International Union of Operating Engineers

AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

August 4, 2011

Mr. Timothy J. Helm
Chief, Branch of Government Contracts Enforcement
Division of Enforcement Policy and Procedures
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW, Room S3006
Washington, D.C. 20210

Re: Coverage of Field Surveying Crew

Dear Mr. Helm:

The International Union of Operating Engineers ("IUOE") and IUOE Local 12 request that the Wage and Hour Division ("WHD") recognize field surveyors as a subclassification within the key classification of operating engineer on the Davis-Bacon wage determination schedules.[1] As discussed herein, since the job titles of the workers in a surveying crew vary regionally, the subclassifications will vary regionally.

The IUOE would like to have the opportunity to meet with the WHD to discuss this request.

In light of the broad meaning of the terms "laborers" and "mechanics" at the time that the Davis-Bacon Act was enacted, the WHD should start with the premise that workers employed on the "site of the work" performing work that is functionally integrated with the construction are covered unless they are exempt for a reason specifically contemplated by the Act.

SUMMARY OF IUOE's POSITION

In excluding field surveyors as a subclassification, the WHD has failed to implement opinions of the Secretary of Labor and the Solicitor of Labor which determined that surveying crews are covered by the Davis-Bacon Act. In at least ten opinions issued by the Secretary of Labor and the Solicitor of Labor between 1960 and 1964, the DOL found that surveying crews were covered under the Davis-Bacon Act.

In the 1960's, the Secretary and Solicitor correctly interpreted the Davis-Bacon Act in finding coverage of surveying crews. The commonly understood

[1] The IUOE will submit a separate request that the WHD recognize material testers, non-destructive testers, and inspectors as subclassifications within the key classification of operating engineer.

meaning of laborers and mechanics in 1931 was that a laborer is a worker whose work is manual or physical, and a mechanic is a person who works with tools or is employed in a skilled trade regardless of whether the job is physical or manual.

As is evident from a review of the opinions issued by the WHD from 1975 to the present, the WHD has 1) erred in reading words used by the Solicitor of Labor and the Secretary of Labor to illustrate some of the manual work required by a job – *e.g.*, clearing brush and sharpening stakes - performed by the surveying crew as words of limitation; and 2) has confused the work of office/professional surveyors with the work of rodmen, chainmen, and instrumentmen.

The WHD has misinterpreted the Act and its definition of "laborer or mechanic" in 29 C.F.R. 5.2(m) in denying coverage to survey crews based upon its view that the physical or manual requirements of a job are not sufficiently demanding. The degree of physical demands or manual labor should not be a litmus test in determining coverage under the DBA of workers who perform on-site functions that are functionally integrated with the construction contract. Congress did not intend that the DOL engage in an analysis of the relative intensity of the physical demands of each on-site, functionally integrated job.

However, if the WHD continues to read 29 C.F.R. 5.2(m) as requiring an assessment as to whether the work of a skilled tradesperson is sufficiently physical or manual, the WHD should find that field surveyors are "laborers or mechanics." The work of the field surveying crew ranges from very physically demanding work, such as using a heavy sledge hammer to pound in lathes and walking over challenging terrain, to the more skilled work involved in executing the plans prepared by an office surveyor.

Finally, in light of decrease in crew size from four-person crews to two-person crews, the functions found by the WHD in the past to be "supervisory" no longer exist. Rather than directing the crew, the party chief is a lead person who performs all the functions that are performed by the other crew member.

FACTS

Educational Requirements

There is no minimum level of formal education required to become a field surveyor. A GED is sufficient. *See* Acting Solicitor of Labor Harold C. Nystrom's August 31, 1960 letter: "[R]odmen, chainmen, axemen (grubbing brush, etc.) stakemen, and the like, clearly perform the work of laborers and do not in fact even approach the educational or other qualifications associated with the true professional."

The Jobs of Office Surveyors and Field Surveyors are Not the Same

The job of the field survey crew is similar to that of a grade checker – to ensure that the heavy equipment operators dig or fill to the correct depth and in the correct location. The office surveyor determines the depth and location based upon measurements provided by the field surveyors and provides field surveyors on the site of the work with the necessary step-by-step instructions concerning grade and elevation. The office surveyors make mathematical calculations and plot the coordinates of the locations that need to be staked by the field surveyor.

State DOLs recognize the difference between office surveyors who are licensed and field surveyors in limiting coverage under state prevailing wage law to non-licensed surveyors. In Minnesota, for example, the state DOL specifically excludes licensed surveyors from coverage under its prevailing wage law (emphasis added)(Attachment A):

> Survey field technician (operate total station, GPS receiver, level, rod or range poles, steel tape measurement; mark and drive stakes; hand or power digging for and identification of markers or monuments; perform and check calculations; review and understand construction plans and land survey materials). **This classification does not apply to the work performed on a prevailing wage project by a land surveyor who is licensed pursuant to Minnesota statutes, sections 326.02 to 326.15.**

In Washington, "construction site surveyor" work is excluded if required to be performed by a registered professional surveyor. WAC 296-127-01396 (Attachment B). Likewise, the Nevada wage determinations (Attachment C) list "surveyor (non-licensed)" as an operating engineer subclassification.

No Judgment or Discretion in Executing Directions of Office Surveyor

In performing their work, the survey crew uses predetermined locations and directions drawn up by the office surveyor. If errors in calculations are discovered by the field surveyor when he or she places laths and hubs in the field, the field surveyor notifies project manager, registered engineer, or licensed office surveyor. One of these professionals corrects the problem and provides the field surveyor with the corrected information.

The Current Standard in the Industry is a Two-Person Crew

Within the typical survey party, there was historically a rodman who held the leveling staff while measurements of distance and elevation were made; a chairman who helped measure distances with a surveyor chain; an instrument man who adjusted and read instruments for measurement (level, transit, laser, calculators/field computers, etc.); and a party chief who directed the work.

A two person crew is now the standard in the industry. Technological advances – including the use of "total stations" - have caused a reduction of crew size and less definite roles within the two-person crew. The use of computerized equipment has eliminated the need for use of a steel chain to measure distance. The work of the chainman, rodman, the instrumentman, and party chief is now shared by a two-person crew, with the party chief functioning as a lead person.

The names of the subclassifications within the survey crew vary regionally, and in many regions, the names incorporated into wage determination schedules by state DOLs reflect the technological changes in the surveying trade. In Nevada, for example, "Global Position Systems Chainman and Rodman" and "Fathometer Instrument man" are among the survey crew subclassifications. In Minnesota, the state DOL refers to a field surveyor as a "survey field technician." In Hawaii, chief of party and grade setter are included in the state wage determinations.[2] The New York Department of Labor's wage determination (Attachment E) includes Party Chief and Instrument/Rod person in its wage determination schedules.

