wage and Hour Division to consider alternative methodologies for implementing the statutory objectives (BSCA Case No. 92–01 (August 28, 1992) and Case No. 93–08 (September 23, 1993)). The proposed rulemaking alternatives are being considered in order to develop a methodology for establishing prevailing SCA fringe benefits consistent with statutory requirements. In the meantime, SEIU moved the district court to reopen its case against the Department. The district court dismissed the case without prejudice to SEIU's right to reopen for reconsideration upon a showing that DOL has not adopted a final rule in this matter by July 31, 1996 (*SEIU* v. *Reich*, CA No. 91–0605 (CRR) (D.D.C. January 19, 1996)).

(2) Objectives of and Legal Basis for Rule

These regulations are issued under the authority of the McNamara-O'Hara Service Contract Act of 1965 (SCA) (41 U.S.C. 351 *et seq.*), Public Law 89–286, 79 Stat. 1034, as amended by Public Law 92–473, 86 Stat. 789; by Public Law 93–57, 87 Stat. 140; and by Public Law 94–489, 90 Stat. 2358. The objective of these regulations is to provide effective procedures for implementing SCA's statutory requirement that DOL determine prevailing health and welfare fringe benefits that are to be specified in wage determinations included in SCA-covered service contracts, which benefits are required to be furnished to the various classes of service employees performing work on SCA-covered contracts.

(3) Number of Small Entities Covered Under the Rule

The definition of small business varies considerably depending upon the policy issues and circumstances under review, the industry being studied, and the measures used. The Small Business Administration's Office of Advocacy generally uses employment data as a basis for size comparisons, with firms having fewer than 100 employees or fewer than 500 employees defined as small.[24]

Statistics published by the Internal Revenue Service indicate that in 1990, an estimated 20.4 million business tax returns were filed for 4.4 million corporations, 1.8 million partnerships, and 14.2 million sole proprietorships, most of which are ''small''—fewer than 7,000 would qualify as large businesses if an employment measure of 500 employees or less is used to define small and medium-sized businesses.[25]

Federal procurement data are compiled and reported by the Federal Procurement Data Center (FPDC) in the *Federal Procurement Data System Federal Procurement Report* (Washington, D.C.: U.S. Government Printing Office). The value of Federal contracts and volume of contract ''actions'' are currently reported individually to the FPDC for contract actions exceeding $25,000; actions of less than $25,000 are reported only in the aggregate. A contract ''action'' differs from an initial contract ''award'' because a single contract may involve more than one action—for example, a modification to an initial contract award is reported to the FPDC as a separate action and may involve the obligation or de-obligation of funds.

Small businesses were awarded $58.8 billion of the $184.2 billion spent by the Federal government on goods and services in Fiscal Year (FY) 1989, including $31.6 billion awarded directly to small firms and $27.2 billion awarded to small subcontractors by Federal prime contractors.[26] Small firms accounted for more than one-half (51.3

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[24] The State of Small Business: A Report of the President Transmitted to the Congress (1991), Together with The Annual Report on Small Business and Competition of the U.S. Small Business Administration (United States Government Printing Office, Washington, D.C., 1991), p. 19. A more detailed breakdown also used is: under 20 employees, very small; 20–99, small; 100–499, medium-sized; and over 500, large. In general, a business bidding on a government contract is regarded as small if it has fewer than 500 employees (see p. 221).

[25] U.S. Department of the Treasury, Internal Revenue Service, *SOI Bulletin* (Spring 1990) Table 19; reprinted by SBA in The State of Small Business (1991), Id., p. 21.

[26] *Id.*, p. 220.

percent) of the value of contracts under $25,000, but only 14.1 percent of those over $25,000 in FY 1989.[27] Since FY 1979 when the FPDC first began reporting procurement data regularly, the share of Federal procurement dollars awarded to small firms has fluctuated between 14 and 16 percent over the entire period—for FY 1989 it was 14.1 percent overall.

