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Davis-Bacon: Employment of Helpers on Federal Contract Construction

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Abstract. The Davis-Bacon Act (1931, as amended) requires payment of not less than the locally prevailing wage on covered federal construction. Each craft category is treated separately for wage rate determination purposes. This report examines the question of having "helpers" treated as a separate worker category under the Act.

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Prepared for Members and
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Summary

The Davis-Bacon Act of 1931, as amended, requires that not less than the locally prevailing wage (not necessarily the union rate) be paid to workers engaged in contract construction work to which the government of the United States or of the District of Columbia is a party. The coverage threshold is $2,000.

Under Davis-Bacon, the Secretary of Labor makes wage rate determinations for "the various classes of laborers and mechanics" employed on covered work. The Secretary has, through regulation, recognized apprentices and trainees, registered in formal programs, as special categories and allowed a special reduced wage for these workers. Some contractors, however, have created yet another category of worker: i.e., "helpers." These may be informal trainees, or they may simply be general utility workers employed outside of a craft classification. These workers are most often not recognized as a separate category for wage rate determination purposes.

Through the years, the Department of Labor (DOL) had rigorously adhered to this general worker classification system as necessary to assure that not less than the locally prevailing rate would be paid to "the various classes of laborers and mechanics" on a project. Were helpers indiscriminately substituted for journeymen or laborers, DOL holds, wage rates would be depressed and the intent of Congress in crafting the Davis-Bacon Act would be subverted.

In 1979, the Carter Administration began a general review of Davis-Bacon — including the helper issue. New regulations were issued in January 1981. Before they could be implemented, they were withdrawn and rewritten by the Reagan Administration (1982). Through the next decade, these new Davis-Bacon regulations were largely implemented — but the helper segment remained in litigation. When, in 1992 (following a series of legal maneuvers), judicial approval of the helper regulations was finally secured, Congress blocked their enforcement through the appropriations process, variously denying funding for their implementation.

In mid-1996, the Associated Builders and Contractors sought court assistance to require enforcement of the helper regulation. DOL responded by returning to the rulemaking process. Subsequently, DOL published a proposed rule (April 1999) defining the concept of helpers and soliciting comment. The proposed rule, essentially, reaffirmed Departmental practice of the 1970s with respect to the use of helpers: the issue had come full circle. This final rule was issued by the Department and took effect on January 19, 2001.

Administrative initiatives found a counterpart in legislative proposals, introduced periodically up through the 109th Congress. No such proposals have as yet been introduced in the 110th Congress. This report, which will be updated periodically as events unfold, tracks the administrative, judicial and legislative evolution of the "helper" issue.

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In 1979, following decades of increasingly vigorous argument about the Davis-Bacon Act, the Carter Administration agreed to review and, ultimately, to revise the federal regulations governing administration of the statute. This set in motion a quarter-century of administrative rulemaking, litigation, legislative oversight and proposed amendment of the act. The process continued through the Reagan and Bush Administrations to the close of the Clinton Administration — and beyond.

To a large degree the core issues from the 1970s and 1980s, associated with the Davis-Bacon Act, remain controversial. Among these is the question of the employment of *helpers* on Davis-Bacon covered federal and federally-assisted contract construction work. For example, how is the concept of helper to be defined for Davis-Bacon purposes? What distinguishes a helper from other construction workers? On Davis-Bacon work, should they be integrated into the regular construction crew? Should helpers receive training to enhance their skills and, if so, how should such training be structured? How should their wage rates compare with those of other project workers?

These questions quickly became a source of contention. Through more than 2 decades, employment of helpers (as a separate category of worker on projects covered by the Davis-Bacon Act) remained a matter of dispute. Then, in April 1999, the Department of Labor published a proposed rule on the use of helpers that would, essentially, revert to the 1970s practice of the Department so far as the use of helpers was concerned. A comment period on the proposal closed on June 8, 1999. Meanwhile, legislation was introduced that would have provided a statutory definition of *helper* — but no legislative action was taken.

Under date of November 17, 2000, the Department issued a final rule on the helper issue — to take effect on January 19, 2001, during the closing hours of the Clinton Administration. In effect, the final rule reaffirmed Departmental practice of the 1970s: the issue had come full circle. Although the new rule (and confirmation of ongoing practice) is now in place, some appear to be unhappy with the outcome. Thus, the issue may not yet be entirely resolved.

Introductory Comment

Speaking broadly of the construction industry, a helper might be viewed as a general utility employee who assists a more skilled or specialized construction worker. Normally, the helper would be unskilled — though, in fact, he (or she) could have a wide range of skills but, not having gone through a formal training program,

would not be recognized as skilled. A helper could also be a craftsman, a journeyman, down on his luck, and forced by economic necessity to accept general utility work below his level of training. Normally, the helper is unlikely to be a trade union member (or, if a member, not employed under a collectively bargained contract). He may usually be paid a wage lower than that of a skilled worker; though, for particular types of work, he may perform equally as well as a skilled craftsman.

Because he is cheaper to employ and more flexible in the types of work he may be willing to accept (working outside of craft), he can be a useful addition to a work crew. Where a manager carefully supervises the work to be done, the less expensive helper can be assigned to perform narrow aspects of an otherwise complex task. (This process has been referred to as craft fragmentation.) At the worksite, one might expect to find, in the absence of workrules that would preclude it, a battery of helpers working under the guidance of a more highly paid journeyman. Whether such an arrangement is economical, in terms of productivity and quality of workmanship, is a subject of intense and on-going debate.

An apprentice or a trainee (enrolled in a formal program) could be expected to rotate throughout the worksite, receiving on-the-job training and, in the case of the former, outside instruction as well. In contrast, the helper would normally receive the narrowest possible training, no more extensive than is absolutely required for the task at hand. And, in large measure, the helper is regarded as a temporary worker rather than a permanent member of his employer's crew. As the Davis-Bacon Act has been implemented by the Secretary of Labor, the Department has recognized apprentices and trainees in formal programs as a classification of workers for wage rate purposes. It has not, generally, recognized the category of helper, however, on the assumption that to do so would undercut the locally prevailing wage structure and skills system that the Davis-Bacon Act was designed to protect.

Helpers Under Davis-Bacon: The Context of the Issue

The Davis-Bacon Act (1931, as amended) requires that the "advertised specifications" for construction contracts in excess of $2,000 to which the government of the United States or of the District of Columbia is a party:

> ... shall contain a provision stating the minimum wages to be paid *various classes of laborers and mechanics* which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for *the corresponding classes of laborers and mechanics* employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed....[1] (Emphasis added.)

Congress left to the Secretary the task of working out the precise manner in which the act should be applied. It also left up to the Secretary the responsibility for

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[1] See 40 U.S.C. 276a-276a-5. See also 29 CFR Parts 1, 3, 5, 6, and 7. The Davis-Bacon Act has now been recodified as 40 U.S.C. 3141-3148.

defining such concepts as "wages" and "prevailing" and "project of a character similar" and the scope of the locality in which the work was to be performed. Each of these concepts has been, intermittently, a focus of contention (and, often, of litigation), of rulemaking and of congressional debate through more than 60 years.[2]

A Question of Definition

Similarly contentious has been the concept of the term *helper*. And, further, whether the use of helpers has been a common practice in the area in which federal construction work was to take place. As with other aspects of the act, Congress had legislated in broad strokes. The original Act referred to "classes of laborers and mechanics" employed on public construction projects and to "the corresponding classes of laborers and mechanics" employed on comparable work in the non-federal sector.[3] It made no reference to "helpers" nor, for that matter, to "trainees," "apprentices," or other skill groups. Further definition, if such were required, was left to the Secretary of Labor. Although the act has been amended through the years, it still refers only to "various classes of laborers and mechanics" — the phrase being repeated with slight modification throughout the statute.[4]

Through the years, the Secretary developed such definitions as seemed appropriate and necessary. The evolving regulations focused upon apprentices and trainees registered in formal training programs: for example, those under the supervision of the Bureau of Apprenticeship and Training within the DOL. The term "helper" did appear in the regulations but seems to have been used casually, without precise definition, and with no hint as to how it might be applied in wage rate determinations or at the worksite. This situation prevailed up through the late 1970s.[5]

An Industry Perspective

Business economist Armand Thieblot, writing in 1975, observed that the Davis-Bacon regulations were "filled with words of art which must, in turn, be defined." By way of example, he pointed to the phrase, "classifications of laborers and mechanics," and added:

> Open-shop firms bidding on covered construction in predominantly union areas might find that some of their own classifications — notably helpers — would not be considered prevailing classifications as such; therefore, no prevailing wages would be determined for them. ... Under such circumstances, the helpers would have to be reclassified as journeymen or laborers (journeymen, if they use the tools of the trade).

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[2] For an overview of the Davis-Bacon Act, see CRS Report 94-408, *The Davis-Bacon Act: Institutional Evolution and Public Policy*, by William G. Whittaker.

[3] See P.L. 71-798.

[4] See Title 40 U.S.C. 276a-276a-5.

[5] 29 CFR 5.5(a), and 5.6(a)(2) & (3), revised edition of July 1, 1978. See *Daily Labor Report*, August 14, 1981, p. E3. (Hereafter cited as *DLR*).