No Supervisory or Managerial Function in Two-Person Crews

During the era of the four-person crew, the party chief directed the work of the other members of the crew while performing hands on work. The WHD relied upon these alleged "supervisory" functions as a basis for denying coverage to party chiefs. *See* Acting Solicitor of Labor Nystrom's June 29, 1960 opinion letter (emphasis added): "Such a person [the party chief] **always supervises** two or more persons on the job and, as you are aware, we have never asserted that foremen or other supervisory personnel are within the Act."

The current industry practice is that the party chief is a lead person who performs all the functions that are performed by the other crew member.

Regardless of the relationship between the party chief and the other crew member, the party chief does not lead two or more other employees. To qualify as an exempt executive under the FLSA, an employee must customarily and regularly direct the work of **two** or more other employees. 29 C.F.R. § 541.103(d).

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[2] Group 11 – chief of party (upgraded from Group 10), Group 9A – grade setter ("when working from drawings, plus on specifications without the direct supervision of a lead person or superintendent"; and Group 8- grade setter. In excluding professional "land surveyors" from coverage under its prevailing wage law and including surveying crews, the Hawaii Department of Labor and Industrial Relations stated that (Memorandum No. WSD-1A (Attachment D)): "Workers who use surveying tools for the construction process, specifically related to grade setting and laying out the work during actual construction from the surveyors' established points and elevation done in direct support of construction crews are subject to the prevailing wages."

No State Licensure or Certification for Field Surveyors

States and municipalities do not require that field surveyors hold a license or certification. By contrast, as discussed below, all states require licensing of office surveyors.

The fact that the job of an officer surveyor requires licensure and the job of field surveyor does not even require certification demonstrates a vast difference in levels of skill, knowledge, and responsibility involved.[3] The WHD should view the absence of a licensure or certification requirement as a key factor in determining that work that is not "mental," as the term is used in 29 C.F.R. 5.2(m).

The IUOE does not wish to imply, however, that a certification or licensure requirement indicates professional stature or "mental or managerial" employment. Indeed, states or OSHA require licensing or certification of persons working in other skilled trades, such as electricians, plumbers/pipefitters, and crane operators. According to the Bureau of Labor Statistics' Occupational Outlook Handbook (www.bls.gov.oco)(Attachment F), "Although licensing requirements vary from State to State, electricians usually must pass an examination that tests their knowledge of electrical theory, the National Electrical Code, and local and State electric and building codes." With regard to plumbers and pipefitters, the Occupational Outlook Handbook states that (Attachment G): "Although there are no uniform national licensing requirements, most States and communities require plumbers to be licensed. Licensing requirements vary, but most localities require workers to have 2 to 5 years of experience and to pass an examination that tests their knowledge of the trade and of local plumbing codes before they are permitted to work independently. Several States require a special license to work on gas lines. A few States require pipefitters to be licensed. Licenses usually require a test, experience, or both." In 2010, OSHA adopted rule requiring the certification or qualification of crane operators. *See* 29 C.F.R. § 1926.1427.

Knowledge of Basic Mathematics/Reading Plans

The mathematical knowledge needed to perform the work of a field surveyor does not distinguish the work of a field surveyor from that of many other skilled trades, including electrician and sheet metal worker. Likewise, skilled trades typically require reading of plans, manuals, charts, or instructions. This mental element does not render the work of electricians, plumbers, or other skilled

[3] For example, during the recent Crane and Derrick Rulemaking, OSHA stated that certification of signalpersons was not necessary to promote safety because of the more limited range of skills required to perform the work of the signal person safely. 75 *Fed.Reg.* 48,029 (August 9, 2010) ("The assessment of a signal person's qualifications is inherently less complex than the assessment of a crane operator's qualifications because the range of signals and their applications are more finite than the wide assortment of scenarios and skills for which a crane operator must be tested.")

trades exempt as "metal or managerial" employment as those terms are used in 29 C.F.R. 5.2(m).

The description of the various skilled trades in the "Occupational Outlook Handbook" demonstrates that it is typical for the work of skilled trades, including electricians, plumbers and pipefitters, and sheet metal workers, to involve mathematics and reading (Attachments F, G, and H):

1. Electricians

> "Electricians usually start their work by reading blueprints— technical diagrams that show the locations of circuits, outlets, load centers, panel boards, and other equipment. After determining where all the wires and components will go, electricians install and connect the wires to circuit breakers, transformers, outlets, or other components and systems."
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> "In the classroom, apprentices learn electrical theory, blueprint reading, mathematics, electrical code requirements, and safety and first aid practices."
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> "Education continues throughout an electrician's career. Electricians may need to take classes to learn about changes to the National Electrical Code, and they often complete regular safety programs, manufacturer-specific training, and management training courses."

2. Plumbers and Pipefitters

> "Classroom subjects include drafting and blueprint reading, mathematics, applied physics and chemistry, safety, and local plumbing codes and regulations."

3. Sheet Metal Workers

> "In the classroom, apprentices learn computer aided drafting; reading of plans and specifications; trigonometry and geometry applicable to layout work; welding; the use of computerized equipment; the principles of heating, air-conditioning, and ventilation systems."
>
> "It is important for experienced sheet metal workers to keep abreast of new technological developments, such as the use of computerized layout and laser-cutting machines."

In amending the FLSA regulations concerning the definition of bona fide executive, administrative, and professional capacity, the DOL recognized that the work of skilled trades involves knowledge of a "fairly advanced type" (29 C.F.R. §541.301(b)):

The phrase "field of science or learning" is further defined as including the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or **skilled trades where in some instances the knowledge is of a fairly advanced type**, but is not in a field of science or learning.

The Knowledge Required to Perform a Skilled Trade is Reflected in the Pay Scale of Skilled Tradespersons

The pay scale of skilled construction workers in the skilled trades reflects the fact that the work requires a high degree of knowledge attained through on-the-job training and through apprenticeship programs, with classroom instruction. The mental element of most jobs in skilled trades enables the workers to earn greater wages and benefits than unskilled laborers in construction.

A comparison of the total package – wage and benefits - earned by laborers and skilled trades illustrates this point. In the Philadelphia County, for example, electricians, sheet metal workers, and plumbers earned $75.71, $70.18, and 69.29, respectively. *See* PA5 (building) WD. A laborer who perform arduous, but unskilled work, such as raking or shoveling asphalt, earn $45.50 per hour. Other laborers earn up to $47.05 per hour.