Of the major product/service categories under which contract actions are reported to the FPDC, the ''other services'' category (which includes a variety of non-construction activities ranging from technical, sociological, administrative, and other professional services, to installation, maintenance, and repair of equipment) amounted to 28.9 percent of the total Federal prime contract actions reported individually in FY 1989. Small businesses were awarded $6.8 billion or 14.7 percent of the contract dollars awarded for services in FY 1989.[28]

This FPDC data on small business awards does not correlate precisely with the number of contract actions or contract dollars awarded that are subject to the SCA. However, the ''services'' category can be considered a reliable proxy for analyzing the universe of SCA-covered contracts reported to the FPDC that may be awarded to small businesses. Of a total 502,138 contract actions valued at $177.8 billion that were individually reported to the FPDC in FY 1992 (i.e., actions over $25,000 each), 82,957 contract actions, valued at $18.1 billion, were classified as subject to the SCA.[29] Of these awards, we estimate that $2.66 billion (14.7 percent) went to small businesses. These figures, however, do not include any portion of the contract actions not individually reported but reported in summary to the FPDC, which totaled 19.6 million contract actions valued at $22.02 billion.[30] Based upon the percentage of contract actions and contract dollars in the services category that were reported individually to FPDC as being subject to SCA, we estimate that an additional 2,905,696 actions, valued at $2.2 billion, of the actions reported in summary to the FPDC were subject to SCA. Of these awards, we estimate that $1.1 billion (50 percent) went to small businesses.

No current employment data are available by size of business that would relate to Federal contracts awarded subject to SCA. (The SBA measures employment change on a current basis for each small-or large-business-dominated industry using Bureau of Labor Statistics payroll data.[31])

(4) Reporting, Recordkeeping and Other Compliance Requirements of the Rule

This proposed rule, which relates to the procedures to be followed by DOL for determining prevailing health and welfare fringe benefits to be paid to service employees working on Federal service contracts covered by SCA, contains no reporting, recordkeeping, or other compliance requirements applicable to small businesses. However, some of the proposed alternatives may involve additional recordkeeping. All SCA-covered contractors (including small businesses) are required to maintain records specified under 29 CFR Part 4 that demonstrate compliance with the statutory requirements to furnish equivalent fringe benefits or cash equivalents at not less than prevailing rates.

(5) Relevant Federal Rules Duplicating, Overlapping or Conflicting With the Rule

There are currently no Federal rules that duplicate, overlap or conflict with this proposed rule.

(6) Differing Compliance or Reporting Requirements for Small Entities

This proposed rule, as noted, relates to DOL procedures for determining prevailing health and welfare fringe benefits for service employees on SCA-covered service contracts. At this time, the rule contains no reporting, recordkeeping, or other compliance requirements applicable to small businesses. Moreover, the requirement to provide prevailing fringe benefits applies to all contracts in excess of $2,500, and establishing different requirements for small entities is not a valid alternative under the terms of the statute. However, under the express terms of the statute, all SCA-covered contractors may discharge their obligations to furnish prevailing fringe benefits under SCA ''* * * by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary * * *,'' which are set forth at 29 CFR § 4.177.

(7) Clarification, Consolidation and Simplification of Compliance and Reporting Requirements

As noted, this proposed rule pertaining to DOL procedures for determining prevailing fringe benefits under SCA contains no new compliance or reporting requirements for small entities.

(8) Use of Other Standards

Given the stated objectives of the statute, compliance by contractors can only be achieved through performance rather than design standards—i.e., the Secretary is required by the Act to determine the prevailing wages and fringe benefits to be paid by service contractors. The available alternative methodologies that are being considered and put forth in this proposed rule are discussed in the preamble above and are not repeated here.

(9) Exemption From Coverage for Small Entities

Exemption from coverage under this rule for small entities would not be appropriate given the statutory mandate of SCA that all contractors (large and small) performing on SCA-covered contracts furnish prevailing fringe benefits to service employees performing on Federal service contracts. Further exclusion of such small businesses from data collected to determine prevailing fringe benefits would also be impractical, and would distort determinations of prevailing fringe benefits, possibly to the detriment of small businesses.

Summary

Based upon the foregoing analysis, the revised procedures contained in this proposed rule are expected to have a ''significant economic impact on a substantial number of small entities'' within the meaning of the Regulatory Flexibility Act. This impact is mitigated in some respects by the statutory authority for SCA-covered contractors to discharge their obligations to furnish prevailing fringe benefits by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash.

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.

List of Subjects in 29 CFR Part 4

Administrative practice and procedures, Employee benefit plans,

[27] *Ibid.*

[28] *Id.*, pp. 223, 226 & 235–237.

[29] Federal Procurement Data System Standard Report, Fiscal Year 1992, Fourth Quarter, pp. 74–75.

[30] *Id.*, p. 74.

[31] *Id.*, p. 34.

Government contracts, Investigations, Labor, Law enforcement, Minimum wages, Penalties, Recordkeeping requirements, Reporting requirements, Wages.

Signed at Washington, DC, on this 26th day of April, 1996.

Maria Echaveste,

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[FR Doc. 96–10797 Filed 5–1–96; 8:45 am]

BILLING CODE 4510–27–P