

for FC shares. A, a five-percent transferee shareholder, will not be required to include in income any gain realized on the exchange in the year of the transfer if he files a 5-year gain recognition agreement (GRA) and complies with section 6038B.

**Example 3. Control Group.** (i) The facts are the same as in *Example 2*, except that B, another U.S. person, is a 5-percent target shareholder, owning 25 percent of S's stock immediately before the transfer. B owns 40 percent of the stock of FC immediately after the transfer, 10 percent received in the exchange, and the balance being stock in FC that B owned prior to and independent of the transaction.

(ii) A control group exists because A and B, each a five-percent target shareholder within the meaning of paragraph (c)(5)(iii) of this section, together own more than 50 percent of FC immediately after the transfer (counting both stock received in the exchange and stock owned prior to and independent of the exchange). As a result, the condition set forth in paragraph (c)(1)(ii) of this section is not satisfied, and all U.S. persons (not merely A and B) who transferred S stock will recognize gain on the exchange.

**Example 4. Partnerships.** (i) The facts are the same as in *Example 3*, except that B is a partnership (domestic or foreign) that has five equal partners, only two of whom, X and Y, are U.S. persons. Under paragraph (c)(4)(i) of this section, X and Y are treated as the owners and transferors of 5 percent each of the S stock owned and transferred by B and as owners of 8 percent each of the FC stock owned by B immediately after the transfer. U.S. persons that are five-percent target shareholders thus own a total of 31 percent of the stock of FC immediately after the transfer (A's 15 percent, plus X's 8 percent, plus Y's 8 percent).

(ii) Because no control group exists, the condition in paragraph (c)(1)(ii) of this section is satisfied. The conditions in paragraphs (c)(1)(i) and (iv) of this section also are satisfied. Thus, U.S. persons that are not five-percent transferee shareholders will not recognize gain on the exchange of S shares for FC shares. A, X, and Y, each a five-percent transferee shareholder, will not be required to include in income in the year of the transfer any gain realized on the exchange if they file 5-year GRAs and comply with section 6038B.

(11) **Effective date.** This paragraph (c) applies to transfers occurring after January 29, 1997. However, taxpayers may elect to apply this section in its entirety to all transfers occurring after April 17, 1994, provided that the statute of limitations of the affected tax year or years is open.

(d) **Transfers of stock or securities of foreign corporations.** For guidance, see Notice 87-85 (1987-2 C.B. 395). See § 601.601(d)(2) of this chapter.

(e) through (h) [Reserved]. For further guidance, see § 1.367(a)-3T(e) through (h).

Par. 3. In § 1.367(a)-3T, paragraphs (a), (c) and (d) are revised to read as follows:

**§ 1.367(a)-3T Treatment of transfers of stock or securities to foreign corporations (temporary).**

(a) [Reserved]. For further information, see § 1.367(a)-3(a).

\* \* \* \* \*

(c) and (d) [Reserved]. For further information, see § 1.367(a)-3(c) and (d).

\* \* \* \* \*

**PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT**

Par. 4. The authority for citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 5. Section 602.101, paragraph (c) is amended by revising the entry for 1.367(a)-3T and adding an entry to the table in numerical order to read as follows:

**§ 602.101 OMB Control numbers.**

\* \* \* \* \*

(c) \* \* \*

CFR part or section where identified and described	Current OMB control No.
* * * * *	* * * * *
1.367(a)-3 .....	1545-0026
1.367(a)-3T .....	1545-1478
1.367(a)-3T .....	1545-0026
* * * * *	* * * * *

Margaret Milner Richardson,  
*Commissioner of Internal Revenue.*

Approved: December 11, 1996.  
Donald C. Lubick,  
*Assistant Secretary of the Treasury.*  
[FR Doc. 96-32375 Filed 12-27-96; 8:45 am]  
BILLING CODE 4830-01-U

**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, Office of the Secretary, Labor.  
**ACTION:** Final rule.

**SUMMARY:** This document adopts as a final rule the continued suspension of the regulations previously issued under the Davis-Bacon and Related Acts at 29 CFR 1.7(d), 29 CFR 5.2(n)(4), and 29 CFR 5.5(a)(1)(ii) and suspended at 58 FR 58954 (Nov. 5, 1993), 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).