Physical Demands of Field Surveying

- Standing for all but a small fraction of the workday
- Walking and climbing over uneven grades and uphill
- Carrying and wearing heavy objects, including "GPS" equipment, staking staff, lathe rack, hub bag, sledge hammer, hand tape, safety goggle, gloves, buck knife
- Bending and stooping
- Swinging a heavy sledge hammer
- Clearing brush
- Working in inclement weather

Tools or Equipment Used by Field Surveyors

- "Total station"[4] measures (similar to a GPS) angles and distances
- Sledge hammer
- Picks
- Digging bar (used to break up hard surfaces leverage to remove rocks and other objects)
- Brush hooks to clear brush

The Work of Field Surveyors Encompasses the Work of Grade Checker Which is a Covered Classification

The work of surveyors encompasses the work of the grade checker, which the WHD recognizes as a covered subclassification. *See e.g.*, the wage determination schedules in the following areas for a listing of grade checkers in the key classification of operating engineer: Washington, King County (Seattle), WA110 – heavy; Oregon, Multnomah (Portland), OR73 – heavy; and Missouri, statewide heavy-highway - MO1. In some parts of the country, such as New York, the grade checker classification does not exist and the surveyor is responsible for performing the work of a grade checker.

The description of the job of "grade checker (construction)" in the Dictionary of Occupational Titles demonstrates that the job is clearly physical or manual (850.467-010)(Attachment I):[5]

> Sets grade stakes to guide earth moving equipment operators in sloping highways and fill embankments, using measuring instruments and handtools: Reads survey stakes along highway right-of-way to determine grade specification for embankment. Measures horizontally and vertically, in specified ratio, from survey stake to juncture of embankment and initial excavation, using survey rod and eye level. Sets grade stakes, using hatchet, and chalk-marks excavation reference points on stake. Repeats measuring and staking at specified intervals to form horizontal stakeline along embankment. Observes excavating activities to verify conformance to stake references and notifies equipment operators or supervisor of deviations.

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[4] Distance was historically measured with a tape and direction with transit. The "total station" is an electronic/optical instrument used in surveying that reads slope distances from the instrument to particular points.

[5] In Southern California, the basic hourly rate for checker is $38.72 (Group VIII); the operating engineer classifications range from $35.83 to $40.51.

Office Surveyors Perform Mental Work

As discussed above, unlike field surveyors, office surveyors must be licensed. The Occupational Outlook Handbook – BLS describes the educational and licensing requirements of office surveyors (Attachment J):

> All 50 States and all U.S. territories license surveyors. For licensure, most State licensing boards require that individuals pass a series of written examinations given by the National Council of Examiners for Engineering and Surveying (NCEES). After passing a first exam, the Fundamentals of Surveying, most candidates work under the supervision of an experienced surveyor for 4 years before taking a second exam, the Principles and Practice of Surveying. Additionally, most States also require surveyors to pass a written examination prepared by the State licensing board.
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> Specific requirements for training and education vary among the States. An increasing number of States require a bachelor's degree in surveying or in a closely related field, such as civil engineering or forestry, regardless of the number of years of experience. Some States require the degree to be from a school accredited by the Accreditation Board for Engineering and Technology (ABET). Most States also have a continuing education requirement.
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> Additionally, a number of States require cartographers and photogrammetrists to be licensed as surveyors, and some States have specific licenses for photogrammetrists.

Ongoing Exposure of Field Surveyors to Work Hazards

Field surveyors and material testers are exposed to the same occupational hazards as other workers on a construction site, including prolonged exposure to sun during the workday, being struck by heavy equipment, etc. *See Ross, France & Ratliff v. Blevins*, 2000 WL 1593647 (Va.App.)(court upheld a determination that field surveyor, who was exposed to a "profuse presence" of ticks, sustained a "compensable occupational disease" (Lyme disease) that existed and arose out of and in the course of employment); *Voorheis v. Hawthorne-Michaels*, 151 Cal.App.2d 688, 312 P.2d 51 (1957)(grade checker struck by operator of tractor/trailer); *American General Ins. Co. v. Smith*, 163 S.W.2d 849 (1942)(grade checker working on a road crew sustained a compensable injury while attempting to lift an electric light pole out of the path of the scraper); and *Wamser v. Bostian*, 230 Iowa 792, 298 N.W. 860 (1941) (grade checker on highway construction project was struck by a truck delivering concrete mix to a mixer).

The exposure of field surveyors and grade checkers to the same physical dangers to which other construction workers are exposed is recognized in state

safety codes. *See* 8 CCR § 1590(5)(Attachment K): "Employees (on foot), such as grade-checkers, surveyors and others exposed to the hazard of vehicular traffic, shall wear high visibility safety apparel in accordance with the requirements of Sections 1598 and 1599 of these Orders)"; and Minnesota R. 5207.1000, Subpart 1 (Attachment L): "This part identifies minimum safety requirements for the safe operation of mobile earth-moving equipment used for earth moving, building, or road construction or demolition, including, but not limited to, bulldozers, motor graders, scrapers, loaders, skid-steer loaders, compaction equipment, backhoes, end dumps, side dumps, and dump trucks. This part pertains to operators of the equipment and exposed employees, including, but not limited to, grade checkers, grade persons, rod persons, stake hops, stake jumpers, and blue toppers working in the area."

ARGUMENT

In determining coverage of the surveying crew, the WHD's improperly reads into the terms laborer or mechanic a requirement that the physical or manual aspects of the work be demanding or arduous. This reading is wrong for the following reasons: 1) a requirement that the work of a "mechanic" or skilled trade be physical or manual is inconsistent with the ordinary meaning of the word "mechanic" in the 1930's; 2) such a requirement constitutes a misreading of 29 C.F.R. 5.2(m), which uses the words "includes at least those workers whose duties are manual or physical in nature" as words of illustration, not words of limitation; and 3) such a requirement is a far more restrictive interpretation of the terms "physical" or "manual" that the WHD applied in reversing its position on coverage of flaggers and the term "non-manual" in applying the administrative exemption in the FLSA.