Thieblot noted that "many firms are using, or would like to use, semi-skilled labor for uncomplicated aspects of some tasks."[6] But unless such workers were enrolled in a formal DOL-approved apprenticeship program, "they must be considered, for pay purposes, journeymen of the trade in which they are apprentices." Helpers, he explained, "will be recognized for Davis-Bacon rate purposes only in those geographic areas where the practice of employing them is prevalent enough that their classification becomes a prevailing one. This recognition," he adds, "will only apply in areas where open shop firms predominate, because unions rarely recognize the helper category."[7]

A Trade Union Perspective

Recalling the origins of Davis-Bacon, trade unionists view DOL's restrictions upon employment of apprentices, trainees or helpers at sub-craft rates as central to congressional intent and preservation of labor standards in the building trades. "Otherwise," they note, "contractors seeking to undercut the prevailing wage would merely designate the workers by one of these titles and claim that, since they are not fully skilled, they are not entitled to the prevailing rate." Further, they say: "By working his employees out of classification, he [the employer] can undercut the prevailing wage rates that he committed himself to pay when he bid on the [Davis-Bacon covered] project."[8]

Apprentices and trainees recognized as such by DOL cause few problems in the view of the Building and Construction Trades Department (BCTD), AFL-CIO. It is the informal and often imprecise titles of "helper" and "trainee," the BCTD notes, that have provoked conflict. There "is no evidence that most of these trainees and helpers are anything but temporary employees who are released when their work on the project is completed." DOL's restriction on the use of helpers "strikes at one of the wage-cutting devices by which non-union contractors can achieve the advantage they need to be able more frequently to underbid union contractors on federally funded work." And, the BCTD adds, the use of helpers at sub-craft wages was one of the "abuses the Davis-Bacon Act was intended to remedy."[9]

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[6] Armand J. Thieblot, Jr., *The Davis-Bacon Act* (Philadelphia, The Wharton School, University of Pennsylvania, 1975), pp. 20-21. (Hereafter cited as Thieblot, *The Davis-Bacon Act*.)

[7] Thieblot, *The Davis-Bacon Act*, p. 23.

[8] *The Davis-Bacon Act: It Works to Build America* (Washington: The Building and Construction Trades Department, AFL-CIO, 1979), pp. 60-61.

[9] Ibid., p. 61.

Administrative Reform of the *Helper* Provisions

By the late 1970s, a campaign was underway for reform or repeal of Davis-Bacon. Ultimately, the effort would take two forms: direct legislation or, conversely, reform through the regulatory process. The former, of course, would require action by Congress which, while it had often reviewed the Davis-Bacon Act, had not altered it substantially. The latter, regulatory reform, could be undertaken unilaterally by the Administration.

The Carter Administration Regulations (1979-1981)

In late December 1979, the Carter Administration published a proposed rule revising the administration of Davis-Bacon and, among other elements, adding the following language (Section 1.7(d)):

> (d) Classification and wage and fringe benefit rates will be issued only for identifiable "classes of laborers and mechanics." Distinctions between classifications are based upon differences in the work performed, not upon skill and supervisory functions. *A semi-skilled classification of laborers or helpers, for example, is issued when the classification as utilized in the area performs a scope of duties which distinguishes it from other classifications in the area*. Prevailing wages for apprentices and trainees are not issued on wage determinations, but their use is permitted....[10] (Emphasis added)

Thus, the proposed rule would establish two tests for designation of a special wage rate for helpers: *first*, that helpers are utilized in the area of the proposed work; and, *second*, that the helper is distinguishable from other classifications of laborers and mechanics. Later, the proposed rule specifically defined "laborer," "mechanic," "apprentice," and "trainee" but, for whatever reason, omitted any definition of helper.[11]

In mid-January 1981, as the Carter Administration was drawing to a close, a final rule was published. In an introduction, DOL explained its position concerning the use of helpers: "Numerous commenters shared the opinion that the policy of permitting only employment of apprentices and trainees under BAT [Bureau of Apprenticeship and Training] approved programs was denying job opportunities to youths, minorities, and women." The Department noted, however, that recognized programs of apprenticeship and other types of training were available to young persons, minorities and women and affirmed that, through that vehicle, it could be assured "that the training is real and is not a subterfuge" through which to lock such workers "into low paying unskilled jobs." The Department stressed that payment of reduced wages to apprentices and trainees was "an exception to the requirements of the Davis-Bacon Act ... and that strict conditions must be maintained in order to

[10] *Federal Register*, December 28, 1979, pp. 77029-77030.

[11] Ibid., p. 77083.

prevent the circumvention of the act's requirements."[12] But, while the terms apprentice and trainee were defined in the final rule, once again helper was not.[13]

In its discussion of wage determinations, the DOL explained that differences in rates would be based upon "differences in the work performed, not upon skill and supervisory functions."[14] And, further, DOL explained: "In any given classification individual skill levels will vary from employee to employee and any attempt to measure and issue rates on that basis is administratively impossible and could throw the procurement into complete confusion."[15] From this assertion, one might infer the difficulties that the Department anticipated were it to recognize the use of helpers and to determine an appropriate locally prevailing wage rate for these workers.

Three weeks into the Reagan Administration, on February 6, 1981, the Department announced a delay in implementation of the Davis-Bacon regulations. Then, it withdrew them for further review.

The Reagan Administration Regulations (1981 ff.)

Consideration of the helper issue during the Reagan era falls into three periods: issuance of a proposed rule, August 1981; publication of a final rule, May 1982; and subsequent litigation continuing through the remainder of the Reagan Administration.

The Proposed Rule (1981). On August 14, 1981, the Reagan Administration issued a new proposed rule governing the Davis-Bacon Act and called for comment. The Department agreed to allow a helper classification on wage determinations "when the classification is identifiable in the locality." It noted: "Implementation of this proposal would provide recognition of a widespread practice in the construction industry and thus allow wage determinations to reflect actual classification practices and rates."[16] The DOL pointed out that it had long recognized the helper category under certain carefully defined circumstances but, it concluded, the practice had been too restrictive.

The new proposed regulation would issue helper wage determinations "when they can be identified in the locality" — not only when they are found to be prevailing as in prior practice. It noted that the concept of helper "would be broadly defined in the regulation, and permitted in a ratio of one helper to five journeymen."[17]

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[12] *DLR*, January 19, 1981, p. G2.

[13] Ibid., pp. G8, G10.

[14] Ibid., p. H9.

[15] Ibid., p. H5.

[16] *DLR*, August 14, 1981, p. E2.

[17] Ibid., August 14, 1981, p. E3. It is important to keep in mind the continuing problems of meaning; for example, how might one define such terms as identified or prevailing?

However, in order to prevent abuse, DOL explained, "the regulation would prohibit use of journeymen as helpers."[18]

There was a shift of emphasis from the regulations issued by the Carter Administration. The new regulations stated that the purpose was "to provide for the increased use of helpers whenever they are utilized in the area."[19] The concept of helper was now specifically defined as a component of the terms "laborer" or "mechanic."

> A "helper" is a semi-skilled worker [rather than a skilled journeyman mechanic] who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying, and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.[20]

Where a worker is on the payroll as a helper but does not meet the regulatory definition of a helper (or a helper on the job site is in excess of the ratio permitted), he or she would be paid the rate for "the classification of work actually performed."[21]

Following publication of the proposed rule (August 1981), the Department received approximately 2,200 comments. More than 1,000 dealt specifically with the helper issue.[22]

The Final Rule (1982). A final Davis-Bacon rule was issued on May 28, 1995. DOL explained that its prior "restrictive approach" with respect to the use of helpers had been "inappropriate."[23] In setting forth a new standard, DOL rejected the concerns of trade unionists while concurring in the views of industry. Going beyond the rule as proposed in August 1981, DOL affirmed that it had decided "to raise the ceiling from one helper for every five journeymen to two helpers for every three journeymen. The higher ratio will better reflect the wide diversity in practices among different types of construction and localities."[24] The new ratio would allow up to 40% of the total on-site workforce to be composed of helpers[25] and "would increase

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[18] Ibid., p. E11.

[19] Ibid., p. E10.

[20] Ibid., p. E15.

[21] Ibid., p. E17.

[22] *DLR,* May 28, 1982, p. A4.

[23] Ibid., p. E4.

[24] Ibid., p. E8.

[25] Ibid., p. E15. See also p. E26.

the cost savings substantially"[26] where they were hired "instead of journeymen."[27] The actual definition of "helper" remained as in the proposed rule.

