



September 4, 2024

The Honorable Adrienne Todman  
Acting Secretary  
U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW  
Washington, DC 20410

Dear Acting Secretary Todman:

The undersigned national real estate associations represent a broad coalition of housing providers that are committed to working together with policymakers and the Administration to address America’s housing affordability crisis. Today, we write to request that the U. S. Department of Housing and Urban Development (“HUD”) seek a waiver from the U.S. Department of Labor (“DOL”) to permit the use of Project Labor Agreements (“PLAs”) to determine prevailing wages for HUD projects when prevailing wages are required by the Davis-Bacon Act. DOL has discretion in how it determines prevailing wage. PLAs are project-specific bargaining agreements with one or more labor unions. Using PLAs to determine prevailing wages would benefit laborers, developers, HUD and DOL, and could provide more accurate determinations of prevailing wages than DOL’s current, standard determination method. The great need for affordable housing, the additional federal interest present in HUD projects, the oversight provided by HUD, and the complicated nature of HUD transactions all provide just cause and weigh in favor of granting this requested waiver. HUD projects can also serve as a test-case for DOL in considering future revisions to its regulations.

**Background: applicability of Davis-Bacon and DOL methodology for determining prevailing wages**

The Davis-Bacon Act applies to certain federal and federally funded or federally assisted construction contracts. It requires that covered workers on such projects be paid not less than the “prevailing wage” in the area. Numerous statutes include provisions that apply Davis-Bacon wages to the programs authorized by those statutes. These include section 12 of the United States Housing Act of 1937 (applying Davis-Bacon to public housing development and repositioning transactions and Project-Based Voucher developments), section 212 of the National Housing Act (applying Davis-Bacon to FHA-insured transactions), and section 286 of the HOME Investments Partnership Act (applying Davis-Bacon to HOME program projects). These statutes require DOL to determine the prevailing wages, but neither the Davis-Bacon Act nor these related statutory provisions mandate that DOL determine prevailing wages in any particular manner.

The DOL published a final rule updating the “Davis-Bacon and Related Acts Regulations” on August 23, 2023 at 88 *Federal Register* 57526, with the rule effective on October 23, 2023 (“2023 Final Rule”). The regulations delegate the determination to the Administrator of the Wage and Hour Division (“WHD”) within DOL and require WHD to perform voluntary surveys and statistical analyses. The regulations permit DOL to make a project-specific wage determination if wage data is unavailable and allow WHD to adopt prevailing wage rates set by state or local officials, even if the state or locality’s methods or criteria for determining the prevailing wage are not precisely the same as WHD’s, provided that specified criteria are met.

It is noteworthy that, in the preamble to the final rule, DOL’s discussion of the comments it received to the proposed rule reflects a debate between DOL and industry participants over the definition and determination of “prevailing wage.” The comments reflect the industry’s broad dissatisfaction with DOL’s determination method, the method’s lack of accuracy, and the increased costs imposed on construction projects subject to those prevailing wages. DOL uses voluntary surveys to gather wage information, but the comments indicate that these surveys yield limited responses, resulting in data sets that struggle to accurately reflect current, locally representative prevailing wages and are often provided as regional or even statewide wage levels.

**Good cause justification and benefits of PLAs: need, accuracy, timeliness and reduced burden**

Housing providers who operate in high-cost metropolitan areas can testify from their real world experiences that the current prevailing wages determination protocols by WHD significantly increase the costs of providing affordable housing and put affordable housing developers at a disadvantage compared to market rate developers. The regulations also require significant data reporting of the contractors which can be a time, skill and administrative burden, as well as a potential liability, and can create a barrier to entry for smaller and MWBE firms to participate in the HUD programs. We have heard this repeatedly from our members, that navigating the current Davis Bacon wage determination protocols and reporting requirements is a significant barrier to entry for MWBE firms.

One especially problematic aspect of the current method of applying wage determinations to HUD programs is the timing of the determinations. Most often, the final DOL wage determinations are not set until immediately before closing. Parties can estimate wage determinations, but it is not unusual for the final DOL determinations to be different than anticipated. When this happens, it is absolutely disabling for the transaction and causes everyone to scramble.

Our organizations and our members understand the importance of prevailing wages and that there are competing policy considerations in the development of affordable housing. We are not seeking to challenge the applicability of Davis Bacon or prevailing wages. Quite the contrary, given the strong federal interests in both the application of prevailing wages and the implementation of HUD programs designed to create and preserve housing opportunities for those most in need of stable, affordable housing, we seek to reduce unnecessary barriers that delay and challenge the development of affordable housing and complicate the application of prevailing wages.

