



Sept. 3, 2020

The Honorable James Comer
Ranking Member
Committee on Oversight and Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Ranking Member Comer:

On behalf of Associated Builders and Contractors, a national construction industry trade association with 69 chapters representing more than 21,000 members, we thank you for the opportunity to respond to your letter, dated July 16, 2020. ABC is pleased to provide you with information regarding the negative impacts of the Obama administration's regulatory expansion on ABC member contractors, as well as the Trump administration's regulatory relief initiatives, which have helped to remove burdensome barriers to job creation.

ABC member contractors applaud the Trump administration's substantial deregulatory efforts, which brought to light cost and burdens these regulations put on contractors. During the Obama administration, ABC members suffered from an aggressive and burdensome rulemaking agenda, where regulations were promulgated hastily with limited stakeholder input and questionable legal authority. Many of the Obama-era regulations were litigated, which created significant uncertainty for ABC member contractors and hampered economic growth.

As builders of our nation's communities and infrastructure, ABC members believe exceptional jobsite safety and health practices are inherently good for business. They understand the value of standards and regulations when they are based on solid evidence, with appropriate consideration paid to input from the business community. In some cases, regulations are based on conjecture and speculation, lacking foundation in sound scientific analysis. ABC strongly supports comprehensive regulatory reform, which includes across-the-board requirements for departments and agencies to appropriately evaluate risks, weigh costs and assess the benefits of all regulations.

In order to assist in documenting what has worked and what hasn't since the time of the committee's last initiative in 2011, ABC has assembled a comprehensive set of information based on the seven questions presented by your letter, dated July 16, 2020.

1. Individual regulations, regulatory programs and regulatory reform initiatives promulgated or instituted since 2008 that significantly impacted your business' or member businesses' abilities to create or maintain jobs, provide consumers with goods or services, obtain credit, supplies, energy, or other important inputs, compete fairly with other businesses, expand or locate operations or sales, innovate, or grow as much as or more than otherwise would have been possible.

To promote economic growth, we must free industry from those regulations that create unnecessary and costly bureaucratic layers. ABC's most pressing concerns in this area are identified below.

1. Government-mandated project labor agreement policies that are inconsistent across federal agencies.
2. U.S. Department of Labor policies related to the Davis-Bacon Act that stifle competition and impose enormous burdens on contractor productivity and needlessly increase construction costs.
3. DOL policies that serve as barriers to workforce development.

Before considering our detailed concerns below, allow ABC to provide some highlights of how these issues have a chilling effect on competition and impede job creation and economic recovery:

- Government-mandated project labor agreements:
 - Anti-competitive and costly government-mandated project labor agreements on federal and federally assisted contracts drive up the cost of taxpayer-funded construction projects between 12% and 20%.
 - Government-mandated PLAs unfairly discourage merit shop contractors, which employ more than 87.4% of the U.S. construction workforce, from bidding on the projects. The negative impact of PLAs disproportionately harms small businesses.
 - The needless paperwork, waste and red tape associated with the federal government's evaluation and procurement of federal contracts potentially subject to government-mandated PLAs is especially frustrating. ABC is aware of just 12 contracts (totaling \$1.25 billion dollars) that were procured and built in the United States subject to federal government-mandated PLAs and PLA preferences out of 1,681 federal contracts (totaling \$98.74 billion) exceeding \$25 million from FY2009 through FY2019 that were subject to the Obama administration's pro-PLA Executive Order 13502.
 - In contrast, the prevalence of PLA mandates on federally assisted projects procured by certain blue states and localities are wasting billions of federal tax dollars, slowing the velocity of new infrastructure and stifling job creation and opportunity for all industry professionals during America's economic recovery from the COVID-19 pandemic.

- DOL's Davis-Bacon Act policies:
 - ABC members frequently cite onerous Davis-Bacon Act regulations and compliance costs as reasons why they do not pursue public works projects subject to federal, state or local prevailing wage laws.
 - Regulations implementing DOL's Wage and Hour Division process to survey contractors and determine prevailing wage rates is inherently flawed and fails to produce accurate, prevailing or timely rates.
 - In recent years, union wage rates have been found prevailing in a substantial majority of classifications, even though the percent of unionized workers in the U.S. construction industry measured by the Bureau of Labor Statistics has fluctuated between 12.6% and 14.5% during the past decade.
 - DOL's failure to provide detailed information about job duties that correspond to each published wage rate makes it difficult to determine the appropriate wage rate for many construction-related jobs. These wage determinations force federal contractors to use outdated and inefficient union job classifications that ignore the productive multi-trade work practices successfully used in the merit shop construction industry.
 - The Congressional Budget Office has estimated that the repeal of the Davis-Bacon Act would save \$12 billion in federal construction costs between 2019 and 2028. ABC believes the CBO vastly underestimates the true inflated cost of the Davis-Bacon Act because the methodology is extremely conservative. In addition, the CBO does not address the associated increased costs on public works projects procured by state and local governments subject to state and local prevailing wage laws modeled after the federal Davis-Bacon Act. These are large markets and have a significant impact on state and local budgets and the quality of U.S. infrastructure, overall.

- DOL's workforce development policies:
 - To successfully expand apprenticeship opportunities and close the skills gap, all U.S. workers should have the opportunity to participate in DOL's new industry-recognized apprenticeship program, particularly as federal registered apprenticeship programs supply only a small fraction of the construction industry's workforce.
 - While considering new industry programs in 2019, it appears DOL did not take into consideration that the overwhelming majority of America's 8.17 million U.S. construction industry professionals never participated in any federal registered apprenticeship programs but are instead developed through industry-recognized and market-driven apprenticeships sponsored by companies large and small.
 - Graduates of federal registered apprenticeship programs supply just 3.2% of the estimated 550,000 additional construction workers needed to meet industry demands in 2020 alone, according to ABC's estimates prior to the economic downturn caused by the COVID-19 pandemic. At current levels of graduation, it would take more than 30 years for the federal registered apprenticeship program to meet industry demands for just this year.

Government-mandated Project Labor Agreement Policies That Are Inconsistent Across Federal Agencies

A top priority of ABC members is ending anti-competitive and costly government-mandated project labor agreements on federal and federally assisted contracts. When governments mandate or push PLAs on public works projects, U.S. taxpayers suffer from inefficient, anti-competitive and discriminatory procurement policies that studies have found raise the cost of taxpayer-funded projects between 12% and 20%,¹ which results in fewer infrastructure improvements and reduced construction industry job creation. Further, government-mandated PLAs effectively prevent qualified contractors and the 87.4% of the U.S. construction workforce that choose to not join a labor union² from fairly competing for contracts to build taxpayer-funded projects on a level playing field.

ABC continues to urge the Trump administration to rescind President Barack Obama's Executive Order 13502³ and replace it with an inclusive policy similar to President George W. Bush's Executive Orders 13202 and 13208.⁴ This neutral policy would prohibit governments from mandating PLAs and permit contractors to voluntarily enter into PLAs in order to foster full and open competition from all qualified contractors and allow all workers to compete to build America, regardless of whether they execute a PLA with labor unions.⁵

In the absence of full repeal and replacement of the Obama policies, we have urged the administration to evaluate existing PLA policies and make the decision-making process requiring PLAs across the federal government uniform, consistent and legal. As it stands now, PLA policies are often inconsistent between federal agencies and even regional offices within a federal agency, which causes frustration and confusion among our member companies pursuing federal contracts across multiple agencies. Since the Federal Acquisition Regulation rule implementing Obama's executive order was finalized on April 13, 2010,⁶ federal agencies procuring direct federal construction contracts—including the U.S. Army Corps of Engineers,⁷

¹ Most recently, a study published in February 2020 found Connecticut school projects subject to government-mandated PLAs were 19.8% more expensive compared to school projects not built with PLA mandates. Multiple studies measuring the impact of government-mandated PLAs on school construction in New Jersey, Ohio, California, New York and Massachusetts (all states with prevailing wage laws) made similar conclusions and are available at TheTruthAboutPLAs.com, [Research on Government-Mandated Project Labor Agreements](#), updated March 2020.

² See Bureau of Labor Statistics *Union Members Summary*, <http://www.bls.gov/news.release/union2.nr0.htm>, Jan. 22, 2020.

³ https://abc.org/Portals/1/ABC%20Letter_President%20Trump_07_28_2020_1.pdf.

⁴ <https://www.abc.org/Portals/1/2016%20LegWeek/ABC%20Letter%20to%20POTUS%20on%20Fair%20and%20Open%20Competition%20EO%20022119.pdf?ver=2019-02-27-154512-057>.