Reaction to the final rule was sharply divided. Former Labor Secretary and Harvard economist John Dunlop termed DOL's judgment on the 2:3 ratio (helpers to journeymen) "categorically wrong." He observed that the Department "cites no credible evidence to support it [the helper ratio], and for good reason. There is none."[28] The Building and Construction Trades Department, AFL-CIO, charged that the rule would "allow almost unlimited use of helpers within a particular craft as well as the use of a 'cross-craft' helper." The use of helpers, the BCTD pointed out, no longer had to be prevailing in an area (i.e., the common practice) but merely "identifiable" under the new rule. And, it objected that the 2:3 ratio was not absolute because an option for variances was built into the rule.[29] Industry was favorably disposed — having urged just such a regulatory change. The Associated General Contractors termed the helper provision the "most far-reaching change" in the new regulation, also noting the projected cost savings.[30] The American Farm Bureau Federation "commended the Reagan administration for its revision" of the regulations.[31] And, the U.S. Chamber of Commerce, noting that the change would "permit contractors to expand their use of 'helpers,' or semi-skilled workers, on federal projects at wage rates lower than those paid to skilled journeymen," reported that "[t]he business community is hailing as a 'major improvement'" the new Davis-Bacon rules.[32]

Litigation (1982-1983). In late May 1982, the AFL-CIO Executive Council reviewed the entire new Davis-Bacon regulation and noted that of "particular concern" was the new treatment of the helper classification.

> It is our view that the redefinition of "helper" is a derogation of the statutory requirement that the Secretary of Labor determine the minimum wages to be paid various "classes of laborers and mechanics" on federally-funded and federally-assisted construction projects. Furthermore, the changes in the "helper" requirement will adversely impact upon minority construction workers and will lead to the practices of wage-cutting and misclassification which the Davis-Bacon Act is designed to prevent.[33]

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[26] Ibid., p. E8.

[27] Ibid., p. E7.

[28] *DLR*, July 22, 1982, p. A2.

[29] *The Builders*, June 21, 1982, pp. 3-4.

[30] *Davis-Bacon Report: The New Davis-Bacon Regulations, a Summary of the Changes*. Addendum to the June 16, 1982, AGC National Newsletter.

[31] *Farm Bureau News*, June 21, 1982, p. 122.

[32] Washington Report (U.S. Chamber of Commerce), June 8, 1982, pp. 1, 20.

[33] Statements Adopted by AFL-CIO Executive Council, May 27, 1982, reprinted in *DLR*, May 27, 1982, p. F1.

In early June, the AFL-CIO (with interested individual unions) filed suit, seeking to enjoin enforcement and, ultimately, to overturn the rule.[34]

U.S. District Court (1982). The final rule was scheduled for implementation on July 27, 1982. On July 22, Judge Harold H. Greene of the U.S. District Court for the District of Columbia issued a preliminary injunction against the Secretary of Labor[35] and, among other things, addressed at length the issues raised with respect to the helper provision. Judge Greene said:

> At the time of enactment of the Davis-Bacon Act, Congress was acutely conscious of efforts by some employers to classify workers as "helpers" in order to avoid paying the skilled laborers' wage. The Senate Committee report noted that wage standards had [been]:
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> largely broken down by intermediate classifications of labor and failure to retain the strict lines of demarcation intended to be drawn and maintained between skilled and unskilled labor. The whole tendency has been for wages of the skilled group to descend toward the level of the unskilled group, this by reason of intermediate classification devices.

The report concluded by recommending that construction contracts contain a provision stating that the minimum wages to be paid "various classes of laborers and mechanics" shall be based on wages prevailing "for the corresponding classes of laborers and mechanics," the language ultimately adopted in 1935....

> The new regulations will permit precisely that which Congress intended to halt in 1935. The concept of "classes of laborers or mechanics" was and is central to the statutory scheme. Under existing and long-established industry and administrative practice, a "class" of workers is one that has been historically recognized as such and whose members perform well-defined tasks. Helpers have therefore been recognized as a class only when their use has been prevailing in an area and they have formed a distinguishable group performing discrete tasks.
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> Under the new regulations, helpers not only are not defined in traditional terms, but they may perform any task throughout the entire construction field: they are "general helpers." As a consequence, such individuals would be allowed, at the discretion of the contractors, to perform the tasks of laborers, of journeyman mechanics, and of laborers and mechanics on a cross-craft, multi-trade basis. Obviously, if contractors could thus assign a helper to perform the tasks of any and all classes of laborers and mechanics and they could do so at lesser pay, they will do just that, and the requirement that wages be based on "corresponding classes" will effectively be read out of the law. As the Wage Appeals Board said in *Fry Brothers Corp.*, 123 WAB No. 76-6 (June 14, 1977), at p. 15-16:

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[34] *DLR*, June 11, 1982, pp. A9-A10, E1-E5.

[35] Building & Const. Trades Dept., *AFL-CIO v. Donovan*, 543 F.Supp. 1282 (1982). The Secretary of Labor at this time was Raymond J. Donovan, a former construction industry executive.

> If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left to the Davis-Bacon Act.
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> Moreover, under existing administrative practice, a helper classification is recognized only if it is "prevailing" in a particular area; under the new regulations, the use of helpers need only be "identifiable" to be recognized. Yet the statute itself refers to "wages ... prevailing for ... classes," not to wages identified for classes. The effect of this change will be that when there is a single "helper" or a small group of helpers in a town or a metropolitan area, helpers may be employed in substitution of traditional craft workers throughout that area in all aspects of construction work. In that respect, again, the new regulations will depart both from prior practice and from the central purpose of the Act.

For these reasons, it is unlikely that, when the merits are reached, this regulation can be allowed to stand.[36]

Judge Greene noted that "eight Presidents and 15 Secretaries of Labor of many political and ideological persuasions" had interpreted the Davis-Bacon regulations without the "fundamental changes that are brought about by the regulations adopted two months ago" and had "continued to interpret and enforce the laws precisely in accordance with the original understanding." Judge Green concluded: "Such consistent, unwavering administrative construction must be accorded very substantial weight by the Court."[37]

On December 23, 1982, Judge Greene, having further reviewed the case, issued a permanent injunction against implementation of the helper rule.[38] The decision was promptly appealed.[39]

U.S. Court of Appeals (1983). Through the spring of 1983, the U.S. Court of Appeals, District of Columbia Circuit, reviewed Judge Greene's decision.[40] On the helper issue, the Appeals Court partly upheld but partly overturned the District Court verdict.

"The provision requiring that a helper classification need only be 'identifiable' in an area," the Appeals Court declared, "must be struck down because it operates to

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[36] 543 F.Supp. At 1285-1286.

[37] 543 F.Supp. At 1289.

[38] Building & Const. Trades Dept., *AFL-CIO v. Donovan*, 553 F.Supp. 352 (1982). The case before Judge Greene dealt with a number of aspects of Davis-Bacon administration. This memorandum looks only at the helper issue.

[39] *DLR*, January 24, 1983, pp. A6-A7.

[40] Building & Construction Trades' Department, *AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir., 1983).

undermine the fundamental purpose of the act: that wages on federal construction projects mirror those locally prevailing." Further, the Appeals Court pointed to the potential for down-grading a classification of work: for example, making "carpenter work" into "carpenter's helper work" and, in the process, reducing the wages to be paid. After reviewing the legislative history of the act, it observed: "What is clear is that Congress regarded underclassification as contrary to the purposes, and most probably to the terms, of the act." Again: "We have concluded that the Secretary's identifiable-classification regulation would virtually ensure underclassification in union-dominated areas."[41]

With respect to the definition of *helper*, the Appeals Court found that the Secretary of Labor was "entitled to try to come closer ... than his predecessors have" to making wage rates on Davis-Bacon projects accurately reflect local practice. It found that a shift from a definition based upon the use of tools to one based upon the element of supervision was reasonable. "The change may mean that some unscrupulous contractors will find it easier to shift ... journeyman work onto helpers," it noted, "but we find it difficult to second-guess the Secretary's view that he can catch them."[42]

Therefore, the Appeals Court split on the helper issue: sustaining Judge Greene on the question of "identifiable" versus "prevailing" practice but accepting the Secretary's new definition of "helper." Since the regulation was, in effect, a unit, the result blocked implementation of the helper rule.

A *Helper* Rule Is Cleared by the Courts. The unions appealed the decision of the Appeals Court but, in January 1984, the Supreme Court declined to hear the case.[43] Thus, the decision of the Appeals Court stood and the Secretary of Labor was left to restructure the helper regulation in order to win judicial approval. On January 31, 1985, DOL implemented the other portions of the general rule that had been approved, but the helper regulation remained under departmental review.[44]

In late August 1987, the Department issued a new proposed rule on the use of helpers. It conceded the issue with respect to "prevailing" as opposed to merely identifiable — thus conforming to Judge Greene's standard. Defining "prevailing," however, remained a problem. A DOL spokesperson suggested that simply "[t]o state that the helper classification is prevailing because most of the contractors in a local area use helpers is an oversimplification." Therefore, in the proposed rule, the Department set forth several options upon which to base a determination and called

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[41] 712 F.2d (D.C. Cir. 1983) at 622-626.

[42] 712 F.2d (D.C. Cir. (1983) at 629.

[43] *DLR*, January 17, 1984, pp. A11-A12.

[44] *Employment and Training Reporter*, February 6, 1985, p. 673; and *Federal Register*, January 31, 1985, pp. 4506-4507.

for public comment.[45] On January 27, 1989, a new revised final rule was published;[46] but, since the Secretary was still subject to Judge Greene's 1982 injunction, the rule had to be cleared through the District Court before it could be implemented.