**EFFECTIVE DATE:** December 30, 1996.

**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 the duties of 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) (1982).

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. Courts 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 a 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).

Following a new round of notice-and-comment rulemaking, DOL published a final rule in the Federal Register (54 FR 4234) on January 27, 1989, 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 clauses 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 prescribe 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 the ratio provision at 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 102-112, 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, Public Law 103-333); this prohibition extended midway through fiscal 1996 through several continuing resolutions. There was no such prohibition in the Department of Labor's Appropriations Act for the remainder of fiscal 1996, Public Law 104-134, signed into law by President Clinton on April 26, 1996, of for fiscal 1997.

On August 2, 1996, the Department published in the Federal Register (61 FR 40366) a proposal to continue the suspension of the helper regulations previously issued while the Department conducts additional rulemaking proceedings to determine whether further amendments should be made to those regulations. Public comments were invited for 30 days.

In response to this proposal, the Department received forty-seven comments, including submissions by the Associate Builders and Contractors, Inc. (ABC), the Associated General Contractors of America (AGC), the National Association of Home Builders (NAHB), the Coalition to Repeal the

Davis-Bacon Act (CRDBA), the National Alliance for Fair Contracting, the American Subcontractors Association, the American Society of Civil Engineers (ASCE), the Building and Construction Trades Department, AFL-CIO (BCTD), the Sheet Metal Workers' International Association, and the Laborers' International Union of North America (LIUNA), individual contractors, local chapters of unions and industry associations, and individuals.

#### *Summary of Comments and Discussion*

Among the many comments received by the Department, relatively few directly addressed the issue of whether the Department should continue the suspension of the helper regulations temporarily while it engages in rulemaking on possible amendments to those regulations. The bulk of the comments focused on the merits of flaws of the substance of the underlying helper regulations themselves, or on the factors that led the Department to consider amending the regulations.

The issue addressed by the proposal, however, is not whether the Secretary should or should not repeal or amend the helper regulations for the reasons set forth in the NPRM. Those are issues that will be fully explored in an upcoming notice of proposed rulemaking proceeding concerning the substantive aspects of the helper regulations. However, because the Secretary's decision to seek public comments on whether the helper regulations should continue to be suspended pending the outcome of the substantive rulemaking proceedings is obviously intertwined with his conclusion that the helper regulations need to be reexamined, we discuss below both categories of comments, beginning with those that address the proposed temporary suspension.

#### *Comments Concerning the Proposed Temporary Continuation of the Suspension*

The Department expressed its concern in the NPRM that implementing the regulations immediately, during the pendency of rulemaking to consider amending the regulations, could create disruption and uncertainty for both the federal contracting community and the federal agencies. In light of the length of time it would take to fully implement the regulations so that helpers could actually be used on federal construction, and given that shortly after the regulations would be come effective the regulations could change, the Department requested specific comment on whether continuing the suspension during rulemaking would be advisable.

Three comments were received that directly addressed this issue. The BCTD agreed with the Department, stating that the "proposed rule is the most prudent and responsible action under the circumstances" to "avoid the disruption and uncertainty that implementation of the current 'helper' regulations would cause during the short period of time that it will take to complete formal rulemaking."

On the other hand, the AGC disagreed that implementation would be short-term or would create unwarranted disruption. It also disagreed with the Department as to how long it would actually take to implement the regulations if the suspension were lifted immediately. The AGC noted that when the ratio provision was withdrawn by the Department in June 1992, the General Services Administration published a rule amending the FAR and DFAR in September 1992. The AGC claims that since those amendments have been suspended, not withdrawn, "there is no reason to believe that delays, if any, would be more than minimal." The AGC also stated that "there is no reason to believe that additional 'substantive rulemaking' will be completed, and implementation initiated, within one year."

The ABC in its comments did not directly address this issue, but rather asserted:

While engaging in this predetermined rulemaking, the agency thinks it will take too long (60 days) to implement the existing regulations and that this will disrupt public bidding practices. (In other words, the government should not be allowed to save money in its construction projects, or to recognize prevailing practices, where the savings will not be of long duration.)