⁵ Executive Orders 13202 and 13208 were upheld by the U.S. Court of Appeals for the District of Columbia in *Building and Construction Trades Department, AFL-CIO et al., v. Joe M. Allbaugh, Director, Federal Emergency Management Agency, et al.*

⁶ <https://www.federalregister.gov/documents/2010/04/13/2010-8118/federal-acquisition-regulation-far-case-2009-005-use-of-project-labor-agreements-for-federal#p-24>.

⁷ See USACE's PLA policy: *Procurement Instruction Letter (PIL) 2011-01-R1, USACE Policy Relating to the Use of Project Labor Agreements for Federal Construction Projects* (Dec. 16, 2011) at http://thetruthaboutplas.com/wp-content/uploads/2015/04/USACE-PIL_2011-01-R1_Project_Labor_Agreements_Policy-121611.pdf and *Procurement Instruction Letter (PIL) 2011-01, USACE Policy Relating to the Use of Project Labor Agreements (PLAs) for Federal Construction Projects* (Oct. 15, 2010) at <http://thetruthaboutplas.com/wp-content/uploads/2015/04/USACE-Memo-on-PLAs-PIL2011-01ProjectLaborAgreements-101510.pdf>.

Naval Facilities Engineering Command,⁸ U.S. Department of Veterans Affairs⁹ and General Services Administration¹⁰—have issued guidance memos and new agency procurement policies on the use of government-mandated PLAs and PLA preferences for their specific agency or sub-agency.

For example, the GSA has a controversial (and likely illegal)¹¹ blanket PLA preference policy that awards contractors bonus points for submitting a PLA offer. Stakeholders have argued this policy may be in violation of the federal Competition in Contracting Act and other federal statutes requiring fair, full and open competition, because it acts as a disincentive for non-PLA bidders to submit an offer on the project knowing that they will face a lower ranking solely due to the fact they are not submitting a PLA proposal.

The policy gives GSA an arbitrary means of passing over a non-PLA proposal if a PLA bidder and a non-PLA bidder have equal technical qualifications, even if the non-PLA bidder is lower priced. The negative impact of the GSA's blanket pro-PLA preference policy on small businesses is particularly exaggerated, as these firms are less likely to spend resources pursuing prime or subcontracting opportunities if they know they are automatically at a disadvantage if they are part of a team unwilling to submit a PLA offer.

ABC contractors and industry stakeholders have communicated concerns to Congress¹² and the GSA that this is a de facto PLA mandate policy in many markets and the blanket pro-PLA policy is needlessly reducing competition and increasing costs in all markets. In addition, the GSA's pro-PLA policy has led to documented delays,¹³ increased costs¹⁴ and poor local hiring

⁸ See NAVFAC's PLA policy: *Naval Facilities Engineering Command (NAVFAC) Use of Project Labor Agreements In Construction Contracts* (Feb. 8, 2011) at <http://thetruthaboutplas.com/wp-content/uploads/2015/04/NAVFAC-PLA-POLICY-MEMO-11-02-Feb-8-2011.pdf> and NAVFAC's *proposed rule comment* on FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects at <http://thetruthaboutplas.com/wp-content/uploads/2015/04/Navy-Comment-on-FAR-Case-2009-005-Use-of-PLAs-for-Federal-Construction-Projects-Docket-FAR-2009-00241.pdf>.

⁹ The VA's Office of Acquisition and Logistics, *Subpart M822.5 – Use of Project Labor Agreements for Federal Construction Projects M822.503 Policy* (effective May 16, 2018) at <https://www.va.gov/oal/library/vaam/vaamM822.asp#M822503>.

¹⁰ See GSA's PLA policy *GSA Public Building Service (PBS) Procurement Instructional Bulletin 11-05* (Aug. 2, 2011), *GSA PBS Procurement Instructional Bulletin (PIB) 10-04 Revision 1* (Sept. 24, 2010), *GSA PBS Procurement Instructional Bulletin (PIB) 10-04* (April 30, 2010), *GSA PBS Procurement Instructional Bulletin (PIB) 09-02* (Aug. 11, 2009).

¹¹ See section on GSA's blanket pro-PLA policy below.

¹² See TruthAboutPLAs.com, *ABC Members Testify in Support of Legislation Restoring Fairness in Federal Contracting*, June 7, 2011.

¹³ The GSA Headquarters at 1800 F St. in Washington, D.C., suffered a 107-day delay as a result of members of a local construction trade council refusing to agree to the terms of a PLA the contractor presented and signed with other labor unions (post award) not represented by the council. (See www.TheTruthAboutPLAs.com, *Delays and Increased Costs: The Truth About the Failed PLA on the GSA's Headquarters at 1800 F Street*, March 5, 2013). Eventually, the GSA instructed the prime contractor to proceed without a PLA and asked for a refund for millions of dollars built into the bid related to costs associated with the PLA. On March 16, 2011, the *House Oversight and Government Reform Committee's* Regulatory Affairs, Stimulus Oversight and Government Spending Subcommittee held the hearing *Regulatory Impediments to Job Creation: The Cost of Doing Business in the Construction Industry*. GSA officials testified that the prime contractor on the 1800 F St. building could not finalize a PLA with numerous trade unions in the area. The contractor could only reach an agreement with the local carpenters union, leading to some delays and uncertainty in the project. The financial impact of this delay has not been accurately calculated.

¹⁴ In 2010, the GSA awarded a \$52.3 million contract to a general contractor to build the Lafayette federal building in Washington, D.C., but then forced the contractor to sign a change order and build it with a union-favoring PLA that cost taxpayers an additional \$3.3 million. Prior to award, the project was delayed during the bidding process because the GSA was forced to remove a PLA mandate after a contractor filed a bid protest with the Government Accountability Office. See TheTruthAboutPLAs.com, *GSA Wasted Millions on Union Handout, Where's the Outrage?*, April 10, 2012.

outcomes.¹⁵ Even consultants hired by the GSA to evaluate the economy and efficiency of proposed government-mandated PLAs on GSA projects raised questions about their value in certain markets, calling into question the effectiveness of a blanket pro-PLA policy¹⁶ resulting in less competition and increased costs ultimately shouldered by taxpayers.

While the GSA uses a problematic blanket PLA preference policy, other agencies (USACE, NAVFAC and VA) issue costly and time-consuming formal surveys on FBO.gov/SAM.gov on a project-by-project basis¹⁷ to determine if a PLA is supported by members of the responding federal contracting community. These federal agency PLA surveys typically require detailed answers to up to 22 open-ended essay questions, requiring extensive research and analysis from contractors¹⁸ which costs federal contractors and the federal acquisition workforce time and money to submit and review each response.

For example, in 2019, ABC was made aware of a federal contractor that responded to more than 260 federal agency PLA surveys since the final rule was issued, which takes company personnel at least four hours to complete, on average, depending on the complexity of the survey.

Further, some federal agencies (DOL,¹⁹ VA and GSA) have hired expensive consultants to produce studies recommending whether a PLA is appropriate for a project or series of projects in a market, while in other instances agency officials call federal contractors directly and use this information to make their final PLA determination, which again wastes public and private time and resources ultimately shouldered by taxpayers.

This needless paperwork, waste and red tape within the federal procurement process is even more exasperating because ABC is aware of just 12 contracts (totaling \$1.25 billion dollars) that were procured and built in the United States subject to federal government-mandated PLAs and PLA preferences²⁰ out of 1,681 federal contracts (totaling \$98.74 billion) exceeding \$25 million from FY2009 through FY2019 that were subject to Obama's pro-PLA Executive Order 13502.

The problematic patchwork of varying and inconsistent agency PLA policies is confusing and frustrating for both large contractors and small businesses pursuing contracts across a single federal agency and/or multiple federal agencies. Also, the waste of time and resources associated with government contractors submitting responses to individual federal agency PLA surveys and the acquisition workforce reviewing such responses should be considered.

¹⁵ Data collected by Rep Eleanor Holmes-Norton (D-D.C.) on federal projects subject to PLA mandates located in Washington, D.C., demonstrated that PLAs delivered worse local hiring outcomes than other large-scale federal projects not subject to a PLA. (See TheTruthAboutPLAs.com, [Data Busts Myth That Project Labor Agreements Result in Increased Local Hiring](#), March 11, 2013).

¹⁶ Rider Levett Bucknall report [The Applicability of Project Labor Agreements for Selected ARRA Construction Projects for the General Services Administration \(GSA\)](#), Tentative Draft Report Revision 3, Jan. 27, 2010.

¹⁷ See federal agency PLA surveys ABC has responded to and alerted members about at <http://thetruthaboutplas.com/tag/pla-survey/>.

¹⁸ For example, see [USACE Solicitation Number W9127820R0057](#), issued Feb. 24, 2020 for a project at Eglin AFB in Florida, where just 3.3% of the construction workforce belonged to a union in 2019.

¹⁹ See evidence of a total of \$428,000 worth of DOL-commissioned pro-PLA reports for a [Job Corps Center in Manchester, NH, \(\\$128,000\)](#) and a [study promoting PLAs across all federal agencies \(\\$300,000\)](#).