PLAs offer an alternative method of determining prevailing wages, supported by unions and project owners alike. PLAs are negotiated between a developer and a local union, in real time, in the specific context of a proposed development. PLAs are voluntary. A labor union is under no obligation to accept a PLA and would have no incentive to accept a PLA if it did not offer a true reflection of prevailing wage. In this way, PLAs reflect a more current, more local, more accurate determination of prevailing wage for a specific project, rather than DOL's general, statistical analysis based on sporadic responses. At the same time, PLAs provide certainty and timeliness to developers who would otherwise need to wait on a determination from DOL and worry about when those determinations will be made, whether those determinations are accurate in their locality, and whether such determinations will change before they can close on their projects. Use of PLAs can provide assurance to HUD that prevailing wage requirements are being followed and can reduce some of the costs and challenges associated with implementing HUD programs. Finally, PLAs can also alleviate administrative burden at DOL, which wants to provide accurate prevailing wage determinations, but has sometimes struggled with split wage decisions and other complicating factors in analyzing affordable housing developments.

It is worth noting that HUD's Green and Resilient Retrofit Program ("GRRP") provides an example of where PLAs are being used effectively to address the concerns we outline in this letter. Although the context for GRRP is different than the context for other HUD programs, since Davis Bacon wage requirements are not statutorily triggered by the GRRP authorizing statute (the Inflation Reduction Act of 2022, or "IRA"), GRRP allows project owners to use a PLA in lieu of DOL determined Davis Bacon wage rates.

We are not asking for PLAs to replace Davis Bacon requirements or for PLAs to be made mandatory. If a project owner and a union choose not to enter into a PLA or cannot agree on its terms, the existing DOL protocols for determining prevailing wages would apply. But where a project owner and union do agree on a PLA and negotiate its terms voluntarily in the context of a HUD program, the wages set in the PLA should satisfy the Davis Bacon requirements for wage determinations and should be applied in lieu of the wages determined by DOL.

In summary:

- PLAs provide a real, current, on-the-ground determination of prevailing wages. They are voluntary agreements through which developers and unions negotiate current rates for a specific project. These are actually, authentically, true prevailing wages for the projects for which they are negotiated.
- With PLAs, there is no delay in data collection, aggregation, or analysis. There is no question as to the timeliness or accuracy of the wage levels.
- PLAs represent the highest level of worker protection and wages, as they are exclusively agreements with labor unions.
- PLAs reduce administrative burden for developers, contractors, HUD and DOL. Developers and contractors negotiate the PLAs directly and all contractors and sub-contractors on a project would be subject to the PLA, which by definition establishes the prevailing wage.

**Regulatory Waivers Requested: 29 CFR 1.5(b), project wage determinations**

DOL has invested significant time and effort in its current Davis-Bacon methodology as updated by the 2023 final rule. However, the acute need for affordable housing in the country, the federal interest inherent in implementing federal housing programs, the myriad of regulatory requirements and complicating factors that affordable housing transactions must navigate, the competition that affordable housing transactions face from market rate developers in acquiring land and other project resources, and the potential reduction in administrative burden for all involved all justify application of a waiver of this regulatory methodology for HUD programs.

While we defer to HUD and DOL as to the specific mechanics of such a waiver, we believe waiver of 29 CFR 1.5(b) would allow the use of PLAs as project-specific wage determinations. 29 CFR 1.5(b) provides the requirements and method for requesting a “project wage determination,” for a specific project. Waiving this regulation would allow DOL to accept PLAs as project wage determinations.

Alternatively, or in connection with the waiver of 29 CFR 1.5(b), DOL may want to consider waiving the definition of “Prevailing Wage” at 29 CFR 1.2, which would allow DOL to accept a PLA as evidence that prevailing wages have been determined for the project in question, and/or the method for obtaining wage rate information, at 29 CFR 1.3, which would allow DOL to obtain wage rate information by accepting a PLA. DOL may also seek to provide additional sub-regulatory guidance.

## **Conclusion**

This Administration has been dedicated to removing barriers to affordable housing. Successful pursuit of cooperation from DOL in allowing PLAs to determine prevailing wages in HUD projects would remove a significant barrier and competitive disadvantage for affordable housing developers. Use of PLAs to determine prevailing wages also recognizes the great policy interest in ensuring prevailing wages for federally financed and federally assisted project, promotes accuracy and timeliness in prevailing wage determinations, and reduces unnecessary burdens in applying prevailing wages to much needed HUD projects.

Thank you for your consideration of this matter. We look forward to discussing these issues with you further.

Sincerely,

Housing Advisory Group  
National Apartment Association  
National Association of Housing Cooperatives  
National Leased Housing Association  
National Multifamily Housing Council

CC: Julie Su, Acting Secretary, United States Department of Labor