I. AT THE TIME THE DAVIS-BACON ACT WAS ENACTED, "MECHANIC" WAS A TERM OF ART USED TO DESCRIBE A SKILLED TRADESPERSON OR ONE WHO WORKED WITH TOOLS REGARDLESS OF NATURE OF THE PHYSICAL DEMANDS OF THE JOBS

A. The Legislative Purpose in Using "Mechanics and Laborers" is Expressed in the Commonly Understood Meaning of These Words in 1931

The Davis-Bacon Act requires the payment of prevailing wages to "all mechanics and laborers employed directly on the site of the work," but does not define in the statute the terms "mechanics" and "laborers" (40 U.S.C. § 3142):

> the contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any

contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics;

When a statute does not define a term, a court or administrative agency must "'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Russello v. United States*, 464 U.S. 16, 21 (1983), *quoting Richard v. United States*, 369 U.S. 1 (1962). In determining coverage of mechanics and laborers under the DBA, the WHD should adopt the ordinary meaning of the words at the time that the statute was written and interpret the word "mechanic" as broadly as that term was used in 1931. As discussed herein, the terms "mechanic" and "laborers" had different meanings at that time. A "mechanic" was a skilled tradesman or one who worked with tools regardless of the degree of physical demands required by the job and a "laborer" was a worker engaged in unskilled manual labor.

B. In 1931, the Term "Mechanic" Encompassed Tradespersons and Persons Who Worked With Tools Without Regard to Whether the Work Was Physically Demanding

At the time that the Davis-Bacon was enacted, the term "mechanic" was well understood by the courts as it had been incorporated in federal statutes since for more than sixty years. In 1868, Congress mandated an eight-hour work day for all "laborers, workmen, and mechanics who may be employed by or on behalf of the government of the United States." In 1892, Congress passed a law that included a heavy penalty for those federal government contractors and employers who employed "laborers and mechanics" in excess of eight hours per day. 27 *Stat.* 340, ch. 352 (1892).

In the early 20th century, the term "mechanic" was so commonly understood to mean any skilled worker with tools or one who has learned a trade that a federal court deemed it unnecessary to define the word in interpreting a New York's law that gave a preference in bankruptcy to the wages of mechanics, workmen, and laborers. Indeed, in a 1923 case in the Second Circuit Court of Appeals, *De Vries v. Alsen Cement Co. of America*, 290 F. 746, 748 (2d Cir. 1923), stated that (emphasis added):

> We are concerned with three words only, 'mechanic,' 'workingman,' and 'laborer.' **The first of these words has a well-recognized and specific meaning.** The phrase 'a working man' would mean literally 'a man who works' and might be broad enough to cover any kind of work in which he was engaged; a certified public accountant, who makes an elaborate report on a complicated set of books, certainly 'works' in preparing it, and, if he were paid $300 a week for his work, he might be held to work for hire. The single word 'workingman,' however, has a specific meaning; the dictionary gives it as 'a laboring man; one engaged in manual labor.' No authority has been cited which holds that any one of these three words

should be given a meaning broader than it has in common speech, because it happens to be associated with the other two.

Seven years after the Davis-Bacon Act was enacted, the Comptroller General stated that there was a "commonly understood meaning of laborer and mechanic" when interpreting the applicability to the Eight-Hour Work Limitation Law of June 19, 1912." 18 *Comp. Gen.* 337 (1938)(Attachment M). The Comptroller General relied upon the definition of "mechanic" from a bankruptcy case in stating that the word laborer connotes "toilsome" work as distinguished from the work of mechanic (*Id.*)(capitalization removed):

> The terms laborer and mechanic have been defined variously in numerous decisions of the courts, usually in connection with the application of lien statutes, but generally the term 'laborer' is defined as one who performs manual labor or labors at a toilsome occupation requiring physical strength as distinguished from mental training and equipment, while a 'mechanic' is any skilled worker with tools, one who has learned a trade. In re Osborne, 104 Fed. 780.

The bankruptcy case, *In re Osborne*, 104 Fed. 780 (D.NY 1900) cited by the Comptroller General, involved the work of a baker who was deemed to be a mechanic:

> The commonly accepted definition of a mechanic is 'any skilled worker with tools; one who has learned a trade.' The conduct of the business of baking requires skill and experience in that trade, and necessitates the use of implements and working tools.

C. Congress Intended to Exclude Employees of Manufacturers and Fabricators, Not On-site Skilled Tradespersons Performing Functionally Integrated Work

In determining the scope of Davis-Bacon coverage, the WHD should be mindful of the fact that Congress intended to exclude workers whose jobs were not part of the construction process; there was no intent by Congress that the DOL engage in an analysis of the relative level of physical demands of each on-site, functionally integrated job. Congress accomplished the goal of excluding work that is not part of the construction process by limited coverage to workers employed "directly on the site of the work."

As the United States Court of Appeals for the District of Columbia recognized in *Building and Construction Trades Department v. U.S. DOL*, 932 F.2d 985 (D.C. Cir. 1991), to avoid regulating wages in "private industry," Congress wanted to ensure that where workers manufactured or fabricated products "used anywhere" (*i.e.*, products manufactured or fabricated at previously established commercial sites or non-dedicated facilities), the workers were not

covered by the Act. The following colloquy illustrates that concern (House Debate, at 12366 (June 8, 1932)):

> Mr. LaGuardia. As the gentleman knows, under the present engineering methods a great deal of the building is really constructed in the steel mill and it is assembled on the spot.
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> Mr. Connery. Yes.
>
> Mr. LaGuardia. As I read this bill, it is not sufficiently broad to reach out and compel the prevailing rate of wages in the particular material built for that building.
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> Mr. Connery. I see what the gentleman is after; and while I heartily sympathize with his views on that, if we started in to take materials in connection with this, we would cover many, many industries in the United States, including the United States Steel Corporation, and we would be telling them what wages they would have to pay in that industry. We thought that was too big a field to cover at this time.
>
> Mr. LaGuardia. There is a difference between material like brick and cement which may be used anywhere and the steel structure that is made for that building and that building alone.
>
> Mr. Connery. Yes; but it would affect the bricks and everything else that is manufactured, and the Government would be regulating the wages of private industry. The committee thought that was a little too far to go at this time.

II. THE WHD HAS FAILED TO ADHERE TO THE OPINIONS OF THE SECRETARY AND THE SOLICITOR WHICH DETERMINED THAT SURVEYING CREWS ARE COVERED UNDER THE DAVIS-BACON ACT

A. The WHD Has Reversed its Position on Coverage at Least Twice

From the 1951 to the present, the DOL has issued dozens of opinions on coverage of surveyors. In the course of issuing these opinions, the DOL has reversed its position on coverage of surveyors at least twice over the past 60 years.

From 1951 to 1960, the DOL found that surveying crew members, including rodmen and chainmen, were not covered. In a September 4, 1951 opinion letter, the DOL Assistant Solicitor Donald M. Murtha found that rodmen, chainmen, instrument men, **and** party chiefs were not covered under the Davis-Bacon Act because their work is "nonmanual in nature" or "administrative or supervisory."