First, the Department believes that it would take substantially longer than 60 days to fully implement the helper regulations. This view is fully supported by the Department's past experience with the helper regulations. If the Department were to begin implementation of the suspended rule immediately, the rule itself would provide a 60-day effective date to allow affected parties time to come into compliance, and would apply only to contracts for which bids are advertised or negotiations concluded after that date. Bid solicitations to which the regulations will apply must be advertised for at least 30-60 days before a contract is awarded. Thus, following the effective date of the regulations there will be another 30 to 60 days before contracts potentially containing helper contract clauses could be signed.

Conforming changes in government procurement regulations (the "FAR"

and "DFAR") and standard contract forms would also be needed, a process which has sometimes taken several months. Amendments to the FAR and DFAR following the Department's 1992 notice of implementation had sixty-day effective dates. As noted previously in the NPRM, when the Department implemented the helper rule in January 1992, conforming changes in the FAR and DFAR did not actually become effective until November 1992, approximately ten months after the Department issued its notice implementing the rule. The AGC correctly notes that these changes to the FAR and DFAR also included amendments necessitated by the Department's June 1992 final rule.

Furthermore, a contractor can use helpers in accordance with the helper regulations only if (1) the contract contains a wage determination with a helper classification and rate or (2) the contractor awarded the contract requests that a helper classification be added to the wage determination and the Department determines that the use of the helper classification is a prevailing practice in the area in which the work will be performed. The time necessary for the Department to perform wage determination and prevailing practice surveys would further lengthen the period before contractors could lawfully pay their workers at helper rates.

Furthermore, it continues to be the Department's intention to complete a substantive rulemaking action within approximately one year. Because of the substantial length of time it would take to implement the helper regulations, any saving that might be gained from implementation of the helper regulations during the rulemaking period would be minimal, particularly in light of the disruption and uncertainty which would be caused by implementing the rule while the Department is engaged in rulemaking.

In sum, the comments have provided no information which would change the Department's belief that the suspended regulation, if immediately implemented, "would be effective for only a brief period, if at all, before the Department expects [to] complete substantive rulemaking proceedings" and that "repeated changes in the regulations within a short period of time would create unwarranted disruption in the contracting process of federal agencies" and uncertainty in the contracting community as a whole.

*Whether the proposal to continue the suspension meets the requirements of the Administrative Procedure Act (APA).*

Many of the contractors which commented on the proposal expressed the view that the proposal violates the APA. The comments of the NAHB are illustrative. The NAHB stated that the Department is "already refusing to enforce the current helper regulations, and the comment period has not yet ended," in violation of the APA requirement that agencies follow their own regulations, and may lawfully repeal or suspend those regulations only after the public has been given notice and allowed to comment. The NAHB also contended that the Department's "decision to suspend the regulations is clearly an arbitrary and capricious one," because the Department has stated the need for additional substantive rulemaking on the helper regulation but has not yet proposed any changes.

The ABC also contended that the current rulemaking violates the APA and is arbitrary and capricious because there was no notice and comment on the continued suspension of the regulation while the Department engages in notice and comment rulemaking on whether to further continue the suspension during substantive rulemaking. In other words, ABC claimed that the failure to implement the rules while conducting rulemaking on whether to continue to suspend the rules violates the APA.

The BCTD commented that it does not believe the proposal violates the APA; rather, its view is that the proposal is necessary to satisfy the APA. The BCTD commented that one of the reasons it supports the proposed rule is that it believes it is necessary in order to avoid violating the APA. The BCTD expressed the view that the Department was not required to lift the suspension or begin notice and comment rulemaking immediately after the signing of the current Appropriations Act. On the other hand, the BCTD believes that the suspension could not continue indefinitely without the benefit of public notice and comment. The publication of the August 2, 1996, proposed rule for comment, however, alleviates that concern.