²⁰ Raw data extracted from USAspending.gov and cross-referenced with known contracts subjected to government-mandated PLAs or PLA preferences.

In addition to creating red tape and waste on direct federal construction contracts, Executive Order 13502 has led to PLA mandates on billions of dollars of federally assisted projects procured by state and local governments. While Executive Order 13502 does not require recipients of federal assistance to mandate PLAs, they are permitted and federal agencies during the Obama administration, such as the U.S. Department of Housing and Urban Development²¹ and the U.S. Department of Transportation, have inappropriately encouraged state and local recipients of federal funding to mandate PLAs.

It is unknown how many federally assisted contracts have been subjected to state and local government-mandated PLAs, but snapshots of data from federal agencies demonstrate it is significant. For example, according to DOT's Federal Highway Administration report of projects receiving FHWA funds from May 2010 through the end of 2019, state and local lawmakers mandated PLAs on 446 projects totaling an estimated \$11.67 billion.²²

Eliminating PLA mandates on federally assisted projects would stretch federal investment in infrastructure further and allow all qualified contractors and employees to participate in rebuilding their communities and America's infrastructure.

U.S. Department of Labor Davis-Bacon Act Policies That Stifle Competition and Impose Enormous Burdens on Contractor Productivity

Many ABC members perform work on federal and federally financed construction projects, all of which are subject to prevailing wage and benefits rates set by the DOL's WHD for projects costing more than \$2,000.

Passed in 1931, the Davis-Bacon Act requires contractors to pay no less than the local prevailing wage to on-site workers on federal and federally funded construction projects costing more than \$2,000.²³

The CBO has estimated that the repeal of the Davis-Bacon Act would save \$12 billion in federal construction costs between 2019 and 2028.²⁴ We believe the CBO vastly underestimates the cost of the Davis-Bacon Act because the methodology is extremely conservative. In addition, CBO estimates do not address inflated costs on public works projects procured by state and local governments subject to state and local prevailing wage laws modeled after the federal Davis-Bacon Act. The value of public construction spending by state and local governments is much greater than spending by the federal construction market and it has a greater impact on the quality of U.S. infrastructure, overall.²⁵

²¹ See HUD Sec. Shaun Donovan's pro-PLA comments at the White House Jan. 18, 2011. <http://thetruthaboutplas.com/wp-content/uploads/2009/07/HUD-Secretary-Shaun-Donovan-on-Emerald-Cities-Collaborative-and-PLAs-11811.pdf>. ABC is aware of HUD pushing housing authorities procuring construction projects supported by HUD federal dollars to mandate PLAs on projects in [Boston](#), Chicago, [New Orleans](#), Oakland, [Philadelphia](#) and Portland during the Obama administration. It is unclear if HUD is promoting PLAs to local housing authorities under the Trump administration.

²² U.S. DOT FHWA Report on PLAs Approved 2009-2019 available at: https://thetruthaboutplas.com/wp-content/uploads/2020/09/FHWA-PLA_Summary_Tables_through-010220-Received-012420.xlsx

²³ <https://www.dol.gov/agencies/whd/government-contracts/construction>.

²⁴ <https://www.cbo.gov/budget-options/2018/54786>.

²⁵ See Construction Spending, Historical Value Put in Place, Annual, United States Census Bureau, https://www.census.gov/construction/c30/historical_data.html.

For reasons discussed further in this letter, ABC advocates for full repeal of the Davis-Bacon Act and similar state and local prevailing wage laws.²⁶ However, in the absence of full repeal, we also continue to recommend common-sense reforms to the Davis-Bacon Act’s flawed wage determination process and onerous regulations impacting contractors in order to promote greater transparency, fairness and value to taxpayers.

1) The Wage Survey Process is Inherently Flawed

Currently, DOL’s WHD determines and updates prevailing wage and benefits rates contractors are required to pay to construction workers on applicable construction projects subject to the Davis-Bacon Act. The WHD conducts surveys to collect and compile data about hourly rates contractors pay to employees in dozens of trades for four types of construction (building, highway, heavy and residential) for every single county in America.

Regulations implementing WHD’s process to survey contractors and determine prevailing wage rates is inherently flawed and fails to produce accurate, prevailing or timely rates. For example, in recent years, union wage rates have been found prevailing in a substantial majority of classifications (based upon very small numbers of survey responses),²⁷ even though the percent of unionized workers in the U.S. construction industry measured by the BLS has fluctuated between 12.6% and 14.5% during the past decade.²⁸ That outcome is statistically improbable to say the least and does not reflect a locality’s true prevailing wage in many instances.

In addition, the DOL’s own inspector general audited a sample of the department’s WD-10s—the survey response forms contractors submit to the WHD that are used to determine rates—and “found errors in almost 100% of verified survey forms.”²⁹ The numerous errors occurred “even in the face of revised WD-10s, WD-10 instructions and online WD-10s.”³⁰ Survey form errors included: reporting on incorrect peak weeks, wage rate misreporting and incorrectly reporting job classifications.³¹

²⁶ See Testimony of ABC General Counsel Maurice Baskin at a hearing before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce on “Promoting the Accuracy and Accountability of the Davis-Bacon Act,” June 18, 2013, https://republicans-edlabor.house.gov/uploadedfiles/baskin_-_testimony.pdf.

²⁷ U.S. Government Accountability Office, *Davis–Bacon Act: Methodological Changes Needed to Improve Wage Survey*, GAO-11-152, March 2011, at <http://www.gao.gov/new.items/d11152.pdf>, testimony of D. Thomas Mistick before the House Education and the Workforce Committee Subcommittee on Workforce Protections on *Examining the Department of Labor’s Implementation of the Davis-Bacon Act*, April 14, 2011, at <https://edlabor.house.gov/imo/media/doc/documents/112/pdf/statements/Mistick04142011.pdf> and U.S. Department of Labor’s Office of Inspector General, *Better Strategies are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates*, Report Number: 04-19-001-15-001, March 29, 2019, at <https://www.oversight.gov/sites/default/files/oig-reports/04-19-001--Davis%20Bacon.pdf>.

²⁸ See U.S. Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey, Table 3. Union affiliation of employed wage and salary workers by occupation and industry*. Accessed Jan. 29, 2020. <https://www.bls.gov/webapps/legacy/cpslutab3.htm>.

²⁹ See page 6 of U.S. Government Accountability Office, *Davis–Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, <http://www.gao.gov/new.items/d11152.pdf>, see page 10 of U.S. Department of Labor, Office of Inspector General, *Concerns Persist with the Integrity of Davis–Bacon Act Prevailing Wage Determinations*, Audit Report No. 04-04-003-04-420, March 30, 2004, <https://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf>.

³⁰ See page 10 of U.S. Department of Labor, Office of Inspector General, *Concerns Persist with the Integrity of Davis–Bacon Act Prevailing Wage Determinations*, Audit Report No. 04-04-003-04-420, March 30, 2004, <https://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf>.

³¹ *Id* at pages 10-12.

Further, a 2011 U.S. Government Accountability Office report found that “most survey forms verified against payroll data had errors.” The report further stated that more than “one-quarter of the final wage rates for key job classifications were based on wages reported for six or fewer workers.”³²

ABC continues to find it problematic that the WHD’s survey process is not based on scientific statistical principles and relies on voluntary responses from private marketplace contractors, most of whom have no incentive to assist the department with its survey efforts.³³ Under DOL’s current rules, a survey can be used to determine rates if it has a minimum of two companies with three workers’ wages from each.³⁴ This rule rarely results in an accurate and informed prevailing rate, and invites determinations out of line with area standards.

In contrast, BLS has long relied on scientifically based statistical sampling to determine workforce wage and employment data, which the department relies on for every purpose except Davis-Bacon. Currently, the department uses BLS data (specifically the Occupational Employment Statistics survey) for the Service Contract Act and the Foreign Labor Certification program, which are both prevailing wage requirements.³⁵

BLS already has in place two separate surveys that are done on an annual basis to estimate occupational wages: the Occupational Employment Statistics survey, which estimates local wage rates, and the National Compensation survey, which estimates benefits at the national level.³⁶ By combining the results from these two surveys and enhancing data collection sufficiently to capture more data points, DOL could effectively create more representative and accurate wage rates at the county and state level. Economists at the BLS have already created a model to combine the two sets of wage data, and a similar methodology could be used to determine Davis-Bacon wage rates.³⁷

In addition, because of the cumbersome, time-consuming and flawed process used by DOL’s WHD to calculate prevailing wage rates, various rates are outdated and/or determined through data from areas that are not representative of local wages. For example, the DOL Office of Inspector General recently found 3% of WHD’s 134,738 unique published rates had not been updated in 21 to 40 years, raising questions about the reliability and usefulness of these rates in assisting contractors to pay area wage standards and submit competitive bids.³⁸ In addition, the OIG report also found 48% of the rates sampled in its audit were not determined from data for a single construction worker within the 31 counties that the published rates represented, meaning rates are not determined from local workers.