On September 24, 1990, Judge Greene vacated the injunction, thus permitting DOL to implement the helper regulation.[47] Almost immediately (October 2, 1990), the building trades unions filed an appeal.[48] On December 4, 1990, the Department served notice that the helper rule would become effective February 4, 1991;[49] thereafter, it would "begin surveying for helper use." Contractors were asked "to report the number of helpers, apprentices and trainees they employ in each craft, as well as their wage rates."[50]

At this point, Congress interceded. The "Dire Emergency Supplemental Appropriations" bill of April 10, 1991 (P.L. 102-27) provided that "no funds shall be expended by the Secretary of Labor to implement or administer" the helper regulations (Title III, Section 303).[51] Thus, DOL was barred from further activity through the end of that fiscal year with respect to the helper regulation. Whether the restriction was temporary or permanent became a subject of dispute. In late September 1991, BCTD President Robert Georgine urged Labor Secretary Lynn Martin to withhold implementation until the judicial appeal had been completed.[52] When DOL sought funding in its FY1992 budget request to implement the helper regulation, the request was turned down both in the House and the Senate.[53] The new DOL budget (P.L. 102-170) was signed by President Bush on November 26, 1991, without the requested funding.[54]

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[45] *DLR*, August 25, 1987, pp. A2-A3. See also, *Federal Register*, August 19, 1987, pp. 31366-31372.

[46] *Federal Register*, January 27, 1989, pp. 4234-4244.

[47] *DLR*, September 28, 1990, pp. A3-A4.

[48] *DLR*, October 1, 1990, pp. A4-A5; and December 5, 1990, p. A4.

[49] *DLR*, December 5, 1990, pp. F1-F2.

[50] Associated General Contractors, National Newsletter, December 10, 1990, p. 1.

[51] Further concerning this legislative decision, see Associated General Contractors, National Newsletter, March 18, 1991, p. 4, and May 13, 1991, p. 4; *AFL-CIO News*, April 1, 1991, p. 3; and *DLR*, April 15, 1991, p. A5.

[52] *DLR*, October 2, 1991, pp. A6-A7. Aside from the primary issue of the helper regulation, *per se*, there now arose a separate legal question of whether the restriction placed upon DOL funding in the "Dire Emergency Supplemental Appropriation" was a permanent restraint or merely effective until the end of the fiscal year. See comments of Representative Stenholm, *Congressional Record*, November 22, 1991, pp. H10902-H10903

[53] *DLR*, December 4, 1991, p. A12.

[54] See Terry R. Yellig, et al., to Constance L. Dupre, Clerk, United States Court of Appeals for the District of Columbia Circuit, December 3, 1991, which outlines the dispute concerning implementation of the regulation.

On April 21, 1992, the Appeals Court, having once more reviewed the helper regulations, concurred in the Department's definition of "helper" and "prevailing." But, it ruled that the ratio of helpers to journeymen (two helpers to three journeymen) was "arbitrary and capricious" and, therefore, this one provision was declared invalid.[55] In the opinion of the court, the ratio was "a purely arbitrary choice without rational decision making." It noted

> Such an unsubstantiated imposition of a fixed ratio in a regulatory scheme based on a statute designed to implement prevailing practices represents the very essence of arbitrariness. It is true that a regulation must be sustained as long as the agency has articulated a reasonable basis for its decision. ... Here, however, all the agency has done is to state that a 2:3 ratio better reflects industry use of helpers than did the 1:5 ratio.... To state a conclusion is not to reason.

The matter was sent back to the Department.[56] Two months later, on June 24, 1992, DOL issued a new final Davis-Bacon rule, removing the section of the earlier regulation that had set a ratio of helpers to journeymen and, thus, allowing for an open-ended interpretation.[57] The rule was to be effective June 26, 1992.[58]

This action by the Department, observed the *Daily Labor Report*, was "a major blow to building trades unions." Conversely, it could be viewed as a victory for industry critics of the act, though such groups as the Associated Builders and Contractors "had favored a more sweeping use of helpers."[59]

Congressional Interest Continues

Notwithstanding the decision of the Department to implement the helper regulation during the summer of 1992, such implementation remained in abeyance. Both within the Congress and in the broader policy community, debate continued concerning the wisdom of the helper regulation and its various effects: in terms of manpower utilization, and in terms of labor, administrative and project costs.[60]

Legislative Initiatives of the 103rd Congress

Major revision or repeal of the Davis-Bacon Act through legislation, though urged by critics of the statute, had not proven a viable option. Reform through the rulemaking process offered what may have seemed, initially, a more likely approach.

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[55] *DLR*, April 22, 1992, pp. A5-A7, E1-E5.

[56] Building & Construction Trades Department, *AFL-CIO v. Martin*, 961 F.2d 269, 277 (D.C. Cir., 1992).

[57] *DLR*, June 26, 1992, pp. A3-A4.

[58] *Federal Register*, June 26, 1992, p. 28776.

[59] *DLR*, June 26, 1992, pp. A3-A4.

[60] *Federal Register*, November 5, 1993, pp. 58954-58955; and January 7, 1994, pp. 1029-1031.

Rulemaking, however, did not offer a permanent solution; for which one Administration might effect through the rulemaking process, another of a different persuasion might reverse.

As early as September 1982, Senator Nickles had introduced legislation which, among its other provisions, would have stricken the reference to laborers and mechanics in the act and replaced it with the phrase: "laborers, mechanics, helpers, or any combination thereof" and by adding the classification of "helper" to the other classifications of workers throughout the act.[61] Although the Nickles proposal was not adopted, other efforts to codify the Davis-Bacon regulations followed (without success) — as did efforts to prevent implementation of that portion of the regulation dealing with helpers.

The Nickles/Craig Objection. The helper issue was back before the Congress during the fall of 1993. During consideration of H.R. 2518 (the "Department of Labor ... Appropriations Act of 1994"), Senator Nickles, with Senator Craig, proposed deletion of committee language blocking implementation of the DOL-proposed regulations permitting the use of helpers on Davis-Bacon projects.

Senator Nickles affirmed that employment of helpers on federal projects "will save the federal government nearly $600 million a year on labor construction costs." Restricting the use of helpers would "waste billions of dollars of taxpayer money and deny the opportunity for hundreds of thousands of Americans" to find work in construction. He estimated the employment loss of not implementing the regulations at "over 250,000 jobs."[62]

Senator Harkin opposed the Nickles/Craig proposal, recalling that the helper regulations were already a decade old. To delay their implementation for one year would allow the new Clinton Administration time to evaluate them. He protested that the helper regulations, as drawn, would have "a disproportionately high impact upon employment of minority workers" and an adverse impact for apprentice training programs. "These minority and female laborers will face an immediate reduction in employment or they will be reclassed [sic.] as helpers by the contractors who seek to remain competitive on federal construction, again, with an accompanying reduction in wages and fringe benefits." Finally, the Senator from Iowa (Mr. Harkin) disputed that $600 million in savings would result from implementation of the helper regulation.[63]

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[61] *Congressional Record*, September 17, 1982, p. S11738.

[62] *Congressional Record*, September 27, 1993, pp. S12530-S12533. Both estimates were attributed to the Congressional Budget Office.

[63] *Congressional Record*, September 27, 1993, pp. S12533-S12534.

By a vote of 60 yeas to 39 nays, the Nickles/Craig objection was set aside and the committee's amendment (to suspend implementation of DOL's helper regulations for one year) was passed instead.[64]

The DeLay Amendment. The following spring when DOL funding was again under consideration, the Davis-Bacon helper issue reappeared. On June 21, 1994, the House Appropriations Committee defeated a proposal by Representative DeLay that would have removed the helper funding restraint from a pending DOL appropriations measure (H.R. 4606).[65] On June 28, during floor debate on H.R. 4606, Representative DeLay urged that "this onerous provision" (the restrictive language) be deleted so that the helper regulation could go into effect. He suggested that implementation of the Rule would produce less costly public construction, open up more employment opportunities, and help the small, local contractors that "it [was] intended to help."[66]

Conversely, Representative William Ford declared that the Davis-Bacon requirement prevents "wages and benefits in local communities" from being undermined, ensures "quality construction" and "saves money in the long run." Representative Ford stated that implementation of the regulation "would allow contractors to shift work from highly productive journeymen to lower stilled and lower paid helpers." This would "undermine apprenticeship training programs," he argued, "because contractors would substitute helpers for apprentices. Both of these practices run contrary to the goal of creating high skilled, high paying jobs in the Nation instead of low skilled dead end work." Finally, Representative Ford noted that the Department had advised him of its intention "to issue revised helpers regulations within the upcoming fiscal year." The appropriations language, he stated, "will allow the conclusion of the administrative process" and he urged that the DeLay amendment be defeated.[67]

Following a review of the issues, the DeLay amendment was defeated by a voice vote. The language prohibiting implementation of the helper regulations was retained in the bill.[68]

Legislative Initiatives of the 104th Congress

Through the years, Congress had sought to modify the Davis-Bacon Act through amendments to program legislation and through the appropriations process, as well as through free standing legislation — or, simply, to repeal the statute. That pattern continued through the 104th Congress; though, at least during the first session, emphasis seemed to focus upon the latter course: repeal.

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[64] *Congressional Record*, September 28, 1993, p. S12599.