It is the Department's belief that the contention that the continued suspension of the helper regulations violates the APA arises from the faulty premise that the helper regulations are currently in effect, and therefore must be enforced until such time as they are amended or repealed after appropriate notice and comment proceedings. However, the helper regulations are not now in effect, and have not been in effect at any time during the past three years. The helper regulations were properly suspended by notice published in the Federal Register on November 5,

1993, in response to the enactment of the prohibition on expending funds to implement the regulations which was contained in the Department's 1994 Appropriations Act. While the Department's current Appropriations Act does not contain such a prohibition, that Act did not have the effect of lifting the suspension. Because the suspension of the helper regulation had been effected through rulemaking action in the Federal Register, action by the Department in the Federal Register was necessary to lift the suspension. Thus, the proposed rule does not suspend the helper regulations; they were already lawfully suspended.

Furthermore, even if the Secretary's continuation of the suspension were construed as a postponement of the (as yet unestablished) effective date of the helper regulations to allow time for notice and comment, it is the view of the Department that the APA permits the Department to seek comments before a final determination concerning implementation of the rule is made. It is the Department's view that delay for the sole purpose of seeking public comments accords with both the language and underlying objectives of the APA—particularly where the public has never had an opportunity to comment on the rule in its present form (without a ratio provision) and over fourteen years have passed since the Department first issued the rule.

It is also the Department's view that it has not acted arbitrarily and capriciously in undertaking the current rulemaking. The purpose of the proposed rule is to solicit 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." 61 FR 40367. The Department has not decided to repeal the helper regulations; nor has the Department made a final decision to amend the regulations. The Department has, however, concluded that the basis and effect of the semi-skilled helper regulations should be reexamined.

The Department believes that the reasons set forth in the NPRM provide a reasonable basis for the decision to seek public comments before making any decision concerning implementation of the rule. Implementation of the regulation, on a short-term basis during the pendency of the substantive rulemaking procedure, would affect relatively few contracts, and yet could potentially create substantial disruption and uncertainty in the federal procurement process. Consequently, the Department believes it was entirely appropriate and

consistent with the objectives of the APA to seek comments from affected parties before deciding how to proceed.<sup>1</sup>

#### Comments Concerning the Reasons for the Department's Decision To Initiate Rulemaking Proceedings Proposing Further Amendments to the Suspended Helper Rule

Many of the comments received addressed the reasons given by the Department for initiating substantive rulemaking concerning the helper rule. The specific question posed by the current proposed rule is whether to continue the suspension of the helper regulation while the Department further considers such substantive issues and what, if any, amendments it should propose to address them. The time for full consideration of substantive issues is after the Department has published a proposal that would further amend the helper rule and the public has had the opportunity to comment on that proposal. But given that most of the comments received addressed the Department's substantive concerns with the helper regulations, and that the need to address those concerns is what led the Department to propose the continued suspension of the regulations, it is appropriate to summarize and discuss those comments here.

The Department explained in the NPRM that it has decided to reexamine the helpers regulations to consider whether further amendment is warranted. Data gathered during the brief period during which the helper regulation was effective suggest that the use of helpers may not be as widespread as initially thought. The Department is also preparing an updated economic impact analysis based in part on data sources not previously available. As a result of the Department's experience in attempting to develop enforcement guidelines and the removal of the ratio requirement from the regulation, the Department is very concerned that administration of the helper regulation, and the policing of potential abuse of the helper classification, may be more difficult than initially anticipated. Finally, the Department stated that it is concerned about the potential impact of the regulation on formal apprenticeship and training programs.

#### *Use of helpers may not be as widespread as initially thought.*

<sup>1</sup>The question of the proposed rule's adequacy under the APA is currently before the U.S. District Court for the District of Columbia in the matter of *Associated Builders and Contractors, Inc., et al. v. Reich*, Civil Action No. 96-1490 CRR. The views of both the Department and the ABC are discussed in greater length in the pleadings filed in the case.

The belief that use of helpers was widespread was a key assumption underlying the Department's development of the helper regulation. Many of the contractors and contractors' associations submitting comments questioned the Department's stated concern that the use of helpers might not be as widespread as it had initially assumed, and its reliance upon prevailing wage survey results when the helper regulation was in effect as the basis for that statement. The ABC, relying upon its assertion that helpers are utilized extensively in the open-shop sector, also points to BLS statistics showing a flat or slightly declining level of unionization during the period 1989-1992 to question the legitimacy of the Department's concern.