In 1960, the DOL acknowledged that it reversed its position on coverage of survey crews in a series of opinion letters, which unequivocally state that rodmen, chainmen, and instrumentmen (under a party chief) are covered. *See* June 29, 1960 opinion letter of Acting Solicitor of Labor Harold C. Nystrom. "Although the position which we have previously entertained is of long standing, we have again undertaken to review the subject and have arrived at some new conclusions." *See also* Mr. Nystrom's August 31, 1960 opinion letter: "[O]ur previous position was based both upon the lack of a close relationship between survey work and construction work and the status of the employees as professional or subprofessionals."

The DOL's second reversal of its position on coverage of field surveyors occurred without acknowledgement by the WHD. From 1975 to the present, based upon its misreading of a series of opinions issued between 1960 and 1964 the WHD has taken the position that only very limited functions performed by survey crews are covered. The Field Operations Manual reflects the current position of the WHD, which excludes from coverage most of the essential functions of survey crews and limits coverage to "manual work, for example, clearing brush" (FOH 15e20(b)):

> The determination as to whether certain members of survey crews are laborers or mechanics is a question of fact. Such a determination must take into account the actual duties performed. As a general matter, members of the survey party who hold the leveling staff while measurements of distance and elevation are made, who help measure distance with a surveyor chain or other device, who adjust and read instruments for measurement or who direct the work are not considered laborers or mechanics. However, a crew member who primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent.

B. From 1960 to 1964, the DOL Issued Two All Agency Memoranda and Eight Other Opinions Which Found That Non-Supervisory Members of Survey Crews Are Covered by the Davis-Bacon Act

In the first opinion letter in which the WHD reversed its position on coverage of survey crews, Acting Solicitor of Labor Harold C. Nystrom stated that ((June 29, 1960 opinion letter)(All Agency Memorandum No. 16)):

> We are prepared, however, to assert coverage of survey work which is undertaken immediately prior to or during construction which involves laying off distances and angles to locate construction lines and other layout measurements. This includes the setting of stakes, the determination of grades and levels, and

other work which is performed as an aid to the crafts which are engaged in the actual physical construction of the projects.

With respect to the status of particular employees, we agree that chainmen and rodmen whose work is largely of a physical nature such as clearing brush, sharpening and setting stakes, handling the rod and the tape and other comparable activities are laborers and mechanics within the meaning of the Act.

The DOL repeated this position in at least nine opinion letters issued from 1960 to 1964 and listed a number of examples of the physical work performed by the surveying crew:

1. August 31, 1960 and November 14, 1960 opinion letters of Acting Solicitor Nystrom: "[C]ertain members of the crews, such as rodmen, chainmen, axemen (grubbing brush, etc.) stakemen, and the like, clearly perform the work of laborers and do not in fact even approach the educational or other qualifications normally associated with the true professional."[6]

2. November 23, 1960 opinion letter of Acting Solicitor Nystrom to Ohio AGC: "[W]e should regard rodmen and chainmen as laborers and mechanics...Where axemen and stakemen are an established classification, separate wages will also be determined for them."

3. November 23, 1960 opinion letter of Acting Solicitor Nystrom to New York AGC: "[T]here is no question at all in our minds but what persons performing the typical duties of an ordinary chainman or rodman as they have been described to us are 'laborers' within the meaning of the Davis-Bacon and related Acts...[T] classifications of rodman and chainman require no particular skills..."

4. December 9, 1960 opinion letter of Albert L. McDermott, Special Assistant to the Secretary: The "functions" of rodman and chainman are "largely physical"... [W]e should regard rodmen and chainmen generally as laborers and mechanics...It is our intention in all cases involving rodmen, chainmen, and instrumentmen (under a party chief) to follow a reasonable and common sense approach in order to ensure that the benefits of the Davis-Bacon and related Acts are preserved for the type of workmen which Congress had in mind."

5. January 5, 1961 opinion letter of Acting Solicitor Nystrom: "The duties of rodmen, chainmen and instrumentmen (surveying under a party chief) would not appear to be those performed by professional

[6] The only difference between the August 31, 1960 and the November 14, 1960 quotations is that the word "usually" is inserted before "do not in fact" in the latter version.

personnel. Rodmen and chainmen, particularly, are called upon to do work largely of a physical nature such as clearing brush, sharpening and setting stakes, handling the rod and tape, etc. Although it is believed that instrumentmen may in certain instances be performing work not considered that of a laborer or mechanic, it is the position of this Department that instrumentmen serving under a party chief do perform many of the duties similar to those of rodmen and chainmen and in many instances serve as an aid to the construction work in determining the placement and level of piling, the placement of steel beams and girders, etc. Such employees should, therefore, be considered laborers or mechanics within the provisions of the Davis-Bacon Act, as amended."

6. November 29, 1961 opinion of Secretary of Labor: "[I]n some areas of the country so-called rodmen and chainmen are, in fact, nothing more than laborers and mechanics employed upon a casual basis to perform what is primarily physical work and without thought of professional training or advancement."

7. August 2, 1962 opinion letter of Secretary of Labor Goldberg to the Ohio Society of **Professional Engineers** ((All Agency Memorandum No. 39) (emphasis added)): "In those cases where the work of an individual functioning in a survey crew is considered professional or sub-professional in character, this Department has held, in accordance with your view, that one so employed is not a laborer or mechanic within the meaning of the Davis-Bacon Act. On the other hand, where individuals perform primarily manual work, such as **clearing brush and sharpening stake**, they would fall within the definition of the term 'laborer.' It is my understanding that situations of the latter kind are not commonplace."

8. January 10, 1964 opinion of Under Secretary of Labor John Henning: "From the particular facts and circumstances presented, the Solicitor has concluded that the duties of rodman, chainman, and instrumentman, which are described in your presentation, are those of laborers and mechanics under the act, as it has been interpreted in former Secretary Goldberg's letter of August 2, 1962, to the President of the Ohio Society of Professional Engineers. The workmen involved appear to perform predominantly manual work as contrasted with work which is professional or subprofessional in character."

C. All Agency Memorandum No. 39 Recognizes the Distinction Between a Laborer and a Mechanic

All Agency Memorandum No. 39 cites to the 1938 Comptroller General opinion, 18 *Comp.Gen.* 341, which defines "laborer" and "mechanic" as separate terms (emphasis added):

> The Comptroller General has defined the term "laborer" as "one who performs manual labor or labors at a **toilsome** occupation requiring physical strength as distinguished from mental training and equipment, while a "mechanic" is any skilled worker with tools, one who has learned a trade. (18 Comp. Gen. 341).