[65] *DLR*, June 22, 1994, pp. A2-A3.

[66] *Congressional Record*, June 28, 1994, pp. H5276-H5277.

[67] *Congressional Record*, June 28, 1994, p. H5277.

[68] Ibid., p. H5281.

On January 4, 1995, Senator Kassebaum introduced S. 141, calling for repeal of Davis-Bacon and of the related Copeland "anti-kickback" Act. The bill was referred to the Committee on Labor and Human Resources of which the Senator was Chair. On March 29, 1995, following a hearing, the Committee, dividing along party lines, voted to report the measure.[69] Meanwhile, roughly parallel action was taking place in the House. On January 13, 1995, Representative Ballenger had introduced H.R. 500, also providing for repeal of the Davis-Bacon and Copeland Acts. Referred to the Subcommittee on Workforce Protections chaired by Representative Ballenger, it received a mixed reception. On March 2, 1995, the Subcommittee voted, again along party lines, to report the measure to the full Committee on Economic and Educational Opportunities.[70]

During the summer and fall of 1995, as the repeal legislation moved toward floor consideration, two additional measures were introduced: S. 1183 (Hatfield) and H.R. 2472 (Weldon). The Hatfield/Weldon bills were regarded by their sponsors as a compromise, based on the premise that "reform, rather than repeal" of Davis-Bacon was more appropriate.[71] Representative Weldon contended that to repeal Davis-Bacon "would be a disaster for thousands of skilled construction workers and their families."[72]

The Hatfield and Weldon bills were comprehensive revisions of the Davis-Bacon Act. Each contained the following language dealing with helpers.

> HELPERS. — A helper who is employed under a contract subject to subsection (a) may be paid less than the rate required by such subsection if —
>
> (A) the helper is employed in a classification of helpers the use of which prevails in the area in which the helper is employed;
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> (B) the scope of the duties of the helper is defined and is separate and distinct from the duties of either a laborer or a mechanic; and

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[69] U.S. Congress, Senate Committee on Labor and Human Resources, *Repeal of the Davis-Bacon Act*, report to accompany S. 141, S.Rept. No. 104-80, 104th Cong., 1st sess. (Washington, GPO, 1995), 24 p.

[70] On February 15, 1995, Representative Clay, Ranking Member of the full Committee on Economic and Educational Opportunities, had introduced H.R. 967, a bill which he stated "updates and modernizes several provisions of the Davis-Bacon Act." *Congressional Record*, February 16, 1995, p. E366.

[71] See *Congressional Record*, August 11, 1995, pp. S12372-12374.

[72] Curt Weldon, "Reforming Davis-Bacon the Right Way," *The Laborer*, January/February 1996, p. 23.

(C) the helper is not used as an informal apprentice or trainee.[73]

The Hatfield/Weldon bills, had they been approved, would not appear to have resolved the technical issues involved in the helper question. For example: *A classification of helpers* might be a single grouping of workers, compensated at a single rate, or, separate sub-categories for carpenter's helper, electrician's helper, etc., potentially compensated at different rates. The term *prevails* remained undefined. And, unlike the Reagan regulations, no ratio of helpers to journeymen was established. These issues, with others, might have been addressed through the rulemaking process; but that, in turn, could have led to yet another round of court challenges.

When the 104th Congress adjourned, no action had been taken on the Hatfield/Weldon legislation — and no further action on the earlier Kassebaum and Ballenger bills.

The Labor Department Reconsiders

In November 1993, the Department, under mandate from Congress, had suspended the helper regulation.[74] The spending prohibition, through a series of legislative actions, continued until the middle of fiscal 1996, but "no such prohibition" was imposed during the latter half of fiscal 1996 nor for fiscal 1997.[75]

The Suspension Continues (August 1996)

In June 1996, noting that "here is at present no longer any statutory obstacle to enforcement of the revised [helper] regulations," the Associated Builders and Contractors (ABC) brought suit in federal court to require the Department to enforce the regulations. ABC President Gary Hess stated that "the exclusion of helpers has cost the American taxpayer more than $500 million per year." He explained: "All we're trying to do is to bring public construction practices in line with those of the vast majority of the industry."[76]

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[73] In August 1981, DOL had explained, that it "recognized a helper classification in some areas under certain well-defined situations" — that is ... where (1) it constitutes a separate and distinct class of workers (i.e., the scope of duties of the helper is defined and can be differentiated from journeyman duties); (2) the particular helper classification prevails in the area; and (3) the helper is not used as an informal apprentice or trainee." See DLR, August 14, 1981, p. A3.

[74] *Federal Register*, November 5, 1993, pp. 58954-58955.

[75] *Federal Register*, December 30, 1996, p. 68642.

[76] *DLR*, June 28, 1996, p. A7. Hess also expressed the opinion that Secretary Robert Reich's failure to implement the helper regulations "can best be explained by his close relationship with the AFL-CIO and organized labor's fierce opposition to helpers."

The Department, it appears, responded quickly. A month later (in late July 1996), Assistant Secretary of Labor Bernard Anderson affirmed that the current helper regulation (approved, but still suspended) "simply is non-administrable." Anderson explained that the distinction between helpers and other workers in terms of their role and duties was insufficiently clear, and that the Department had no intention of implementing the regulation in its current form.[77]

The policy voiced by Anderson was set forth in more detail a few days later in the *Federal Register* of August 2, 1996. The DOL observed: "Fourteen years have passed since the Department first promulgated the [helper] regulation, and more than four years have passed since the Department last attempted to put a revised version of that regulation in effect. During the extended period of time in which the regulation was suspended," DOL noted, "additional information has become available which warrants review of the suspended rule." The rule had originally been crafted, in part, the Department explained, in the belief that "it would result in a construction workforce on federal construction projects that more closely mirrored the private construction workforce's widespread use of helpers and, at the same time, effect significant cost savings in federal construction costs." The *Federal Register* notice continued:

> ... data developed from the Department's experience implementing the helper regulation (which was not available during the rulemaking proceedings and upon which the public has had no opportunity to comment) reveals that the use of helpers might not be as widespread as previously thought.

The Department expressed concern "that the helper regulation may create an unwarranted potential for abuse of the helper classification to justify payment of wages which are less than the prevailing wage in the area." It also expressed concern "about the possible impact of the helper regulations on formal apprenticeship and training programs." For these and other reasons (including "the obvious Congressional controversy over the regulation"), DOL concluded "that the basis and effect of the semi-skilled helper regulation should be reexamined."[78]

DOL recalled that there had been no public comment upon the helper regulation as revised to meet court requirements. Further, it suggested, were the court-approved rule (implementation of which had been withheld by action of the Congress) to be given effect on an interim basis during a further review of the issue by the Department, such action "would create unwarranted disruption and uncertainty for both federal agencies and the contracting community." Therefore, DOL determined that the suspension would continue "while the Department engages in substantive rulemaking concerning the helper regulations."[79] The Department requested comment from the public.

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[77] *DLR*, July 29, 1996, pp. A9-A10.

[78] *Federal Register*, August 2, 1996, p. 40367.

[79] Ibid., p. 40367. See also *DLR* August 1, 1996, pp. A2-A3.

A *Final* Suspension (December 1996)?

Nearly five months passed during which the Department received and evaluated comments solicited in its August *Federal Register* notice. Some 47 submissions were received from interested industry and trade union groups, and others. Few of the comments, the Department noted, addressed the issue immediately at hand: namely, a continuing interim suspension of the helper rule. Most dealt with the substantive issues embodied in the rule itself.

On the question of the interim suspension, the Building and Construction Trades Department, AFL-CIO, concurred in the view of the Department: that the interim suspension was "the most prudent and responsible action under the circumstances." The Associated General Contractors (AGC) disagreed, arguing that implementation could be effected relatively quickly (perhaps, 60 days) and with little disruption and, further, that the reevaluation process ought not to be prolonged. DOL, at some length, disputed the AGC contention.

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

The Department noted further: "Conforming changes in government procurement regulations ... and standard contract forms would also be needed, a process which has sometimes taken several months." But, that aside, DOL suggested certain other factors.

> ... a contractor can use helpers in accordance with the helper regulations only if (1) the contract contains a wage determination with a helper classification and rate or (2) the contractor awarded the contract requests that a helper classification be added to the wage determination and the Department determines that the use of the helper classification is a prevailing practice in the area in which the work will be performed. The time necessary for the Department to perform wage determination and prevailing practice surveys would further lengthen the period before contractors could lawfully pay their workers at helper rates.
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> Furthermore, it continues to be the Department's intention to complete a substantive rulemaking action within approximately one year. Because of the substantial length of time it would take to implement the helper regulations, any saving that might be gained from implementation of the helper regulations during the rulemaking period would be minimal, particularly in light of the disruption and uncertainty which would be caused by implementing the rule while the Department is engaged in rulemaking.