In the proposed rule published in August 1987, the Secretary projected that helpers would be determined to be prevailing in two-thirds to 100 percent of all craft classifications. 52 FR 31369. This was amended by the statement (without quantification) in the final rule that this would be reduced somewhat to the extent that collectively bargained rates were recognized as prevailing and did not provide for use of a helper classification. 54 FR 4242.

The Secretary's actual experience with the regulation presented a starkly different picture. In contrast to the estimate published in 1987 that helpers would prevail in at least two-thirds of all craft classifications, the Secretary found that use of helpers prevailed with respect to only 69, or 3.9 percent, of the 1763 classifications included in the 78 prevailing wage surveys completed during the period the rule was in effect.<sup>2</sup> These numbers are even lower if one looks only at the nonunion sector—where it had been assumed in the past that helpers would almost always be found to prevail. Of the 69 helper classifications found to prevail, 21 were prevailing based on the practice of union contractors.<sup>3</sup>

Furthermore, the Secretary found that use of helpers was not the prevailing practice in *any* classifications in 43 of the 78 surveys conducted, covering 229 of 328 counties surveyed.<sup>4</sup> These

<sup>2</sup>Not included in the 69 helper classifications are instances where the number of helpers actually used or the number of contractors using helpers was insufficient to determine a prevailing rate.

<sup>3</sup>Fifteen of the 21 union help classifications were elevator constructor helpers—a classification historically recognized nationwide in the union sector of the elevator constructor trade.

<sup>4</sup>Note that the survey results have been rechecked and the numbers revised slightly since publication of the proposed rule. Compare 61 FR 40367. Both the ABC and the AGC questioned the results obtained in the 78 surveys, citing a 1996 GAO report on the Davis Bacon wage determination

surveys included 2 surveys in which the schedule reflected entirely collectively bargained rates, 10 surveys in which the schedule reflected entirely open shop rates, and 66 mixed schedules, 51 of which reflected 50 percent or more open shop rates. In 13 of the 35 surveys where a helper classification was issued, the only helper classification found to prevail was a union helper. A total of only 48 open shop helper classifications were found to prevail. Thus open shop helper classifications were found to prevail in only 20 of 78 surveys conducted, covering only 52 of 328 counties surveyed.

ABC in its comments attempts to dismiss this data as "statistically insignificant." However, the extraordinary divergences between the actual data and the projection used as a basis for adopting the helper regulations clearly support the Secretary's conclusion that "the basis and effect of the semi-skilled helper regulations should be reexamined." 61 FR 40367. Moreover, ABC's reference to statistics that show a decline in unionization fails to explain the dramatic discrepancy between the Secretary's project in the 1987 proposed rule and the data compiled from actual wage surveys during 1992 and 1993.

Data not previously available when the helper regulations were originally proposed and promulgated also show a lower use of helpers than was originally believed and, therefore, support the Secretary's determination that the helper regulations require further examination. For example, Bureau of Labor Statistics ("BLS") tabulations from the 1995 Current Population Survey ("CPS") show that helpers comprise only 1.3 percent of the total construction employment. Employment data from the Occupational Employment Statistics ("OES") program, which have formed the basis for earlier analyses of helper employment, show that helpers comprise 9.4 percent of the total construction workforce—higher than the CPS data but a much lower incidence than the Department's economic impact analysis in 1987 and 1989 would suggest. However, the OES figure is based on a helper definition which appears to correspond to what is commonly considered to be laborer's or

tenders' work and does not appear to envision that helpers use tools of the trade—an important component of the definition in the suspended regulation.

#### *Potential Cost Savings*

The potential cost savings to be realized from implementation of the helper regulation was cited by many of the commenters who opposed the temporary continuation of the suspension. Many claimed that implementation of the helper regulation could save the government up to \$600 million a year, based on the Department's earlier economic impact analysis.

LIUNA expressed its view that implementation of the helper rule would not significantly reduce the cost of federal and federally-assisted construction projects. They believe the cost estimates developed in the course of rulemaking on the helper regulations were overly simplistic, failing to account for the productivity costs of replacing higher wage, skilled workers with lower wage, less skilled workers. Another commenter stated the view that semi-skilled workers increase project costs due to increased safety violations and worker's compensation claims, and lower productivity.