³² U.S. Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, <http://www.gao.gov/new.items/d11152.pdf>.

³³ 29 C.F.R. §1.3(d) provides that “data from Federal or federally assisted projects subject to Davis-Bacon” will not be used for calculating wage determinations “unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data.

³⁴ “Labor Department Can Create Jobs by Calculating Davis-Bacon Rates More Accurately,” James Sherk, Jan. 21, 2017, <http://www.heritage.org/jobs-and-labor/report/labor-department-can-create-jobs-calculating-davis-bacon-rates-more>, page 4.

³⁵ Sherk, “Labor Department Can Create Jobs by Calculating Davis-Bacon Rates More Accurately,” page 16.

³⁶ Sherk, “Labor Department Can Create Jobs by Calculating Davis-Bacon Rates More Accurately,” page 14.

³⁷ Sherk, “Labor Department Can Create Jobs by Calculating Davis-Bacon Rates More Accurately,” page 16.

³⁸ U.S. Department of Labor, Office of Inspector General, *Better Strategies are Needed to Improve the Timelines and Accuracy of Davis-Bacon Prevailing Wage Rates*, March 29, 2019, <https://www.oversight.gov/sites/default/files/oig-reports/04-19-001--Davis%20Bacon.pdf>.

Research has shown the impact of relying on the outmoded WHD methodology to determine prevailing wages under the Davis-Bacon Act is to inflate the costs of constructing affordable housing, transportation projects and infrastructure projects important to the U.S. economy. For example, in 2008, researchers at the Beacon Hill Institute examined nine occupational categories in 80 metropolitan areas and concluded that the current WHD methodology unnecessarily inflates wages by a weighted average of 22% when compared to wages determined by BLS methodology.³⁹ Some of the problems found in the calculation of the prevailing wages under WHD included untimely wage reporting, poor survey design and the opportunity for unions to disproportionately dominate the survey process.

As outlined above, the responsibility for conducting Davis-Bacon wage determinations should be transferred to the BLS.⁴⁰ The BLS has long relied on scientifically based statistical sampling to determine work force wage and employment data, which the department relies on for every purpose except Davis-Bacon. Further, there is no statutory obstacle to having BLS data serve as the source of prevailing wage rates and replace the antiquated, inefficient, inaccurate and costly Davis-Bacon wage survey process.⁴¹

2) Providing Fair Notice of Prevailing Scope of Work in Classifications

The Davis-Bacon Act's regulatory and compliance costs to businesses have a chilling impact on competition from contractors. ABC members frequently cite onerous Davis-Bacon Act regulations as a reason why they do not pursue public works projects subject to federal, state or local prevailing wage laws.

For example, DOL's failure to provide detailed information about job duties that correspond to each published wage rate makes it difficult to determine the appropriate wage rate for many construction-related jobs. These wage determinations force federal contractors to use outdated and inefficient union job classifications that ignore the productive work practices successfully used in the merit shop construction industry. Further, DOL has failed to give contractors notice of many of its letter rulings and, with rare exceptions, has not posted such rulings on its website.

To provide fair notice to contractors of the scope of work to be performed by specific trades listed in wage determinations, DOL should post hyperlinks to union collective bargaining agreements "scope of work" sections in the public wage determination whenever union wage rates are considered prevailing. Failure of the unions to provide such links to their scope of work provisions would bar any attempt by the DOL to claim the employer had misclassified its employees. Where more than one union claims to do the work in question according to their collective bargaining agreements, or where nonunion area practices otherwise prevail, then

³⁹ Beacon Hill Institute, *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages*, February 2008, <http://www.beaconhill.org/BHISStudies/PrevWage08/DavisBaconPrevWage080207Final.pdf>.

⁴⁰ See discussion of calculating Davis-Bacon wage rates via the BLS in the Heritage Foundation report by James Sher: *Labor Department Can Create Jobs By Calculating Davis-Bacon Rates More Accurately*, Jan.21, 2017, at <https://www.heritage.org/jobs-and-labor/report/labor-department-can-create-jobs-calculating-davis-bacon-rates-more>.

⁴¹ See Testimony of Maurice Baskin at a hearing before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce on "Promoting the Accuracy and Accountability of the Davis-Bacon Act," June 18, 2013, https://republicans-edlabor.house.gov/uploadedfiles/baskin_-_testimony.pdf.

contractors should be able to classify their workers in accordance with either the union’s CBA or the nonunion area practice.

To increase transparency and remove the unfair lack of notice to merit shop contractors on Davis-Bacon projects, ABC urges DOL to require a hyperlink to any union CBA scope-of-work provision found to be prevailing in a wage determination.

3) Davis-Bacon Multiple or “Split Wage” Rate Determinations on U.S. Department of Housing and Urban Development Residential Projects

Recently, items generally deemed by HUD as “incidental” to residential construction (four stories or less), i.e. swimming pools, community buildings, storage sheds, etc., have received Davis-Bacon multiple or “split wage” rate determinations, which has caused confusion and created uncertainty for ABC contractors and contracting officers in charge of HUD-financed projects.

In order to alleviate confusion and mitigate barriers to constructing federal HUD-financed affordable housing projects, DOL should issue guidance to reinstate DOL’s past policy that only residential wage decisions shall be applied to housing projects (four stories or less), including all incidental items, unless there is an established area practice to the contrary.

Further, in cases where a quantitative guideline may be appropriate, the guideline should be a threshold of more than 20% of the total costs⁴² (not a threshold of \$1 million⁴³), and it should apply only to individual work components of a project (not to aggregations).

U.S. Department of Labor Policies That Serve as Barriers to Workforce Development

ABC appreciates that the Trump administration and DOL have worked to expand apprenticeships and create new opportunities for U.S. workers.⁴⁴ We agree it is imperative that U.S. workers obtain the skills and knowledge necessary to acquire and succeed at the jobs of tomorrow. And the acknowledgement of the value of an industry-led apprenticeship system is a positive step in addressing the nation’s skilled workforce shortage.⁴⁵

However, to successfully expand apprenticeship opportunities and close the skills gap, all U.S. workers should have the opportunity to participate in DOL’s new industry-recognized apprenticeship program, particularly as federal registered apprenticeship programs supply only a small fraction of the construction industry’s workforce. Industry-recognized apprenticeship programs offer a solution to the current skills shortage in the construction industry, and there is no justification for the federal government’s failure to recognize the value of these programs and the importance of construction industry professionals participating in such programs.

⁴² All Agency Memorandum No. 130 and 131 at <https://www.dol.gov/whd/programs/dbra/docs/memo-131.pdf>.

⁴³ Dec. 2, 1996 Letter No. LR-96-03, Application of Department of Labor guidance concerning “projects of a similar character.” at https://www.hud.gov/program_offices/davis_bacon_and_labor_standards/olr_9603.

⁴⁴ <https://www.whitehouse.gov/presidential-actions/3245/>.

⁴⁵ <https://www.dol.gov/apprenticeship/docs/task-force-apprenticeship-expansion-report.pdf>.

Unfortunately, while considering new industry programs in 2019,⁴⁶ the DOL erroneously determined that the construction industry is a sector that already has “significant” DOL-registered apprenticeship opportunities.⁴⁷ Additionally, DOL inaccurately considered construction industry apprenticeships as “well established” and/or “already effective and substantially widespread.”⁴⁸ In making these assertions, it appears the department did not take into consideration that the overwhelming majority of America’s 8.17 million U.S. construction industry professionals⁴⁹ never participated in any federal registered apprenticeship programs but are instead developed through industry-recognized and market-driven apprenticeships sponsored by companies large and small.⁵⁰

According to data cited in DOL’s 2019 proposed rule, “The construction industry has had approximately 48% of all federal registered apprentices [across all industries] on average over the prior five-year period, averaging approximately 144,000 federal registered apprentices per year.”⁵¹ However, the 48% figure (and the arbitrary 25% minimum threshold referenced in the rule)⁵² are misleading because they only count federal registered apprentices in construction against the paltry number of federal registered apprentices in all other industries. As ABC argued in its Aug. 26, 2019 comment letter⁵³ to DOL, “The true measurement of whether federal registered apprenticeship is ‘widespread’ or ‘significant’ in the construction industry should be to compare the number of federal registered apprentices with the total number of construction industry professionals—a mere 144,000 federal registered apprentices in an industry that employs 8.17 million workers.”⁵⁴

In fiscal year 2018, DOL reported that 17,748 construction industry apprentices completed federal registered apprenticeship programs. If a similar number completed federal registered apprenticeship programs in the construction industry this year, it would supply just 3.2% of the estimated 550,000 additional construction workers that need to be hired in 2020,⁵⁵ in order to meet the existing backlog of projects under contract but not yet completed, which stood at 8.1 months in June 2020.⁵⁶ Thus, it would take more than 30 years for the federal registered apprenticeship program to supply the number of new construction workers the construction industry needs to hire in 2020.