The DOL's citation to the Comptroller General opinion demonstrates that the Secretary of Labor not only understood that the terms "laborer" and "mechanic" have different meanings, but found that the work of chainmen and rodmen is sufficiently physical or toilsome to fall within the classification of laborer. The DOL made clear in its 1960's opinion that it did not view the work of a surveying crew as particularly skilled, let alone akin to professional or "subprofessional" work. Indeed, in a November 23, 1960 letter to the New York AGC, the Acting Solicitor stated that the work of rodmen and chainmen required "no particular skill."

All Agency Memorandum No. 39, which was written by the Secretary to the Ohio Society of **Professional Engineers**, states that the work of a "survey crew" that is "considered professional or sub-professional in character" is not covered. The Secretary clearly did not intend to characterize work requiring no particular skill as "professional or sub-professional," despite WHD's later misinterpretation of AAM No. 39. Indeed, Under Secretary of Labor John Henning stated in a January 10, 1964 opinion (quoted above) that the Solicitor has concluded that the duties of "rodman, chainman, and instrumentman" are those of "laborers and mechanics" as it has been interpreted in "former Secretary Goldberg's letter of August 2, 1962, to the President of the Ohio Society of Professional Engineers."

D. From the 1970's to the Present, the WHD Erred in Using Words of Illustration From 1960's Opinions – "Clearing Brush and Sharpening Stakes" - As Words of Limitation and in Confusing a Reference to the Status of Office or Professional Surveyors With the Status of Field Surveyors

Despite the clear 1960's opinions of the Secretary of Labor and the Solicitor of Labor, the WHD denied coverage to surveying crews based upon a gross misreading of those opinions. The Secretary of Labor and Solicitor of Labor used "clearing brush and sharpening stakes" as examples of survey crew work covered under the DBA, and consistently found, without qualification, that the work of rodmen, chainmen, and instrumentmen (under a party chief) was covered under the Davis-Bacon Act.

As is evident from a review of the opinions issued by the WHD from 1975 to the present, the WHD has 1) read words used by the Solicitor of Labor and the Secretary of Labor to illustrate some of the manual work performed by the surveying crew as words of limitation; and 2) has confused the work of

office/professional surveyors with the work of rodmen, chainmen, and instrumentmen.

The WHD's opinion letters from 1975 to the present demonstrate a failure to understand the 1960 to 1964 opinion letters of the Secretary of Labor and the Solicitor of Labor (emphasis added):

1. February 21, 1975 opinion letter of Assistant Administrator Ray Dolan (by Dorothy P. Come): The Davis-Bacon Act "would be applicable only to those survey crew members who perform primarily manual work, such as **clearing brush or sharpening stakes**."

2. May 6, 1980 opinion letter of Assistant Administrator Dorothy Come: "[T]he Davis-Bacon prevailing wage rates only apply to 'laborers and mechanics'. For example, survey crew members who perform primarily manual work, such as **clearing brush or sharpening stakes**, would be entitled to the applicable prevailing wage rate. One the other hand, those crew members who duties are primarily **professional or subprofessional** in character are not considered to be 'laborers and mechanics' and they are not covered by the Act."

3. May 29, 1981: opinion letter of Sylvester L. Green, Director of Division of Government Contract Enforcement: The Act applies "only to 'laborers and mechanics"... who perform primarily manual work, such as **clearing brush or sharpening stakes**. Such workers would be entitled to the applicable Federal prevailing wage rates issued by the Secretary of Labor. However, those crew members who [sic] are primarily **professional or subprofessional** in character are not considered 'laborers and mechanics' and therefore, they would not be covered by the Act."

4. October 6, 1993 opinion letter of Deputy Assistant Administrator Daniel F. Sweeney: "[T]he Davis-Bacon prevailing wage provisions are applicable to those survey crew members who perform primarily manual work on the job site, such **as clearing brush or sharpening stakes**."

5. October 13, 1993 opinion letter of Deputy Assistant Administrator Sweeney: "[T]he Davis-Bacon prevailing wage provisions are applicable to those survey crew members who perform primarily manual work on the job site, **such as clearing brush or sharpening tools**. The covered employees are entitled to the applicable to the applicable prevailing wage rates for the time so spent. On the other hand, crew members whose duties are primarily mental in character are not considered "laborers and mechanics" and therefore they are not covered by the Act.

6. November 1, 2004 opinion letter of Timothy Helm - "As a general matter, an instrumentman or transitman, rodman, chainman, party chief, etc., are not considered laborers or mechanics. However, a crew member who primarily does manual work, for example, **clearing brush**, is a laborer and is covered for the time so spent."

E. The WHD Cannot Rely on the Alleged Supervisory Status of Party Chief to Deny Coverage

In light of the fact that the two-person crew is now the standard in the industry, the party chief cannot be deemed to be a exempt on the basis of any executive functions performed within the crew. To qualify as an exempt executive under the FLSA, an employee must customarily and regularly direct the work of two or more other employees. 29 C.F.R. § 541.103(d).

F. Field Surveyors Are Clearly Not "Professional," "Semiprofessional," or "Subprofessional"

In the Davis-Bacon context, the WHD has issued opinion letter characterizing work as "subprofessional" and "semiprofessional" as a justification for failing to extend coverage to skilled tradespersons. These terms are not used by the WHD in the FLSA context. The FLSA exempts professional employees, not semiprofessional or subprofessional employees.

In any event, a field surveyor is clearly not a professional, or even a "subprofessional" or "semiprofessional." There is no requirement that field surveyors be licensed or even obtain a certification. There is no requirement that a field surveyor have a college degree or even a high school diploma. A GED is sufficient.

III. THE WHD HAS MISREAD THE REGULATORY DEFINITION OF "LABORER AND MECHANIC" IN LIMITING COVERAGE TO WORKERS BASED ON THE DEGREE OF PHYSICAL DEMANDS OF ON-SITE CONSTRUCTION JOBS

A. "Excludes" and "At Least" Are Words of Illustration, Not Limitation

Contrary to the WHD's current interpretation of 29 C.F.R. 5.2(m), the regulatory definition of "laborers or mechanics" does not limit coverage to workers who perform manual or physical labor; rather it states that "include[d]" among laborers or mechanics are "at least" workers who perform manual or physical work:

> (m) The term laborer or mechanic includes **at least those workers whose duties are manual or physical in nature** (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term laborer or mechanic includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent.