The data discussed above indicate that helpers may be found to prevail at a much lower rate than previously assumed. The Department is preparing a preliminary regulatory impact analysis which will discuss the Department's updated estimate of costs and benefits relating to the proposed regulation in preparation, and will include projected savings if the suspended helper rule were implemented. This analysis will be published for notice and comment with the proposed rule.

#### *Potential for Abuse*

Both the ABC and the AGC challenged the Department's concern 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. The AGC does not believe there is any more potential for abuse with respect to the helpers regulation than there is with respect to the Department's procedures for identifying other classifications, calculating prevailing wages, or conforming classifications. The ABC stated that if helpers prevail in only a few areas, the position it ascribes to the Department, then it is not likely that there would be any significant amount of abuse.

The extent to which helpers prevail in particular areas does not bear on

whether the use of helpers will be abused where they do prevail. Moreover, the issue of what, if any, changes need to be made to prevent potential abuse is one of the primary reasons the Department has decided to reexamine the helper rule. The Department notes that the helper classification as currently defined is unique in being based on subjective standards such as skill level and supervision, rather than an objective test of work performed. The Department is concerned that such a subjective standard may be more difficult to enforce.

Three commenters, all of whom supported the proposal to continue the suspension, expressed their concern that the definition of a helper contained in the regulation would lead to abuse and misclassification. One commenter submitted anecdotal evidence of intentional misclassification under a State wage determination law that allowed the use of helpers, and the two others believe it will be very difficult to enforce the regulation against contractors who would call the majority of their workforce helpers, including workers whose skill-levels qualify them as journeymen.

Both the ABC and the AGC reject the notion that the regulation is more difficult to administer without the ratio provision, and neither finds it relevant that the public never had the opportunity to comment on the possible impact on the regulation of eliminating the ratio. LIUNA on the other hand believes the regulation without such a ratio is significantly different from what was originally proposed, and believes that the failure to submit the regulation without the ratio for public comment renders it legally deficient.

The elimination of the ratio cap provisions from the helper regulation, under which there could be no more than two helpers for every three journeymen, is one of the primary reasons the Department is concerned that the regulations may be more difficult to enforce than anticipated, and more subject to abuse. As the proposed rules published in 1981, 1987 and 1996 uniformly reflect, this ratio provision was intended specifically to limit the potential for abuse of the helper classification. 46 FR 41456 (Aug. 14, 1981); 52 FR 31366 (Aug. 1987); 61 FR 40367 (Aug. 2, 1996). The D.C. Circuit echoed the Secretary's concern with potential abuse of the helper regulations in its 1983 decision when the Court observed that "[t]he change may mean that some unscrupulous contractors will find it easier to shift what the prevailing practice denominates journeyman work

process. GAO/HEHS-96-130, May 1996. It is inappropriate to draw conclusions concerning the accuracy of survey results based on the GAO report. The report did not examine or verify the accuracy of wage determination data, survey response rates, or calculation of prevailing wages. It focused on the policies and procedures utilized to prevent the use of inaccurate data, and proposed changes to strengthen those policies and procedures.

onto helpers \* \* \* ." 712 F.2d at 629. The Court, like the Secretary, concluded that the numeric ratio "increase[s] the likelihood that gross violation will be caught, or at least that evasion will not get too far out of line \* \* \* ." *Id.* at 630. While the D.C. Circuit invalidated the specific ratio selected by the Secretary in its 1992 decision, nothing in that opinion suggests that a ratio is not an important element of the regulation, nor does it purport to preclude the Secretary from adopting such a measure designed to curb the potential for abuse so long as the Secretary adequately explains his actions. *See Building & Construction Trades Dept.*, 961 F.2d at 276-277.

The regulation was modified as a result of the 1992 court decision, to eliminate the numerical ratio of helpers to journeymen. Although that ratio was one of the principal protections against abuse of the new helper definition, the public never had an opportunity to comment on whether other changes to the regulation, or an alternative ratio, was appropriate in light of the elimination of the ratio provision.