While registered apprenticeship programs provide career opportunities, the data shows they cannot fill industry’s labor needs and skills gap on their own. America needs an all-hands-on-deck effort from all industries, including construction most of all, to meet industry workforce development needs in order to grow the U.S. economy and close the skills gap.

⁴⁶ 84 Fed. Reg. 29970.

⁴⁷ Id. at 29980-29981.

⁴⁸ Id. at 29980.

⁴⁹ <https://www.bls.gov/cps/cpsaat42.pdf>.

⁵⁰ https://doleta.gov/oa/data_statistics.cfm.

⁵¹ 84 Fed. Reg. 29981, footnote #19, <https://www.federalregister.gov/documents/2019/06/25/2019-13076/apprenticeship-programs-labor-standards-for-registration-amendment-of-regulations#footnote-19-p29981>.

⁵² 84 Fed. Reg. 29980.

⁵³ <https://www.regulations.gov/document?D=ETA-2019-0005-61441>.

⁵⁴ <https://www.bls.gov/cps/cpsaat42.pdf>.

⁵⁵ <https://abc.org/News-Media/Newsline/entryid/17036/the-construction-industry-needs-to-hire-an-additional-550-000-workers-in-2020>.

⁵⁶ <https://abc.org/News-Media/News-Releases/entryid/17892/abc-s-construction-backlog-indicator-up-in-june-contractor-optimism-grows>.

In 2019, ABC contractor members invested \$1.5 billion in workforce development initiatives, providing craft, leadership and safety education to 1.1 million course attendees to advance their careers in commercial and industrial construction.⁵⁷ The overwhelming majority of America's construction industry professionals⁵⁸ were not educated in federal registered apprenticeship programs but are instead developed through industry-recognized and market-driven apprenticeships sponsored by companies large and small.⁵⁹ In fact, many employers elect to establish apprenticeship programs outside of registered apprenticeship programs due to the lack of flexibility, unnecessary paperwork and the bureaucracy involved in registering a program with the DOL or equivalent state agency, especially for employers with a national presence that need to work with both federal and state officials to gain program approval.⁶⁰

ABC and its 69 chapters are doing their part to educate craft, safety and management professionals using an all-of-the-above strategy for workforce development, such as just-in-time task training, competency-based progression, work-based learning, industry-recognized apprenticeship programs and government-registered apprenticeships to build a safe, skilled and productive workforce.

Both industry-recognized and registered apprenticeship programs have been utilized by the merit shop construction industry for decades to educate and upskill the workforce. In partnership with NCCER, a not-for-profit 501(c)(3) education foundation created by ABC in the 1990s, ABC is intensively engaged in building our workforce through more than 800 apprenticeship, craft, management and safety education programs at more than 1,400 locations across the United States.

ABC's commitment to creating a safe, skilled and productive workforce is evident from the practices contractor members have in place, from the utilization of both government-registered and industry-recognized apprenticeship programs to a world-class safety management system such as ABC's STEP safety management system.⁶¹ STEP dramatically improves safety performance among participants regardless of company size or type of work and proves that world-class safety is achievable with a company-wide commitment to safety as a core value.

ABC's 2020 Safety Performance Report, which is based on 2019 data gathered from ABC STEP member companies recording nearly one billion hours of work in construction, heavy construction, civil engineering and specialty trades, documents the dramatic impact of using proactive safety practices to reduce recordable incidents by up to 88%, making the best-performing companies 827% safer than the BLS industry average.⁶²

American industries have always been the leaders and incubators of transformation in the world, including in educating and upskilling the American workforce. And while the employment needs of the merit shop construction workforce are in flux as a result of the coronavirus pandemic,

⁵⁷ abc.org/WFSurvey.

⁵⁸ <https://www.bls.gov/cps/cpsaat42.pdf>.

⁵⁹ https://doleta.gov/oa/data_statistics.cfm.

⁶⁰ <https://www.dol.gov/apprenticeship/docs/task-force-apprenticeship-expansion-report.pdf>.

⁶¹ <http://www.abcstep.org/>.

⁶² abc.org/spr.

ABC members remain committed to recruiting, educating and upskilling craft and management professionals.

As stated above, there is a place for both government-registered and market-driven apprenticeships in an industry that is constantly evolving through technology and process improvements. ABC is committed to working with DOL to ensure that all U.S. workers in all industries have the opportunity to participate in the agency's new industry-recognized apprenticeship program in order to effectively meet the needs of a 21st century workforce.

2. Individual regulations and regulatory programs rescinded or modified since 2008 in ways that significantly impacted your business' or member businesses' abilities to create or maintain jobs, provide consumers with goods or services, obtain credit, supplies, energy, or other important inputs, compete fairly with other businesses, expand or locate operations or sales, innovate, or grow as much as otherwise would have been possible.

ABC has identified the following anti-growth Obama-era regulations that the Trump administration eliminated, reversed and/or modified. The Trump administration's actions promote free enterprise, reduce regulatory burdens and costs, and positively impact employers and workers within the industry.

- Rescinded FAR Fair Pay and Safe Workplaces (Blacklisting) final rule
- Rescinded DOL Persuader final rule
- Eliminated OSHA Volks final rule
- Modified DOL Overtime final rule
- Modified OSHA Tracking of Workplace Injuries and Illnesses final rule
- Modified OSHA Respirable Crystalline Silica final rule
- Modified 2014 NLRB Ambush Elections final rule
- Reversed 2015 NLRB Decision in *Browning-Ferris Industries*
- Repealed and replaced 2015 WOTUS final rule

Rescinded FAR Fair Pay and Safe Workplaces (Blacklisting) Final Rule

The Fair Pay and Safe Workplaces final rule, or blacklisting final rule, issued by the Federal Acquisition Regulatory Council would have threatened federal contractors' due process rights, injected unwarranted subjectivity into the federal acquisition process, and added needless and duplicative layers of bureaucracy.⁶³

According to a September 2016 survey of ABC members:⁶⁴

- 51% said the rule's onerous requirements, including reporting alleged violations that firms are still contesting, will force them to abandon the pursuit of federal contracts;

⁶³ <http://www.abc.org/News-Media/Newsline/entryid/4323/abc-urges-withdrawal-of-obama-administration-s-unlawful-and-impractical-blacklisting-proposal>.

⁶⁴ <http://www.abc.org/News-Media/Newsline/entryid/7637/abc-survey-finds-blacklisting-rule-will-force-many-contractors-to-abandon-federal-marketplace>.

- 91% said the rule will impose a significant or extreme burden for their firm through new requirements to compile information needed to comply with the final rule;
- 93% said the final rule will make the contracting process less efficient; and
- 98% said the final rule will make the contracting process more expensive.

ABC opposed the illegal blacklisting rule from the day it was proposed as an executive order by President Obama⁶⁵ and ultimately filed a successful lawsuit against it.⁶⁶

During the 115th Congress, the U.S. House of Representatives and U.S. Senate passed resolution H.J.Res. 37,⁶⁷ which blocked the implementation of the controversial final rule through the Congressional Review Act. President Trump signed H.J.Res. 37 into law on March 27, 2017. ABC applauded President Trump for permanently eliminating the blacklisting rule.⁶⁸

ABC continues to be committed to working with the Trump administration and Congress to improve the government's current procurement system to ensure that taxpayer-funded projects are awarded through a transparent and fair bidding process that encourages competition from all qualified contractors.

Rescinded DOL Persuader Final Rule

The Obama administration's 2016 persuader final rule would have significantly broadened the reporting requirements under the Labor-Management Reporting and Disclosure Act by redefining what is meant by labor relations "advice."

The rule altered the law's implementing regulations to require employers, attorneys, trade associations, and other third-party advisors to disclose any communication between themselves on how to legally communicate with employees during a union organizing drive.

The rule would have greatly limited the ability of employers, particularly small businesses, to obtain advice from labor relations experts or find representation, making it less likely employers would feel comfortable discussing unionization with their employees. This in turn would deprive employees of their right to obtain balanced information about union representation.

ABC consistently opposed⁶⁹ the persuader rule since it was first proposed in 2011.⁷⁰ On Nov. 16, 2016, the U.S. District Court for the Northern District of Texas issued a permanent injunction blocking the final rule.⁷¹

⁶⁵ <http://www.abc.org/News-Media/News-Releases/entryid/7559/associated-builders-and-contractors-blacklisting-final-rule-hurts-contractors-employees-and-taxpayers>.