Finally, the Department concluded that the comments had "provided no information which would change ... [its] belief" that the suspension of the helper regulation should continue.[80]

On the broader issue of the use of helpers, *per se*, the Department affirmed that it had "not decided to repeal the helper regulations; nor has the Department made a final decision to amend the regulations. The Department has," it stated, "... concluded that the basis and effect of the semi-skilled helper regulations should be reexamined." It noted that, in due course, it would decide if any changes in the existing rule were in order; and, if so, it would then publish a proposed rule for public comment on its substance. Meanwhile, however, the Department appeared to have reached several tentative conclusions. New data, it noted, "suggest that the use of helpers may not be as widespread as initially thought." Further, the Department expressed its concern "that administration of the helper regulation and the policing of potential abuse of the helper classification, may be more difficult than initially anticipated." And, finally, the Department expressed concern "about the potential impact of the [helper] regulation on formal apprenticeship and training programs."[81]

While the Department expressed its willingness to explore further the extent of private sector helper utilization and related costs/savings impacts, the potential for abuse appeared to present a larger problem. DOL explained:

> The Department notes that the helper classification as currently defined is unique in being based on subjective standards such as skill level and supervision, rather than an objective test of work performed. The Department is concerned that such a subjective standard may be more difficult to enforce.[82]

The Department observed that the helper classification, alone under Davis-Bacon, is defined "with duties that are specifically intended to overlap with the duties performed by other classifications," thus rendering enforcement and administration, likely, more difficult than the authors of the various versions of the helper regulation anticipated.[83]

Critics of the regulation (then suspended) expressed concern about its potential impact for apprenticeship and training. "They claim that the ability to pay apprentices a wage lower than that paid to journeymen is a significant incentive for contractors to participate in formal training programs. They also claim," the Department noted, "that the availability of lower paid helpers would cause contractors to withdraw from such programs and would threaten private funding for apprenticeship and training." DOL, summarizing this perspective, observed that this could pose a threat "both to industry, which would face shortages of skilled, trained labor, and to the individual workers who would find themselves in dead-end, low skilled jobs without adequate opportunity to increase their skills." At the same time,

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[80] *Federal Register*, December 30, 1996, pp. 68641-68643.

[81] Ibid., p. 68644.

[82] Ibid., p. 68645.

[83] Ibid., p. 68646.

the Department also observed that both the ABC and the AGC "believe such concerns are unfounded." Some in industry, DOL pointed out, regard helpers basically as "entry-level" workers. The use of the helper classification, it was suggested, would allow such workers "... to gain experience; provide the semi-skilled with an opportunity to gain experience; and provide the unskilled with a first step to higher paying jobs." Some, it was noted, viewed the helper option as "a pre-apprentice opportunity for unskilled workers to acquire the skills necessary to enter an apprenticeship program."

These divergent opinions seemed to confirm the Department's judgment that the helper/apprentice relationship "is not fully understood, and should be revisited through further rulemaking." Therefore, the helper regulation is suspended "until the Department either (1) issues a final rule amending (and superseding) the suspended helper regulations; or (2) determines that no further rulemaking is appropriate, and issues a final rule reinstating the suspended regulations."[84]

Indefinite Suspension Confirmed by the Court

During the summer of 1996, the Associated Builders and Contractors (ABC) filed suit to force the DOL to implement the helper regulations. A year later, in July 1997, the U.S. District Court for the District of Columbia ruled that the Department had acted properly in instituting an indefinite suspension of the helper regulations.

In summary, Judge Stanley Sporkin observed that the Department, in the fall of 1993, had "good cause" for its suspension of the regulations, given the prohibition by the Congress of any expenditure for their implementation. That, he suggested, was not in dispute. But, recognizing the "good cause" for the Department's action in 1993, he noted, "the next question is whether the suspension of these regulations remained valid once the emergency — the congressional prohibition — expired on April 26, 1996."

The plaintiffs (ABC) argued that DOL was "compelled" to implement the regulations once the spending ban had expired. Judge Sporkin disagreed, holding that, rather than being bound by an automatic requirement for implementation of the regulations, the Department was free to review the regulations to ascertain whether any changes or updating would be appropriate. "Two-and-a-half years [roughly, late 1993 to spring of 1996] passed between the suspension of the revised helper regulations and the expiration of the congressional ban. During this time," Judge Sporkin noted, "the defendants [DOL] had collected new data on the prevailing employment of helpers" which, the Department argued, "seriously undermined a key assumption underlying the development of the revised helper regulations, thereby creating substantial doubt about whether these regulations would result in the previously-projected cost-savings on federal construction projects." He explained:

> The Department was not required to ignore changed circumstances, new concerns, or new information that it discovered in the two-and-a-half years since the regulations were last implemented, especially when this new information

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[84] Ibid.

> suggests that one of the fundamental bases of the revised helper regulations (the widespread use of helpers) no longer holds true. Therefore, assuming a rational basis for the Department's findings, not only was it committed to the Department's discretion to seek an indefinite postponement of the effective date, it arguably was its duty to [do] so.

Judge Sporkin pointed out that the Department ought not to have waited three months between the expiration of the congressional spending prohibition and the publication of notice of intent indefinitely to suspend implementation of the regulations; but, since the Department had ultimately published such a notice, the "claim attacking that delay is now moot."

Judge Sporkin reviewed the contentions of each side, noting that while the plaintiffs were clearly opposed to the actions taken by the Department, they had tended to focus upon the substance of the helper regulations, *per se*, rather than the procedural issues that were before the court. They had offered, Judge Sporkin observed, "little evidence" that the delays on the part of DOL were "arbitrary and capricious." Instead, he noted, they "argue that none of the reasons cited by the Department justify such re-examination" of the helper regulations. On the contrary, the court found that the rationale offered by the Department was, on its face, reasonable. Even the assertion that implementation of the helper regulations "would reduce the costs of government construction by more than $600 million" was called into question by more recent data and altered assumptions, the court found. Ultimately, Judge Sporkin ruled in behalf of the DOL. With the concurrence of the courts, the helper regulation was indefinitely suspended.[85]

Proposed Restoration of the Pre-1980s Standard?

In the *Federal Register* for April 9, 1999, DOL published notice of a new proposed rule on the use of helpers on Davis-Bacon projects. The Wage and Hour Division affirmed that the rule would re-institute "its longstanding policy" on the helper issue[86] and would reflect "current" practice.[87] It would allow the use of helpers on covered projects only where "(1) the duties of the helper are clearly defined and distinct from those of the journeyman or laborers, (2) the use of such helpers is an established prevailing practice in the area, and (3) the term 'helper' is not synonymous with 'trainee' in an informal training program."[88]

The notice reviewed the various Departmental initiatives: the proposals and counter-proposals, the fate of each before the courts, and the restraints imposed by the Congress upon implementation of a new helper rule — even when sustained by the courts. It recalled that, in crafting the helper proposals of the early 1980s, DOL

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[85] *Associated Builders & Contractors, Inc. v. Herman* (1997 WL 525268 (D.D.C. 1997)).

[86] *Federal Register,* April 9, 1999, p. 17442.

[87] Ibid., p. 17455.

[88] Ibid., p. 17442. The notice, signed by Assistant Secretary for Employment Standards, Bernard E. Anderson, was dated April 1, 1999.

had operated on the expectation that the new policy (a) would more closely reflect private sector industry practice, (b) that it would "effect significant savings in federal construction costs," and (c) that it would "provide additional job and training opportunities to unskilled workers, in particular women and minorities." *However*, after nearly 2 decades of hearings and analysis, the agency had come to a quite different set of conclusions: namely, (a) that the suspended rule (the result of the various earlier proposals) "likely ... cannot be enforced effectively," (b) that the use of helpers in the private sector is not so widespread as had earlier been assumed, and (c) that the suspended rule, "if fully implemented, could have a negative impact on apprenticeship and training."[89]

A New Perspective

The assumptions and findings of the DOL under the Clinton Administration appear, in some measure, different from those of the Reagan and Bush Administrations. Thus, the agency that had developed the suspended regulation and that had defended it, variously, through a decade and a half, now found little in it with which to concur. Essentially, it would revert to pre-1980s practice.

Difficult to Administer. The suspended regulation, DOL now concluded, posed "significant administrative difficulties" and "cannot be effectively enforced in a manner consistent with the goals of the statute." The Department critiqued the definition of "helper" used in the earlier rule (traditionally, a semi-skilled worker) as "internally inconsistent" and not distinguishable from that of a general laborer. It explained:

> Wage and Hour has traditionally identified and differentiated among job classifications on the basis of the tasks performed by each classification. Among the issues Wage and Hour struggled with in trying to develop enforcement guidelines were: (1) What it means to be semi-skilled; (2) how to identify the line between a semi-skilled and skilled journeyworkers; (3) whether at some point a semi-skilled helper could acquire sufficient skills to qualify as a skilled worker, and how to determine when that had occurred; (4) whether a skilled worker could accept a position as a semi-skilled helper — and therefore be paid the lower helper wage rate — without violating the regulation or the intent of the Act; and (5) whether hiring as a semi-skilled helper a skilled worker who failed to disclose his skill level would violate the regulations or the Act.

One by one, the Department dissected the provisions of the suspended rule. "Supervision by a journeyworker is not a practical standard for distinguishing semi-skilled helpers from others on the worksite, as even laborers and journeylevel construction workers may work under the 'direction and supervision' of other journeyworkers," DOL argued. "The definition does not indicate the nature or amount of direction and supervision that helpers must receive to distinguish them from others on the worksite."