In the course of attempting to develop enforcement guidelines for the regulations while they were in effect, it became apparent that the helper definition may be more difficult to administer and enforce than anticipated, and more difficult to administer than other aspects of the wage determination structure. Because a helper as defined in the suspended regulation is the only classification with duties that are specifically intended to overlap with the duties performed by other classifications, the Department believed that the ratio cap was a necessary buffer against potential contractor abuse and misclassification. The Department is concerned that the elimination of the ratio provision may greatly increase the possibility that misclassifications will go unchecked. The Department therefore continues to be concerned that the suspended regulation as written should be reexamined through notice and comment rulemaking.

#### *Effect on Apprenticeship and Training*

Several of those who supported the proposed continuation of the suspension believe that the helper regulation would have a negative impact on formal apprenticeship and training programs. They claim that the ability to pay apprentices a wage lower than that paid to journeymen is a significant incentive for contractors to participate in formal training programs. They also claim that the availability of lower paid helpers would cause contractors to withdraw from such programs and would threaten private funding for

apprenticeship and training. They believe that this poses a threat both to the industry, which would face shortages of skilled, trained labor, and to the individual workers who would find themselves in dead-end, low skilled jobs without adequate opportunity to increase their skills. Both the ABC and the AGC, however, believe such concerns are unfounded, and both observe that the Department provided no new evidence on this topic in the proposal.

The contractors who wrote to oppose the suspension proposal did not directly address the impact the helper regulation would have on apprenticeship and training. But some of them did describe how they use helpers, suggesting that they view helpers not as a separate and distinct classification but as an entry-level position in which workers acquire skills to move up to the journey level, much like an apprentice. These commenters endorsed the helper regulations (and opposed their continued suspension, even temporarily) because they allow workers to gain experience; promote training of unskilled workers; provide the semi-skilled with an opportunity to gain experience; and provide the unskilled with a first step to higher paying jobs.

Some of these commenters, however, described helpers in a way that is not incompatible with apprenticeship programs. One company noted that it is not practical to enroll abundant numbers of semi-skilled workers in apprenticeship training programs. Another viewed the helper position as a pre-apprentice opportunity for unskilled workers to acquire the skills necessary to enter an apprenticeship program.

These comments taken together confirm the Department's view that the potential impact of the helper regulation on apprenticeship programs is not fully understood, and should be revisited through further rulemaking.

#### *Additional Comments*

A large number of those opposed to the proposed rule also raised two additional issues. First, commenters stated that contractors that use helpers would be more able to compete for federal construction contracts if the helper regulation were implemented immediately. Second, commenters contend that women and minorities are more likely to be employed as helpers; therefore immediate implementation of the helper regulations would increase employment opportunities for those groups. LIUNA, on the other hand, stated that women and minorities are more likely to be employed as laborers

and therefore would be harmed by implementation of the helper regulation.

LIUNA also stated its view that the Department's position on the impact of the helper regulation on other occupational classifications shifted without explanation during the prior rulemaking on the suspended regulation. LIUNA notes that throughout the rulemaking the Department had assumed that helpers would replace laborers as well as journeymen, but significantly changed its position in the 1989 final rule, in which it assumed that helpers would replace only journeymen. They also cite developments within the industry that have rendered obsolete the understanding of laborers as unskilled workers, making it more difficult to use skill-level as a basis for distinguishing between laborers and helpers. Thus, it is LIUNA's view that the impact of the helper regulations upon laborers should be reexamined before the regulations are implemented.

That certain contractors, who utilize "helpers" as that term is defined in the suspended regulations, may benefit from implementation of the helper regulations, does not negate either the need to reexamine the practicality and enforceability of such regulations or the advisability of continuing the suspension of these regulations during such reexamination. Moreover, the disagreement among the commenters as to the degree and nature of the potential effect of the helper regulations upon the employment of women and minorities, as well as the employment of laborers, provides even additional support for the Secretary's decision to further reexamine the helper regulations through additional rulemaking.

#### *Conclusion*

For the foregoing reasons and after consideration of all of the comments submitted in response to the proposed rule published on August 2, 1996, in the Federal Register (61 FR 40366), the helper regulations previously issued under the Davis-Bacon and Related Acts at 29 CFR 1.7(d), 29 CFR 5.2(n)(4) and 29 CFR 5.5(a)(1)(ii) and suspended at 58 FR 58954 (Nov. 5, 1993), are suspended until the Department either (1) issues a final rule amending (and superseding) the suspended helper regulations; or (2) determines that no further rulemaking is appropriate, and issues a final rule reinstating the suspended regulations. The Department expects these proceedings to be completed within approximately one year.