⁶⁶ <http://www.abc.org/News-Media/News-Releases/entryid/7768/associated-builders-and-contractors-applauds-court-s-injunction-against-blacklisting-rule>.

⁶⁷ <http://www.abc.org/News-Media/Newsline/entryid/8256/congress-votes-to-permanently-block-illegal-blacklisting-rule>.

⁶⁸ <https://www.abc.org/News-Media/News-Releases/entryid/8321/associated-builders-and-contractors-praises-president-trump-for-eliminating-illegal-obama-blacklisting-rule>.

⁶⁹ <https://abc.org/News-Media/News-Releases/entryid/5089/abc-slams-persuader-rule-dol-proposal-designed-to-silence-employers>.

⁷⁰ <http://www.abc.org/News-Media/Newsline/entryid/184/More-Than-500-ABC-Members-Tell-DOL-To-Scrap-Persuader-Rule>.

⁷¹ <https://abc.org/News-Media/News-Releases/entryid/7868/abc-applauds-court-s-ruling-to-permanently-block-dol-s-persuader-rule>.

In 2017, ABC submitted comments in support of the Trump administration’s proposal to rescind the 2016 persuader rule,⁷² and ABC applauded its final rescission in 2018.⁷³

ABC continues to support the preservation of the current interpretation of the LMRDA’s section 203(c) “advice” exemption provision.

Eliminated OSHA Volks Final Rule

The Clarification of an Employer’s Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness final rule, or the Volks final rule, would have extended the time period in which OSHA could cite an employer for recordkeeping violations from six months to up to five years.⁷⁴

Finalized by DOL in the last few days of President Obama’s term, the rule would have imposed a massive paperwork burden on contractors without improving jobsite safety.

During the 115th Congress, the U.S. House of Representatives and the U.S. Senate passed resolution H.J.Res. 83,⁷⁵ which President Trump signed into law on April 3, 2017, permanently eliminating the Volks rule.

ABC praised President Trump for eliminating the burdensome recordkeeping rule.⁷⁶ ABC looks forward to continuing to work with OSHA to develop standards that include real-world input from contractors and accomplish the agency’s important goal of improving jobsite safety without unduly burdening job creators.

Modified DOL Overtime Final Rule

The Obama-era overtime final rule, officially named Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, would have changed the federal exemptions to overtime pay under the Fair Labor Standards Act for “white collar” workers. The rule doubled the minimum salary threshold under which employees must be paid overtime from \$23,660 per year to \$47,476 and automatically increased the threshold every three years.⁷⁷

The drastic increase to the salary threshold under the 2016 final rule would have forced ABC members to reclassify employees as nonexempt from overtime pay despite the fact that their jobs had been exempt and well-suited to exempt status. That loss of status would have negatively impacted morale, workplace flexibility, and advancement opportunities for employees and

⁷² <https://www.abc.org/News-Media/Newsline/entryid/8929/abc-supports-rescission-of-dol-persuader-rule>.

⁷³ <http://www.abc.org/News-Media/News-Releases/entryid/15377/abc-applauds-rescission-of-the-dol-s-overreaching-persuader-rule>.

⁷⁴ <http://www.abc.org/News-Media/Newsline/entryid/8038/osha-final-rule-reverses-volks-decision>.

⁷⁵ <https://www.abc.org/News-Media/Newsline/entryid/8261/house-passes-legislation-to-block-osha-s-volks-rule>.

⁷⁶ <https://www.abc.org/News-Media/Newsline/entryid/8377/president-trump-signs-resolution-to-eliminate-burdensome-osha-recordkeeping-rule>.

⁷⁷ <http://www.abc.org/News-Media/News-Releases/entryid/5286/abc-slams-job-killing-overtime-rule>.

increased the administrative costs of construction industry operations with little to no benefit for the employees themselves.⁷⁸

While ABC was an active participant throughout the rulemaking process, the Obama-era DOL did not heed ABC members' concerns with the proposal and finalized changes to the regulations. As such, in 2016, ABC, along with several other business groups, sued DOL in federal court and succeeded in blocking the Obama rule from taking effect.⁷⁹ See *Plano Chamber of Commerce et al v. Perez* (E.D. TX 2016).

In light of the court's ruling, on March 22, 2019, the Trump administration issued a new overtime proposal to formally rescind the 2016 rule and update the regulations in a more prudent manner.⁸⁰ Following notice and comment rulemaking, the Trump administration's DOL issued a final rule, effective Jan. 1, 2020, increasing the minimum salary threshold for exemption from \$455 per week (\$23,660 annualized) to \$684 per week (\$35,568 annualized).

Overall, the final overtime rule addresses many of the concerns expressed by ABC in its May 2019 comment letter.⁸¹ ABC is pleased the final rule retains in large part the methodology used in 2004 to determine an appropriate minimum salary threshold, establishes one nationwide standard salary threshold, and does not impose automatic indexing on the minimum salary threshold.

Modified OSHA Tracking of Workplace Injuries and Illnesses Final Rule

The Obama administration's 2016 Electronic Injury Reporting and Anti-Retaliation final rule, or officially known as the Improve Tracking of Workplace Injuries and Illnesses final rule, required many employers to electronically submit detailed injury and illness records to OSHA.

Under the rule, establishments with 250 or more employees would be annually required to electronically submit to OSHA information from OSHA Forms 300 and 301. These reports and the data they contained would then be publicized on OSHA's website without any context or clarifying information.

Also, some forms of post-accident drug testing and accident-free incentive programs were deemed to be unlawfully retaliatory, which could force many employers to change their safety programs in ways that would make workplaces less safe by discouraging drug testing and safety incentive programs.

In 2014, more than 900 ABC members joined ABC in submitting comments to OSHA requesting it withdraw its proposed rule.⁸² In 2016, ABC challenged the anti-retaliation provisions of OSHA's electronic injury reporting rule.⁸³

⁷⁸<http://www.abc.org/Portals/1/ABC%20Comments%20Overtime%20Rule%20090415.pdf?ver=2017-04-28-153206-153>.

⁷⁹ <http://www.abc.org/News-Media/News-Releases/entryid/7881/abc-praises-injunction-against-department-of-labor-s-controversial-overtime-rule>.

⁸⁰ <http://www.abc.org/News-Media/Newsline/entryid/16086/dol-issues-long-awaited-overtime-proposal>.

⁸¹http://www.abc.org/Portals/1/Newsline%202017/Newsline%202019/ABC_WHD_Overtime_NPRM_05.21.2019.pdf?ver=2019-05-22-121158-520.

⁸² <http://www.abc.org/News-Media/Newsline/entryid/2018/more-than-900-abc-members-tell-osha-to-withdraw-electronic-recordkeeping-proposal>.

⁸³<https://www.abc.org/News-Media/News-Releases/entryid/6442>.

In 2019, the Trump administration issued a final rule that eliminates provisions of the 2016 Obama-era final rule requiring establishments with 250 or more employees to electronically submit to OSHA information from OSHA Forms 300 and 301 annually. ABC commented on the administration's 2018 proposed rule.⁸⁴

OSHA also issued a 2018 memorandum⁸⁵ clarifying its position on workplace safety incentive programs and post-incident drug testing included in the 2016 final rule, which is a positive step. ABC has long argued that the 2016 final rule's anti-retaliation provisions impose significant burdens on ABC members and threaten workplace safety. ABC urges OSHA to withdraw Sections 1904.35 and 1904.36 of the injury reporting discrimination/retaliation rule. The rule(s) exceed OSHA's statutory authority established by Congress in Section 11(c) of the Occupational Safety and Health Act.⁸⁶ In November 2020, OSHA is expected to issue the Drug Testing Program and Safety Incentives proposed rule, which ABC welcomes.

ABC continues to promote healthy and safe work environments and is pleased the Trump administration made revisions to the Obama-era final rule.

Modified OSHA Respirable Crystalline Silica Final Rule

The Obama administration's silica final rule lowers the permissible exposure limit from 250 micrograms per cubic meter of air to 50 micrograms per cubic meter of air averaged over an eight-hour day and requires contractors to follow several ancillary provisions.

On Aug. 15, 2019, OSHA published its request for information seeking comment on Table 1 of the agency's Respirable Crystalline Silica Standard for Construction. ABC submitted comments as part of the Construction Industry Safety Coalition.⁸⁷

The comment letter stated, "CISC applauds the agency for issuing this RFI and has been pushing the agency to do so for more than two years. Expanding Table 1 and otherwise improving compliance with the rule is of paramount importance to CISC member associations and contractors across the country. Based upon the feedback the CISC has received from contractors—both large and small—compliance with the rule remains challenging. CISC encourages OSHA to move quickly with rulemaking to permit contractors additional compliance options and tools."