The definition in the suspended rule, it contended, "provides little meaningful guidance for distinguishing between a 'semi-skilled helper' who used the tools of the

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[89] *Federal Register*, April 9, 1999, p. 17444.

trade, and a journeyworker with little experience." That it allowed "significant overlap between the duties of helpers and those of laborers increases the difficulty of identifying helpers as a distinct classification." This overlap, it suggested, "increases the likelihood that helpers will displace laborers, or that laborers will be misclassified as helpers." Further, it stated, "the term 'helper' has multiple, quite different meanings within the construction industry."

The Department pointed to the "subjectivity" of the helper definition in the suspended rule and questioned whether "any regulatory definition of helpers" would "adequately reflect the actual and varied practice in the construction industry as a whole or even in any particular area." It concluded that "conducting a meaningful wage determination process concerning helpers" would be difficult, given that "contractors responding to area wage surveys would ascribe very different meanings to the term 'helpers.'"[90]

Use of *Helpers* Not Widespread. While the suspended rule had been based upon the assumption that the use of helpers was widespread, the Department now concluded that the assumption had been in error or, at least, overstated. During the later stages of litigation, prior to implementation of the rule, survey data convinced the Department that such use was "substantially lower" than it had thought. Here again, the problem of definition arose. Thus, survey data may be problematic.[91]

A Negative Impact for Apprentice Training. Through the years, the Department has assumed that "formal structured training programs are more effective than informal on-the-job training alone." It explained: "Workers enrolled in formal apprenticeship training programs are more likely to achieve journeylevel status, and to do so more quickly, than workers trained informally, who may become stuck in low-paying jobs. Apprenticeship programs," it added, "are also more likely to produce better skilled, more productive and safety-conscious workers."

One objective of Departmental policy, as it has considered Davis-Bacon implementation, has been "to encourage training for unskilled and semi-skilled workers, including in particular, women and minorities." By permitting, under that act, lower rates of pay in structured programs for training apprentices and trainees,[92] employers are encouraged to enter into such programs. "Wage and Hour believes that the suspended helper regulations could undermine effective training in the industry," it reasoned, "if contractors use helpers, who may never become

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[90] Ibid., pp. 17444-17445. Later, the Department stated that it would be necessary to develop "clear definitions of the duties or tasks that helpers to each journeylevel craft worker would be allowed to perform." This would involve "extensive occupational analysis and further rulemaking to promulgate helpers duties descriptions." This, the Department pointed out, "would result in uniform, nationwide definitions, departing from the principle that classifications are determined based on local area practice." See p. 17448. It could also involve substantial monitoring to enforce compliance.

[91] *Federal Register*, April 9, 1999, pp. 17445-17446.

[92] Here, the concept of trainee is of one engaged in a structured program, not simply an unskilled or low-skilled worker who follows a more highly trained worker and who may, informally, acquire some knowledge.

journeylevel workers, in lieu of apprentices and trainees participating in formal programs."[93]

Call for Comment

The announcement for the proposed new helper rule provided a comment period of two months: until June 8, 1999. No target date was set for publication of a final rule. Review of submissions commenced — potentially, an extended process; but, because the new rule would be a confirmation of current practice, timing may not have been critical.

Legislative Interest Continues: the 105th and the 106th

Late in the 105th Congress, Representative Norwood introduced legislation (H.R. 4546) to establish by statute that "helpers of laborers and mechanics" be recognized as a separate classification of worker under the Davis-Bacon Act and "paid the prevailing wage" of helpers on similar projects in the locality. No action was taken on the Norwood bill.

Early in the 106th Congress, Representative Norwood reintroduced the proposal (H.R. 1012). It defined "helper" as "a semi-skilled worker (other than a skilled journeyman mechanic)" who:

> (1) works under the direction of and assists a journeyman;
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> (2) under the journeyman's direction and supervision, performs a variety of duties to assist the journeyman such as preparing, carrying, and furnishing materials, tools, equipment, and supplies, maintaining them in order, cleaning and preparing work areas, lifting, positioning, and holding materials or tools, and other related semi-skilled tasks as directed by the journeyman; and
>
> (3) may use tools of the trade at and under the direction and supervision of the journeyman.

Introduced March 4, 1999, the bill was referred to the Committee on Education and the Workforce and, subsequently, to the Subcommittee on Workforce Protections. No action was taken on the Norwood proposal.

In presenting it proposed rule of April 1999, however, DOL (without referring directly to H.R. 1012) reviewed the approach taken in the legislation. It concluded that language such as that represented by the proposed legislation, was imprecise and would result in significant administrative burdens. (See discussion above.)

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[93] *Federal Register*, April 9, 1999, p. 17446.

A Final Rule on *Helpers* Goes into Effect

Under date of November 17, 2000, the DOL issued a final rule on the use of helpers on Davis-Bacon projects. In its opening summary of the new regulation, the Department affirmed that it was amending the regulations "to incorporate the Wage and Hour Division's longstanding policy" with respect to the recognition of helpers as a separate category of workers. The regulation took effect on January 19, 2001, during the closing hours of the Clinton Administration.[94]

DOL Assessment of the Suspended Rule

In assessing comment on the proposed rule (returning to 1970s practice), the Department followed a pattern similar to that of prior years. And, with some detail, it explained why the regulations that it had proposed through the years (during previous Administrations) would not work in a satisfactory manner.

First. *DOL concluded that the suspended rule, with its definition of helpers, would be difficult to administer and enforce and insisted on a duties-based approach*. The BCTD of the AFL-CIO seems to have concurred; industry spokespersons, to have dissented. The latter reasoned that "the Department should be able to identify helper classes through area practice surveys as easily as it differentiates among the various trade classifications."[95]

The Department reasoned that a laborer or mechanic "is entitled to be paid the prevailing rate for the work performed according to the local area practice, and therefore, is classified based on the duties the worker performs." It continued:

> Because under the suspended definition, helpers may perform the duties of other classifications — both journeylevel workers and laborers — without any limitations other than that they be supervised by and assist a journeyworker, it would be extremely difficult for the Department to identify the work of a helper in any given area, both for enforcement and wage determination purposes."

Further, the Department affirmed, "the suspended rule would allow the duties of a helper to overlap with those of other classifications that prevail within the locality, possibly leading to the employment of helpers to perform the work of other classifications at lower wages." Thus, the suspended rule, it found, would have undermined the prevailing wage structure.[96]

Indicative of a change of policy within the Department, DOL pointed to the "vague, subjective criteria of its definition" of helper in the suspended rule that it had earlier proposed. The Department stated that it "does not believe it [DOL] could draw the line effectively between semi-skilled and skilled work, especially given that, in today's construction market, skilled craft workers may perform a whole range of

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[94] *Federal Register*, November 20, 2000, p. 69674.

[95] Ibid., p. 69677.

[96] Ibid., pp. 69677 and 69678.

duties from unskilled to semi-skilled to skilled, and laborers often perform what may be considered semi-skilled work as well." Even the element of supervision would not be helpful in this respect, the Department insisted. Laborers and journeyworkers, DOL stated, "like helpers under the suspended rule, also may work under the 'direction and supervision' of other journeyworkers." It described "supervision on a construction worksite" as "often an amorphous concept" and that it "does not lend itself to objective evaluation." Further, it stressed the "definitional ambiguities" of the suspended rule.[97]

DOL expressed concern that, under the suspended rule, the Wage and Hour Administration "would not be able to conduct a meaningful wage determination process using the suspended definition of helpers in light of the likelihood that contractors responding to area wage surveys would ascribe very different meanings to the term 'helpers.'"[98]

The impact of the suspended rule was raised by the Mercatus Center at George Mason University. While it acknowledged the difficulties the rule would pose with respect to enforcement and administration, it cautioned "that they must be balanced against the productivity and cost-saving benefits" the suspended rule would provide. The Department countered that although "cost-saving features are certainly desirable, they cannot be determinative" where a regulation "cannot be fairly and effectively administered in a manner consistent with the goals of the statute" — that is, "to protect prevailing wages for the corresponding classes of work performed." Further, DOL recalled that the purpose of the Davis-Bacon Act "was to set a floor on wages so that wages would not be reduced below the prevailing wage" in the locality of construction — not to secure the cheapest possible labor.[99]

Second. *DOL found (and argued) that helpers are used less widely than had been supposed*. The Department explained that, during its initial rulemaking process with respect to employment of helpers (during the Reagan Administration), it had been "projected that the use of helpers would be found to be a prevailing practice in from two-thirds to 100 percent of all craft classifications surveyed, except where collectively bargained rates were found to prevail and did not provide for a helper classification." With more recent experience, DOL found that this was not the case:

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[97] Ibid., pp. 69678-69679.

[98] Ibid., p. 69679. DOL summarized the dissenting view of business economist and Davis-Bacon critic Armand Thieblot. "Dr. Thieblot stated that surveying for helper rates presents no special difficulties since it is Wage and Hour's practice 'to accept the rates and job titles as submitted by the contractors who paid them, whatever those titles might be without analyzing job content...." It should be no more difficult, Dr. Thieblot stated (as summarized by DOL), "for Wage and Hour to determine if the job title 'mason's helper' prevails in a given area, than to determine if the job title 'mason's tender' prevails." The Department denied Thieblot's assertion, holding: "When faced with more than one name for the same type of work, Wage and Hour must determine whether the workers with the various job titles in question perform the same basic duties, in which case the data for such work will be combined for the purpose of determining the prevailing classification and issuing a single prevailing rate for the particular work performed."