#### V. Administrative Procedure Act

The APA at 5 U.S.C. 553(d)(3) requires that the effective date for a

regulation be not less than 30 days from the date of publication unless there is "good cause" shown for an earlier date. This rule does not require affected persons to take any actions to prepare for its implementation. Furthermore, a delay in the effective date could cause confusion among the affected public as to whether the previously suspended rule is in effect in the meantime. Therefore the Department finds good cause to have this rule effective immediately.

#### VI. Executive Order 12866; § 202 of the Unfunded Mandates Reform Act of 1995

As stated in the notice of proposed rulemaking, the Department is treating this rule as a "significant regulatory action" within the meaning of sec. 3(f)(2) of Executive Order 12866 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 AGC contends that the proposal for further rulemaking is inconsistent with Executive Order No. 12866, Section 202 of the Unfunded Mandates Reform Act of 1995, the Small Business Regulatory Enforcement Fairness Act and the Regulatory Flexibility Act. The AGC claims that the concerns expressed by the Department in the proposed rule regarding implementation of the helper regulations are "vague" and not "supported by reliable data." Relying upon the Department's own previous cost analysis conducted in 1987 and published along with the final rule at 54 FR 4242 (1989), the AGC claims that "the Department's contention that no cost would be incurred by continuing the suspension of the helper regulations is simply not true," and that failure to implement the helper regulations will "cost the federal government, taxpayers and the construction industry hundreds of millions of dollars." Finally, the AGC asserts that "the Department's proposal is a 'major rule' and requires both an economic and regulatory flexibility analysis in full compliance with Executive Order No. 12866 and the Small Business Regulatory Enforcement Fairness Act."

The AGC's comments address potential savings of implementation of the helper regulations, rather than the impact of continuing the suspension. As noted above, the Department is preparing a preliminary regulatory impact analysis which will discuss the Department's estimate of the costs and benefits of the proposed rule in preparation, including any savings that

might be realized from implementation of the helper regulations as they now stand. This analysis will be published for notice and comment concomitant with the Department's regulatory proposals concerning the employment of helpers on Davis-Bacon projects.

As discussed above, the Congressional action of lifting the prohibition against implementing the regulation did not itself reinstate the suspended regulation, and a notice or other rulemaking action by the Department was necessary to lift the suspension on the helper regulation. It is the Department's view, therefore, that the suspension has continued in effect since October 1993, and that the suspension continues in effect today. This rule, which continues the previously existing suspension, merely preserves the status quo. Therefore the Department concludes that there will be no cost savings from the continuation of the suspension of the helper regulations that has been in effect since November 1993 during the substantive rulemaking proceedings.

Moreover, as discussed above, a substantial period of time is required before the regulations would be implemented by their incorporation into contracts, and the Department's experience in the 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 potential savings that would be lost from a failure to implement the helper regulations during the rulemaking period would be minimal.

Accordingly, the Department has concluded that this rule, which continues the suspension of the helper rule and therefore is a continuation of the status quo, will not 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 § 804(2) of the Small Business Regulatory Enforcement Fairness Act.

#### VII. Regulatory Flexibility Act

The AGC contends that the Department's conclusion that the proposed continuation of the suspension "will have no significant impact on small entities is also contradicted by its 1987 estimate.

\* \* \*

Again, the AGC's comments address the potential savings of implementation

of the helper regulations, rather than the costs or savings of continuing the suspension. This regulation is merely a continuation of the status quo. Therefore the Department has determined that the rule does not have a significant economic impact on a substantial number of small entities.

Furthermore, the Department has determined that if the current suspension were lifted and the helper 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 rule is 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.

#### VIII. 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 23rd day of December 1996.

Gene Karp,  
Deputy Assistant Secretary for Employment Standards.

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#### 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:** Final rule.

**SUMMARY:** This document adopts as a final rule a new methodology for establishing minimum health and