According to the Spring 2020 Unified Agenda of Regulatory and Deregulatory Actions, OSHA expects to issue a proposed rule in March 2021 on occupational exposure to crystalline silica to determine if revisions to Table 1 in the standard for construction may be appropriate.⁸⁸

ABC is committed to promoting healthy and safe construction jobsites and continues to work with OSHA to make the silica rule more workable for the construction industry.

⁸⁴ <https://www.abc.org/News-Media/Newsline/entryid/15836/abc-comments-on-osha-s-electronic-injury-reporting-proposal>.

⁸⁵ <https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>.

⁸⁶ <https://www.federalregister.gov/documents/2016/05/12/2016-10443/improve-tracking-of-workplace-injuries-and-illnesses>.

⁸⁷ https://abc.org/Portals/1/CISC%20Silica%20RFI%20Cover%20and%20Response%204818-6798-5833%201_1.pdf.

⁸⁸ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=1218-AD18>.

Modified 2014 NLRB Ambush Elections rules

In 2014, the Obama-era National Labor Relations Board issued its Representation-Case Procedures final rule significantly changing the union representation election process. The rule, known as the ambush elections rule, drastically reduced the amount of time between a union filing a representation petition and a union representation election taking place.⁸⁹

Since it went into effect in April 2015, ABC members have found the ambush elections rule's requirements to be unduly burdensome for employers and intrusive on employee privacy rights and infringe on the rights of employers and employees to a fair pre-election process.

ABC consistently opposed the Obama NLRB's proposed changes as unfair to employers and employees and raised privacy concerns over the proposal's distribution of employees' personal contact information, including in testimony before the NLRB.⁹⁰ In addition, ABC and more than 1,200 of its members filed comments in 2014 requesting the NLRB withdraw the ambush elections proposal.⁹¹

In 2017, the NLRB issued a request for information scaling back some of the Obama-era ambush elections rule changes, and ABC submitted comments in support of such changes.⁹² In revising the Obama-era rule, ABC encouraged the NLRB to return to the election procedures that were in place prior to adoption of the 2014 final rule.

The NLRB's new Representation-Case Procedures final rule was issued in December 2019 and was supposed to go into effect on May 31, 2020, however, in response to a lawsuit filed by the AFL-CIO, the U.S. District Court for the District of Columbia blocked some of the new changes from going into effect. On June 1, the NLRB announced that it would move forward with the election rules changes that were not affected by the court's ruling, which the district court later upheld. The NLRB and the AFL-CIO filed cross-appeals from the district court's decision, and both appeals remain pending before the U.S. Court of Appeals for the District of Columbia Circuit as of this writing.

Reversed 2015 NLRB Decision in *Browning-Ferris Industries*

In 2015, the Obama-era NLRB uprooted more than 30 years of precedent with its decision in *Browning-Ferris Industries*. The decision greatly expanded joint-employer liability under the National Labor Relations Act. The *BFI* standard was vague, confusing and imposed unnecessary barriers to and burdens on contractor and subcontractor relationships throughout the construction industry. ABC was a vocal opponent of the NLRB's radical changes to the joint employer standard.⁹³

⁸⁹ <http://www.abc.org/News-Media/News-Releases/entryid/3063/abc-blasts-nlrbs-latest-assault-on-workplace-freedom>.

⁹⁰ <http://www.abc.org/News-Media/Newsline/entryid/2303/abc-opposes-radical-ambush-election-rule-in-nlrbs-hearings-in-april>.

⁹¹ <http://www.abc.org/News-Media/Newsline/entryid/2285/opposition-to-ambush-election-proposal-grows>.

⁹² https://www.nlr.gov/sites/default/files/webform/uploads/abc_nlrbs_r-case_procedures_rfi_12.14.17_final.pdf.

⁹³ <https://www.abc.org/News-Media/News-Releases/entryid/4324/abc-opposes-nlrbs-joint-employer-ruling-uprooting-decades-old-standards>.

The Trump-era NLRB issued a proposed rule in 2018 that would codify in regulation the pre-*BFI* joint employer standard under the NLRA. ABC submitted comments⁹⁴ in support of the NLRB’s 2018 proposed rule and supported other legal and legislative efforts to restore the joint employer standard that had been in place for over 30 years under the NLRA.

On Feb. 26, 2020, the NLRB issued its joint employer final rule, which reinstates the traditional joint employer standard and provides clear criteria for companies to apply when determining status, which is especially important for industries such as construction.

ABC applauded the NLRB’s final rule.⁹⁵ With further clarification of the standard, contractors will be better able to work and coordinate with multiple employers without fear of being unexpectedly and unfairly found to be joint employers.

Repeal and Replacement of 2015 WOTUS Final Rule

In 2015, the Obama administration issued the final Clean Water Rule: Definition of “Waters of the United States,” also known as the “Waters of the United States” final rule, which dramatically expanded the scope of federal authority over water and land uses across the country.⁹⁶ During the rulemaking process, ABC urged the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to withdraw the 2014 proposed rule.⁹⁷

The 2015 Obama final rule caused uncertainty for the construction industry surrounding what would actually be considered “waters of the United States,” which could potentially lead to a flood of unnecessary and excessive permitting requests that would create project delays and increase costs.⁹⁸ Beyond creating uncertainty over the permitting process, the 2015 rule would increase regulatory compliance costs and lead to a more drawn-out approval process that would harm the construction industry both directly and indirectly, as the industry’s growth relies largely on the growth of the economy as a whole. Issues like these, as well as the increased potential for litigation, easily translate to lost businesses and jobs and stalled economic activity, all of which are detrimental to the construction industry.

Under the Trump administration, EPA and the Corps issued a proposal in 2017 to repeal the Obama administration’s 2015 “waters of the United States” rulemaking⁹⁹ and also proposed a new definition of WOTUS in 2019¹⁰⁰ that provides businesses and land owners with clear definitions on navigable waters subject to federal authority under the Clean Water Act. ABC submitted comments in support of the agencies’ proposal to repeal the 2015 final rule¹⁰¹ and 2019 proposal to redefine WOTUS,¹⁰² which were both finalized and praised by ABC.

⁹⁴ <http://www.abc.org/News-Media/Newsline/entryid/16021/abc-submits-comments-on-nlrbs-joint-employer-proposed-rule>.

⁹⁵ <https://abc.org/News-Media/News-Releases/entryid/16976/abc-applauds-the-nlrbs-joint-employer-final-rule>.

⁹⁶ 80 Fed. Reg. 37054.

⁹⁷ http://www.abc.org/Portals/1/Documents/ABC_EPA_WOTUS_NPRM_11.14.14.pdf.

⁹⁸ <http://www.abc.org/News-Media/News-Releases/entryid/3918/construction-industry-concerns-with-waters-of-the-u-s-rule-remain>.

⁹⁹ 82 Fed. Reg. 34899.

¹⁰⁰ 84 Fed. Reg. 4154.

¹⁰¹ http://www.abc.org/Portals/1/ABC_EPA_WOTUS_Proposed%20Rule_09.27.2017.pdf.

¹⁰² https://abc.org/Portals/1/Documents/PoliticsPolicy/WOTUS%20Comment%20Letter_4.15.19.pdf?ver=2020-08-31-135119-223×tamp=1598896295153.

ABC supports the efforts of EPA and the Corps under the Trump administration and has long advocated for a definition of WOTUS that protects the nation's waterways while providing clear regulations for business owners to follow.

3. Individual regulations or regulatory programs that have adversely impacted your business' or member businesses' abilities to survive or create or maintain jobs, operations or growth during the COVID-19 pandemic.

DOL's Families First Coronavirus Response Act

New York Federal Court Decision Creates Uncertainty for Employers Regarding DOL Paid Leave Rule

On Aug. 3, a federal judge in New York nullified key sections of DOL's rules governing paid leave under the Families First Coronavirus Response Act.¹⁰³ The decision creates many issues for construction industry employers who have been obeying DOL rules now declared to be unlawful.

Of greatest concern to construction, the decision invalidates previous DOL guidance restricting paid leave during layoffs and furloughs and the DOL rules requiring employer consent to paid intermittent leave and employees to provide documentation before taking leave.¹⁰⁴ (The judge also declared unlawful the broad definition of "health care providers," who had been exempted from the leave requirements.)

FFCRA requires private-sector employers with fewer than 500 employees, and certain public employers, to provide covered employees emergency paid sick leave and expanded family and medical leave. The FFCRA's paid leave provisions went into effect on April 1, 2020, and apply to leave taken between April 1, 2020, and Dec. 31, 2020.¹⁰⁵

ABC urges DOL to issue an interim rule reinstating the "no work available" rule and the "intermittent leave" rule. In addition to issuing the interim rule, DOL should immediately appeal and seek a stay of the court's order.