The regulatory definition not only includes those workers who perform manual or physical work but also includes workers who use tools or are performing the work of a trade.

Despite the fact that the words "at least those workers whose duties are manual in nature" are clearly words of illustration, and not words of limitation, the DOL misreads the regulatory definition to extend coverage to only those workers who perform physical or manual work. The use of the words "include" and "at least" demonstrate an obvious intent to convey that work need not be physical or manual to be covered under 29 C.F.R. 5.2(m). *See United States v. Grassie,* 237 F.3d 1199, 1215 (10th Cir.2001) ("[W]e regard the statutory use of the word 'including' ... as the preface for a representative or illustrative example, and not as a term of restriction or exclusion for anything not expressly specified."); *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007)("The word 'including'... indicate[s] that what follows will be an 'illustrative' sampling of the general category that precedes the word.").

The IUOE's reading of 29 C.F.R. 5.2(m) is supported by a 1985 decision of the Comptroller General, which reads the regulatory definition as words of illustration, not words of limitation. *John Buick Construction Company*, 64 Comp. Gen. 792 (1985) (Applicable regulations define a laborer or mechanic as "at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade) ..."

In excluding on-site workers whose work is not deemed sufficiently physical or manual, the DOL appears to be reading 29 C.F.R. 5.2(m) as though the regulation reads "The term laborer or mechanic includes **only** those workers whose duties are manual or physical in nature..." In other words, the DOL appears to be reading "at least" as words of limitation. However, as written, "at least" signifies that workers whose duties are manual or physical in nature must be included, and that workers whose duties are not manual or physical may be

included. A non-physical job may require the use of little or no independent decision-making or judgment. Such a job would not be mental or managerial. This is particularly true 80 years after the enactment of the law since technological changes have rendered a number of jobs that are functionally integrated with the construction process far less physical.

Finally, the WHD's reading of 29 C.F.R. 5.2(m) as excluding work that it deems insufficiently physical or manual is inconsistent with its description of the term "mechanic" in the Field Operations Manual. In FOH 15e00, the WHD uses the description of mechanic from the 1938 Comptroller General opinion: "Generally, mechanics are considered to include any worker who uses tools, or who is performing the work of a trade."

B. Use of Physical or Manual Demands as a Litmus Test for Coverage Would Eliminate Coverage of Workers Heretofore Included as Technological Advancements Make the Majority of Construction Jobs Less Physically Demanding

The use of modern technology – such as the "total station" - in performing field surveying work is not a reasonable basis for denying coverage to surveyors. As technological advances occur, a wide range of construction jobs are performed using more efficient tools of the trades, such as machine operated trowels, miter boxes, and nail guns, and are far less physical demanding than they were in the 1930's. The job of the truck driver, for example, is a far less arduous trade than it was in the 1930's as a result of technological advancements, such as air-conditioned cabs, automatic transmissions, power steering, and monitors showing distances in the rear.

While Congress could not have envisioned the invention of computers and their widespread use in modern construction, it did intend to cover on-site work that is functionally integrated with the construction contract. The purpose and need for the Davis-Bacon protection has not diminished as technological advances have evolved.

In determining which workers are laborers or mechanics, the WHD should construe those terms in a manner that recognizes the evolution of construction techniques over the past 80 years. Indeed, it is a "general rule in the construction of statutes that legislative enactments in general and comprehensive terms, and prospective in operation, apply to persons, subjects and businesses within their general purview and scope, though coming into existence after their passage, where the language fairly includes them." *Cain v. Bowlby*, 114 F.2d 519 (10th Cir. 1940). (See 2A Sutherland Statutory Construction 49.02, and *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925), cert. denied, 269 U.S. 556 (1925), where the court held that the broadcasting by radio for profit of a copyrighted musical composition infringed the statutory copyright even though radio was developed after the enactment of the Copyright Act). In view of the fact that the relevant language in the Davis-

Bacon Act is both broad and prospective, the Davis-Bacon Act includes work performed in furtherance of the contract through new construction techniques that did not exist in the 1930's.

The WHD has recognized in the context of amending its "site of the work" regulation (29 C.F.R. 5.2(l)), that its interpretations of Davis-Bacon Act coverage need to adapt to technological changes. In revising the definition of "site of the work, the WHD pointed out the deficiencies in the then current regulation (65 FR 57270-01(Sept. 21, 2000)):[7]

> In addition, the current site of the work definition at section 5.2(l) does not adequately address certain situations which the Department believes warrant coverage. For example, new construction technologies have been developed that make it practical and economically advantageous to build major segments of complex public works, such as lock and dam projects and bridges, at locations some distance up-river from the locations where the permanent structures will remain when their construction is completed.
>
> Innovative construction methods exist which take advantage of recently developed underwater concrete construction technologies, making it feasible for whole sections of such structures to be constructed up-river and floated down-river to be put in place to form the structure being built. In such situations, much of the construction of the public work is performed at a secondary site other than where it will remain after construction is completed.

IV. IF THE WHD CONTINUES TO LIMIT COVERAGE TO WORK THAT IS PHYSICAL OR MANUAL, THE WHD SHOULD NONETHELESS FIND THAT THE FIELD SURVEYORS ARE "LABORERS OR MECHANICS"

If the WHD continues to read 29 C.F.R. 5.2(m) as requiring an assessment of whether the work of a skilled tradesperson is sufficiently physical or manual, the WHD should nonetheless find that field surveyors are "laborers or mechanics" for the following reasons: 1) the job of the field surveyor is physical demanding as an objective matter; 2) the job of the field surveyors includes the same physical demands as the job of a grade checker, a covered subclassification, since the field surveyor performs grade checker functions; and 3) field surveying entails far more physical demands than those involved in flagging, as that job is described in the All Agency Memorandum in which the WHD reversed its position on coverage of flaggers.

As recognized by the Secretary of Labor and the Solicitor of Labor, the job of a field surveyor involves the physical activities, such as clearing brush,

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[7] *See also* 65 *Fed.Reg.* 80268-01, 80271 (Dec. 20, 2000).

sharpening stakes, and setting stakes. These activities constitute only a small part of the physical demands of field surveying, which also include:

- Standing for all but a small fraction of the workday
- Walking and climbing over uneven grades and uphill
- Carrying and wearing heavy objects, including "GPS" equipment, staking staff, lathe rack, hub bag, sledge hammer, hand tape, safety goggle, gloves, buck knife
- Bending and stooping
- Swinging a heavy sledge hammer
- Clearing brush
- Working in inclement weather

In reversing its position on flaggers, the WHD implicitly found that the degree of manual or physical labor need not be arduous or demanding, but must require minimum amounts of activity, such as standing and walking. The physical activities involving in flagging, as described in All Agency Memorandum No. 141 (1985), are:

- Standing
- "Manually" using a flag and/or stop sign
- Setting up barriers and warning cones
- Tending flashing warning lights
- Lifting and carrying various objects
- Directing activities of others through "body movements"

The physical work involved in flagging is certainly not more demanding than the physical demands involved in surveying work. Indeed, the most physically demanding aspect of flagging work is standing all day in all types weather conditions. The field surveyor is not only on his or her feet all day, but the field surveyor also walks and climbs over challenging terrain while carrying heavy objects. Additionally, the hand and body movement involved in flagging is less taxing than clearing brush and swinging a sledge hammer.