[99] *Federal Register*, November 20, 2000, p. 69680.

"in only 69, or 3.9 percent of the 1763 classifications issued" was it found that the use of helpers prevailed. It went on to cite other estimates; and, while there was some variation in the statistics, the percentage of helpers estimated as employed in construction was extremely low. A BLS projection set the figure at 1.2%; others, marginally higher.

The issue would seem to have been impacted, in part, by the assumptions made about the structure of the construction industry and the manner in which such concepts as "widespread" and "prevailing" or "identifiable," etc., are defined. After a lengthy discussion of conflicting methodologies, the Department affirmed that it "continues to believe that helpers are not as widespread as it had previously assumed."[100]

Third. *The Department found that the suspended helper rule could have an adverse impact for formal apprenticeship and training programs.* DOL expressed its belief that "the suspended helper regulations could undermine effective training in the construction industry" if contractors were permitted to substitute low-wage helpers ("who may never become journeylevel workers") for more highly paid apprentices in formal structured programs under the Fitzgerald Act (the National Apprenticeship Act, 29 U.S.C. 50 *et seq*.).[101] The building trades unions argued (as summarized by DOL) that "contractors and subcontractors who participate in and provide financial support for formal apprenticeship and training programs would be placed at a competitive disadvantage *vis-a-vis* contractors using helpers" and that the use of helpers, thus, would undermine the apprentice training program. The unions also expressed concern, DOL noted, that "the suspended rule's failure to encourage formal craft training would eventually lead to a severe shortage of skilled craft workers in the industry." This contention was disputed by employers. Both the Associated Builders and Contractors and the Associated General Contractors "commented that there is no basis for the Department's concern." Various employer-oriented spokespersons suggested a preference for helpers over apprentices or, at least, that employment of helpers was a useful alternative.[102]

The Department, however, held "that formal structured training programs are more effective than informal on-the-job training alone." DOL, like the unions, expressed concern that "implementation of the suspended rule would discourage the

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[100] Ibid., pp. 69680-69683.

[101] Under the Fitzgerald Act, administered by DOL, persons entering a construction craft (or other fields), with DOL oversight and ultimate certification, become credentialed as journeyman craft workers. Outside of a formal apprenticeship program, however, trainees or informal apprentices/learners *may* be little more than low-wage general utility workers locked in dead-end jobs. (It is also true that many construction workers, absent a formal apprenticeship experience, do very well.)

[102] Ibid., pp. 69683-69684. As a recognized category of worker, enrolled in a formal DOL-supervised training program, apprentices can be paid a lower wage than skilled craftworkers — thus providing an incentive for contractors to hire and to train such persons. It might be noted that in a survey conducted by the Associated General Contractors (dated September 2000), it was reported that "skilled worker shortages confront all contractors through the country." See *DLR*, September 26, 2000, pp. A5-A6.

growth of such programs and result in the replacement of DBRA-covered [Davis-Bacon] projects of apprentices and trainees enrolled in formal programs, by helpers who," the Department stated, "could perform the same work as apprentices and trainees at a lower cost to the construction contractor and without any restrictions as to how helpers are used." It concluded that "the increased use of helpers under the suspended rule poses a significant risk that formal apprenticeship and training programs on DBRA-covered projects would be undermined."[103]

A Final Definition of *Helper*

After more than 2 decades of consideration, the definition of *helper* was restored, essentially, to its original meaning. The final rule (effective January 19, 2001), provides

> (4) A distinct classification of "helper" will be issued in wage determinations applicable to work performed on construction projects covered by the labor standards provisions of the Davis-Bacon and Related Acts only where:
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> (i) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;
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> (ii) The use of such helpers is an established prevailing practice in the area; and
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> (iii) The helper is not employed as a trainee in an informal training program. A "helper" classification will be added to wage determinations pursuant to 5.5(a)(1)(ii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

Legislative Interest During the New Century

At the beginning of the 21st century, the last outstanding rule from the Reagan Administration had been dealt with. However, interest in restructuring the regulation dealing with *helpers* continued in the Congress.

In the 107th Congress on May 23, 2001, Representative Norwood again introduced legislation dealing with the helper issue (the "Helpers Job Opportunity Act," H.R. 1972). No action was taken in the 107th Congress on the Norwood proposal.

On June 2, 2003 (the 108th Congress), Representative Marsha Blackburn (R-TN), with Representatives Norwood and Steve King (R-IA), introduced H.R. 2283: again, the "Helpers Job Opportunity Act." The proposal mandated that helpers "of laborers and mechanics shall be considered to be a separate classification" for Davis-Bacon purposes and "shall be paid the prevailing wage of helpers and laborers or

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[103] *Federal Register*, November 20, 2000, p. 69684.

mechanics employed on projects which are of a character similar" to the project in question in the locality of the construction work.

Under the Blackburn proposal, a "helper" was defined as "a semi-skilled worker (other than a skilled journeyman mechanic)" (a) who "works under the direction of and assists a journeyman" (b) who, "under the journeyman's direction and supervision," assists the journeyman in a series of specified tasks, and (c) who "may use tools of the trade at and under the direction and supervision of the journeyman." The bill was referred to the Committee on Education and the Workforce and, subsequently, to the Subcommittee on Workforce Protections, but no action was taken on the proposal.

On September 27, 2005 (the 109th Congress), Representative Blackburn, with Representative Norwood, reintroduced the "Helpers Job Opportunities Act" (H.R. 3907). The measure was assigned to the Committee on Education and the Workforce, and subsequently to the Subcommittee on Workforce Protections; but no action was taken on the measure. Thus far, the specific issue of *helpers* does not appear to have reemerged during the 110th Congress — though Davis-Bacon has frequently emerged.

Concluding Comment

The Davis-Bacon Act had been subjected to substantive review by the Congress in the early 1960s and has remained a focus of public policy debate since that time: frequently the subject of congressional hearings, reports from GAO, and expressions of concern by the parties directly at interest: contractors and the building trades unions. The only major change in the act, however, that this oversight produced was the expansion of the concept of prevailing wage to include a fringe benefit component (1964).

A new round of review of Davis-Bacon occurred in the late 1970s during the Carter Administration, resulting in rulemaking, a process that continued to the final days of the Carter Presidency and carried over into the Reagan Administration. The Carter regulations were withdrawn and, in 1981, new regulations were proposed. These dealt, in part, with the issue of helpers. Litigation followed. Portions of the proposed rule won court approval and, through the years, were implemented. The helper provision won such approval only in 1992, a decade after it was first proposed. At that point, Congress intervened and, through the appropriations process, blocked enforcement of the helper regulation until the middle of 1996.

By that time, DOL was having second thoughts about the use of helpers on Davis-Bacon construction. The regulation, now, was simply not enforced. Indeed, DOL declared the regulation to be "non-administrable" and suspended it for further review. When the Associated Builders and Contractors sought a court order for enforcement of the regulation (summer 1996), the Department reopened the rulemaking process and, in December 1996, suspended implementation of the regulation until further notice. In so doing, DOL reverted to the *status quo* prior to the Reagan Administration: that is, to the late 1970s.

In issuing its final (December 1996) suspension of the helper regulation, the Department indicated that new evidence had been developed that would make it advisable for the agency to reassess the basis upon which the original rule (and its subsequent amended editions) had been issued. During July 1997, the United States District Court for the District of Columbia ruled that the Department had acted appropriately in its withdrawal of the helper regulation. Then, on April 9, 1999, the Department published in the *Federal Register* notice of a new proposed rule. Essentially, the new rule would reinstate the Department's longstanding practice with respect to the use of helpers. A comment period was set, expiring after June 8, 1999. On November 20, 2000, the Department published its final helper rule which took effect on January 19, 2001, just hours before the end of the Clinton Administration.

To this point, the process of defining appropriate wage treatment of helpers employed on Davis-Bacon projects had consumed over 2 decades. Through that period, the regulation had never fully been implemented, though through a brief period in the mid-1990s, implementation was allowed. Between 1981 and 1993, the Department defended, at times vigorously, different versions of its proposed administrative reforms. Then, after 1993, it began to reassess its position, becoming increasingly critical of its own earlier efforts. With publication of its new rule in April 1999, the Department would revert to its longstanding (1970s) practice where helpers were concerned. With the release of a final rule in November 2000, DOL would largely repudiate its helper policy of the 1980s and 1990s — and the documentation upon which it was based.

Congress had followed the administrative proposals dealing with the "helper" issue. Variously, it had entered into the debate and, at times, had endorsed the new helper classification. In the 109th Congress, legislation (H.R. 3907) was introduced by Representative Blackburn, with Representative Norwood, once again proposing recognition of a separate "helper" classification on Davis-Bacon projects. However, the Blackburn-Norwood bill died at the close of the 109th Congress. To date, the issue has not reemerged in the 110th Congress.