Confusion Surrounds Travel Advisories and FFCRA Eligibility

COVID-19 state travel advisories have also caused confusion for employers within the context of the FFCRA. States such as New York, New Jersey and Connecticut, as well as the District of Columbia, have issued travel advisories where individuals are required to quarantine for 14 days when arriving from an "impacted" state.

¹⁰³ State of New York v. U.S. Dept. of Labor, Case 1:20-cv-03020 (S.D.N.Y.).

¹⁰⁴ <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

¹⁰⁵ <https://www.dol.gov/agencies/whd/ffcra>.

For employers, it is unclear if the travel advisories allow an employee to be eligible for FFCRA leave. ABC urges DOL to issue guidance clarifying whether travel advisories will trigger FFCRA leave.

Flexibility of Respiratory Protection

In a March 23, 2020, letter to OSHA, ABC, as part of CISC, requested that the agency consider flexibility of respiratory protection.¹⁰⁶ The letter pointed out that one approach for the agency's consideration is to permit the use of job rotation to reduce exposures to employees to below the OSHA permissible exposure limits for exposure to hazardous chemicals in the workplace. OSHA permits this practice with respect to respirable crystalline silica but does not do so for other hazardous chemicals on construction worksites.

The letter further stated that while the CISC understands the agency's historical reticence to allow for job rotation when certain chemical exposures are involved, it believes that increased use of job rotation on a short-term basis will not adversely impact the health and safety of employees, as job rotation will be used only after implementation of all feasible engineering control measures and will be designed to keep all employee exposures below the PEL.

As a member of CISC, ABC urges OSHA to evaluate its enforcement position with respect to respirator use as the shortage will affect a significant portion of the construction industry, and, in fact, many other industries throughout the country.¹⁰⁷

Liability Protection

ABC supports targeted liability relief legislation related to the COVID-19 pandemic that would safeguard businesses, non-profit organizations and educational institutions, as well as healthcare providers and facilities, from unfair lawsuits so that they can continue to contribute to a safe and effective recovery from this pandemic.¹⁰⁸

Paycheck Protection Program Tax Deductibility

In addition, ABC supports legislation to ensure Paycheck Protection Program loans are tax deductible.¹⁰⁹ While the IRS has stated that borrowers receiving loans through the PPP are not permitted to deduct normally deductible expenses to the extent the expenses were reimbursed by a PPP loan that was then forgiven, key lawmakers have pushed back against the IRS claim and introduced the Small Business Expense Protection Act (S. 3612), which would clarify that small businesses can deduct expenses paid with a forgiven PPP loan from their taxes.

¹⁰⁶ https://abc.org/Portals/1/CISC%20Letter%20to%20OSHA%20Re%20Recordkeeping%20and%20Respirators%2032320%204826-7264-0184%201_1.pdf.

¹⁰⁷ Id. at pg. 4.

¹⁰⁸ https://www.instituteforlegalreform.com/uploads/sites/1/200730_Coalition_S.4317_SAFETOWORKAct_Congress.pdf.

¹⁰⁹ <https://abc.org/Portals/1/2020%20Files/Main%20Street%20Loan%20Forgiveness%208-4-20%20Final%20.pdf?ver=2020-08-04-121950-683>.

4. Your business’ or member businesses’ experiences that show it would be important to rescind or modify specific regulations or regulatory programs, or suspend or modify their enforcement temporarily, in order to facilitate recovery from the effects of the COVID-19 pandemic.

In order to facilitate recovery from the effects of the COVID-19 pandemic, ABC members advocate for:

- 1) Ending anti-competitive and costly government-mandated project labor agreements on federal and federally assisted contracts,
- 2) Fully repealing the Davis-Bacon Act and similar state and local prevailing wage laws; however, in the absence of full repeal, we also continue to recommend common-sense reforms to the law’s related onerous regulations in order to promote greater transparency and fairness, and
- 3) Eliminating barriers to workforce development.

For a detailed discussion on these priority issues, please refer to question No. 1.

5. Potential new regulations, regulatory programs, or regulatory reform initiatives that your business’ or member businesses’ experiences show to be of the kinds that are most important to avoid, imitate or expand as our nation seeks to recover from the effects of the COVID-19 pandemic and grow its economy in the succeeding years.

Anti-competitive regulations should be avoided, such as government-mandated project labor agreements and inflationary Davis-Bacon prevailing wage requirements. *Refer to question No. 1 for a detailed discussion on both issues, as well as the new industry-recognized apprenticeship program as an example of a program that should be expanded to ensure that all U.S. workers in all industries have the opportunity to participate.*

In addition, any initiatives similar to Circular 2017-01: Guidelines for Reviewing Apprentice to Journeyworker Ratio Requests (Jan. 9, 2017) should be avoided.¹¹⁰ On Nov. 20 2018, when the Trump DOL rescinded the controversial Obama DOL Employment and Training Administration’s Office of Apprenticeship Circular 2017-01, it doubled the apprenticeship to journeyman ratio permitted by regulations in Office of Apprenticeship states.¹¹¹ This expanded the amount of apprenticeship opportunities by allowing contractors to hire more registered apprentices and gave registered apprentices more opportunity to develop their careers—a major win for the construction industry as it faces a skilled workforce shortage. ABC had expressed serious concerns about the burdens Circular 2017-01 placed on ABC chapter apprenticeship programs that were operating on a previous approved ratio of 2:1, with no safety problems.

Further, compelling OSHA to issue an “emergency temporary standard” for infectious diseases/COVID-19 should be rejected. OSHA’s comprehensive response to the COVID-19 outbreak currently eliminates the need for an emergency temporary standard for infectious

¹¹⁰ <https://www.dol.gov/agencies/eta/apprenticeship/bulletins>.

¹¹¹ <https://www.dol.gov/agencies/eta/apprenticeship/bulletins>.

diseases and COVID-19 covering all employees. The government is learning new information about COVID-19 and how best to mitigate related hazards on an almost daily and sometimes even hourly basis, which is why a static, intransigent rule would not be an appropriate response. OSHA's resources are better deployed by developing timely and situational-specific guidance documents, which can be adjusted and adapted as the agency and public health authorities better understand the pandemic.

In the construction sector, even without a COVID-19 outbreak, safety and health is always our No. 1 priority. As representatives of residential, nonresidential and industrial construction contractors across the country, we remain committed to collaborating with state and local health officials, as well as across market sectors, to diligently identify and implement new health and safety protocols on our jobsites to protect construction employees amid the COVID-19 outbreak.

6. Past regulations or regulatory programs that your business' or member businesses' experiences show would be important not to reimpose as our Nation seeks to recover from the effects of the COVID-19 pandemic and grow its economy in the succeeding years.

Please refer to the detailed responses to questions No. 1 and 2.

7. Other suggestions on how individual regulations, regulatory programs, regulatory reforms, the rulemaking process in general, or regulatory enforcement could be improved.

ABC members continue to see meaningful regulatory relief from the Trump administration. In his first term so far, President Trump has eliminated \$50.9 billion in overall regulatory costs across the government.¹¹²

ABC members understand the value of standards and regulations when they are based on solid evidence, with appropriate consideration paid to implementation costs and input from the business community. In some cases, however, regulations are based on conjecture and speculation, lacking foundation in sound scientific analysis.

ABC strongly supports comprehensive regulatory reform, which should include across-the-board requirements for agencies to evaluate the risks, weigh the costs, and assess the benefits of regulations. This will better allocate limited resources and target efforts toward achieving the collective environmental, health and safety goals for the construction industry.

New rulemakings should contain reasonable sunset clauses, and existing regulations should also be reviewed periodically to ensure that they are necessary, current, and cost-effective. The construction industry should not be forced to operate according to burdensome, unjustified, outdated, or inappropriate rules.

For the construction industry, unjustified and unnecessary regulations translate to higher costs, which are then passed along to the consumer or lead to construction projects becoming unaffordable. This chain reaction ultimately results in fewer projects and hinders businesses' ability to hire and expand.

¹¹²https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2019.pdf.

Finally, federal agencies must be held accountable for full compliance with existing rulemaking statutes and requirements when promulgating regulations to ensure they are necessary, current, and cost-effective for businesses to implement.

ABC has supported several bills on regulatory reform during the 116th Congress, including the Regulations from the Executive in Need of Scrutiny Act of 2019 (H.R. 3972/S. 92). The REINS Act requires Congress to pass a joint resolution of approval before any new major rule (defined as having an impact of \$100 million or more) takes effect, which would bring greater transparency and accountability to the federal rulemaking process. The REINS Act would ensure that Congress is held accountable for the impact that finalized rules have on the business community and the American people.

Thank you for your consideration, and for the opportunity to comment on these important matters.

If you or your staff have questions, or require any additional information, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is fluid and cursive, with the first name "Ben" being more prominent than the last name "Brubeck".

Ben Brubeck
Vice President of Regulatory, Labor and State Affairs