V. IN CONSIDERING THE FLSA's ADMINISTRATIVE EXEMPTION, THE WHD INTERPRETS "MANUAL" LABOR VERY BROADLY TO AVOID EXCLUSION FROM COVERAGE

In light of the fact that 29 C.F.R. 5.2(m) specifically references part 541 of title 29, the WHD should apply the principles developed under the FLSA as a guide in interpreting the terms "laborer" and "mechanic" in 29 C.F.R. 5.2(m).[8] In applying principles developed under the FLSA, the WHD should find that the physical requirements of the work of a laborer or mechanic need not be arduous or grueling.

Under the FLSA, an individual performing manual or physical worker need not spend his or her time performing work that is "toilsome," backbreaking, or arduous. Indeed, in interpreting the administrative exemption under the FLSA, the WHD has determined that employees who spend the majority of his or her time using tools, instruments, machinery, or other equipment or performing repetitive manual operations are performing manual or physical work. *Christernberry v. Rental Tools*, 655 F.Supp. 374, 377, 28 WH Cases 265 (E.D. La. 1987); *Donovan v. United Video*, 725 F.2d 577 (10th Cir. 1984)(microwave engineers not exempt when their primary duty was to perform maintenance inspections requiring a great deal of manual work); *Berg v. United States*, 49 Fed.Cl. 459 (Fed.Cl. 2001)(declining to apply the administrative exemption to electronic technicians who spent the majority of their work time using testing equipment, tools and cleaning supplies, working off floors and workbenches, and following instruction manuals); *Saver v. Hyatt Corp.*, 407 So.2d 228, 25 WG Cases 219, 229-30 (Flas.Dist.Ct. App. 1981)(deeming assistant chief engineer who spent 75 percent of his time working with tools not exempt); *Cannella v. Anodyne Corp.*, 1996 WL 680242 (N.D.Ill. 1996) (primary duty was a service technician and not management, supervision or nonmanual, office work directly related to management policies or general business operations).

VI. IN ADDITION TO BEING CONTRARY TO THE COMMONLY UNDERSTOOD DEFINITION OF MECHANIC, THE WHD's COVERAGE RESTRICTIONS BASED UPON THE DEGREE OF PHYSICAL DEMANDS OF ON-SITE CONSTRUCION JOBS IS CONTRARY TO THE STATUTORY PURPOSE

Restrictions on coverage based on a misinterpretation of the breadth of the term "mechanic" is inconsistent with the statutory goal of ensuring that the lowest bidding contractors do not undermine the prevailing wages of construction workers in the locality. The DBA was "founded on the sound principle of public policy that the Federal Government should not be a party to the destruction of prevailing wage practices and customs in a locality." H.R. Rep. No. 308, 88th

[8] In 1960, the Solicitor of Labor stated that while "Regulations 541.3" have the "force and effect of law only under the Fair Labor Standards and Walsh-Healey and Public Contracts Acts, they will be used as a general guide in enforcing the labor standards provisions of other Acts within the jurisdiction of this Department."

Cong., 1st Sess. (1963). The "evil" sought to be remedied was the lowering of local wage standards by the award of federal contracts to contractors who paid workers the lowest wages, and were thus, able to underbid other contractors. *Building & Const. Trades Dept., AFL-CIO v. Donovan*, 712 F.2d 611, 613 (D.C. Cir. 1983), *cert. denied* 464 U.S. 1069 (1984).

A broad interpretation of the terms "laborer" and "mechanic" would facilitate the goal of ensuring that the federal government is not in the business of lowering wage standards in the industry. Indeed, in light of the fact that the DBA is a "remedial act" for the benefit of covered employees and should be "liberally construed to effectuate its beneficent purpose," the DOL should interpret "laborers and mechanics" broadly. *Drivers, Salesmen, Warehousemen, Milk Processors, etc. v. NLRB*, 361 F.2d 547, 553 (D.C. Cir. 1966), *United States v. Binghamption Construction Co.*, 347 U.S. 171, 176-78 (1954). In the context of interpretating another remedial statute, the Attorney General opined in interpreting the Eight Hour Law, 39 *Op.Atty.Gen.* 232 (1938), that "in the Administration of the statute the term 'laborers and mechanic' has been given a somewhat broad meaning ... It is under all circumstances, a well warranted assumption that the Congress intended the Eight Hour Law to have a broad application and to be liberally construed with this end in view."

The WHD has already placed a wide range of restrictions on coverage based upon the location of work, when the work is performed, and the nature of the work. The current limitations on coverage include:

- Work must be performed "directly" on the site of the work- geographic "adjacent or virtually adjacent" and a functional test – exclusively dedicated
- Work must be functionally integrated with construction work [9]
- Clerical work is not covered
- Worker must not be a bona fide executive professional, administrative, or professional capacity as defined in 29 C.F.R. 541
- Work must be performed before the contracting agency "accepts" the public work [10]

[9] *See e.g., Aleutian Constructors*, 1991 WL 494765 (DOL WAB) ("[N]either the Act nor the regulations thereunder cover the camp [culinary] workers, as their relationship to the projects under construction is simply too indirect.")

[10] *See Nosaire Systems, Inc.*, 1995 WL 90009 (DOL WAB).

- Work must not be "preliminary"[11]

Further limitations on coverage based on an analysis of the relative level of physical demands of on-site, functionally integrated work would undermine the remedial purposes of the Davis-Bacon Act.

CONCLUSION

Based on the foregoing, the IUOE and IUOE Local 12 submit that the WHD should issue wage schedules that include field surveyors as a subclassification within the operating engineer key classification.

Respectfully submitted,

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On Behalf of IUOE and
IUOE Local 12

[11] With regard to soil boring performed during a site investigation, the FOH 15d05(c) states that "The latter activities are regarded as preliminary work, and not part of the construction."