



PRIVILEGED AND CONFIDENTIAL DRAFT 8/25/19

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Via <http://www.regulations.gov>

Ms. Adele Gagliardi, Administrator
Office of Policy Development and Research
U.S. Department of Labor
200 Constitution Ave. NW, Room N-5641
Washington, DC 20210

**RE: Regulatory Information Number—RIN 1205-AB85
Comments on the Proposed Construction Exemption from Industry-Recognized Apprenticeship Programs**

Dear Ms. Gagliardi:

On behalf of The Association of Union Constructors (TAUC), please accept these comments regarding the Department of Labor’s Notice of Proposed Rulemaking (NPRM) RIN 1205-AB85.

TAUC is the premier national trade association for the union construction and maintenance industry in the United States. We represent more than 2,000 members, including union contractor companies, local union contractor associations, and vendors in the industrial maintenance and construction fields. TAUC contractors employ skilled union craft personnel on construction and industrial maintenance projects that build and maintain the most critical elements of our nation's industrial infrastructure, including, for example, roads, bridges, hospitals, schools, and water and energy systems. They perform critical upgrades and regular maintenance at power plants, steel mills and manufacturing facilities across the country, reducing downtime and ensuring that businesses have the electricity, raw materials and state-of-the-art technology necessary to keep pace in a rapidly moving economy. These men and women are among the most thoroughly trained and highly skilled construction industry professionals in the world. Their proficiency is directly attributable to rigorous joint labor-management registered apprenticeship programs operated in compliance with DOL’s current apprenticeship regulations and funded entirely by TAUC members and their labor affiliates.

TAUC has a keen interest in preserving the integrity of these long-established programs, which are recognized to be “a proven workforce development model for recruiting, developing, and retaining highly-productive employees.”¹ We support DOL’s decision to exempt the construction industry from the newly created system of Industry-Recognized Apprenticeship Programs (what DOL calls “Industry Programs”), and we strongly urge that the exemption be made permanent. We also request that DOL

¹ See *Apprenticeship in Construction*, <https://apprenticeshipusa.workforcegps.org/resources/2017/08/17/17/36/Apprenticeship-in-Construction> (website sponsored by the DOL Employment and Training Administration).

adopt a definition of “construction” that includes industrial maintenance, an integral component of the construction industry.

I. SUMMARY OF RECOMMENDATIONS

- The final rulemaking should make the construction exemption permanent.
- Construction should be defined to include industrial maintenance.
- If the exemption is not made permanent, the final rulemaking should preclude recognition of Industry Program participants as apprentices for purposes of meeting Davis-Bacon Act wage requirements.

II. DISCUSSION

A. The Construction Exemption Is Amply Justified.

TAUC applauds DOL’s decision to prohibit recognition of Industry Programs in the construction industry. The purpose of Industry Programs, according to Executive Order 13801 and the final report of the Task Force on Apprenticeship Expansion (Task Force), is to expand apprenticeship opportunities in sectors where registered programs are not currently flourishing. As DOL recognizes, Industry Programs would serve no purpose in the construction industry, which already has a robust system of registered apprenticeship programs. These programs offer state-of-the-art training that leads to a portable, nationally recognized credential. They create a continuous supply of skilled craft workers and enable contractors to deliver the safest, highest-quality, most cost-effective services available to their customers, all at no expense to the U.S. taxpayer. There is simply no compelling reason to depart from this tried-and-true system.

Put differently, as applied to the construction industry, Industry Programs are a solution in search of a problem. Opponents of DOL’s construction exemption contend that the existing apprenticeship regulations thwart creation of new apprenticeships in the industry because the regulations are burdensome. But this argument is advanced chiefly by industry participants that have not made the same investment of time and resources as TAUC’s member contractors to develop and finance world-class training programs, and the evidence does not bear out their concerns.

The reality is that union construction contractors and their labor affiliates currently offer 1,600 training centers throughout the United States and invest over \$1.5 billion annually in training U.S. apprentices and journey workers. Since 2016, the industry’s joint labor-management apprenticeship programs have registered on average 60,000 individual apprentices annually.² Indeed, as DOL is aware, the construction industry’s share of active apprentices dwarfs that of every other industry in the nation, including the military.³ Whatever impediments may exist in other sectors to the success of registered apprenticeship programs, those impediments do not exist in the construction sector.

What is more, it is the rigor of DOL’s existing apprenticeship regulations that ensures the effectiveness of the current system. Construction apprenticeships typically last 4 or 5 years and involve thousands of hours of on-the-job training in addition to classroom instruction. This comprehensive training is necessitated by the inherently dangerous environments in which construction professionals work. These workers are

² See *NABTU Apprenticeship Programs*, https://nabtu.org/wp-content/uploads/2019/02/NABTU_ApprenticeshipPrograms.pdf.

³ See DOL Employment and Training Administration, *Apprenticeship Data and Statistics*, https://doleta.gov/oa/data_statistics.cfm.

regularly exposed to serious hazards such as falling from rooftops, being struck by heavy equipment, electrocution, and exposure to extreme temperatures and toxic substances.⁴ In addition, when performing critical maintenance tasks, it's not always possible to shut down the facility or halt other crucial work. In such situations, these workers must perform their maintenance duties on fully active construction sites and manufacturing facilities – yet another reason why first-class training is so important. Under the continued oversight of DOL and state registration agencies, the construction industry's registered programs adhere to time-tested, stringent safety standards, which protect the well-being of workers and every member of the public in the vicinity of their projects.

The registered programs protect workers in other important ways as well. These programs are required by the existing apprenticeship regulations to establish apprentice-to-journeyworker ratios and to pay progressive wages that increase as a worker's skill increases.⁵ Completion of a registered program provides apprentices with a nationally recognized, respected, and portable credential. Additionally, under the regulations' affirmative action provisions,⁶ program sponsors must provide interactive anti-harassment training for everyone involved in the operation of an apprenticeship program. Sponsors also must maintain affirmative action plans, which ensure that underserved populations, including women, racial minorities, and veterans, are actively recruited into these challenging occupations, and that any barriers to full utilization are identified and addressed.

Registered programs also benefit construction contractors by creating a steady pipeline of highly qualified personnel, thereby increasing productivity and reducing the risk of accidents. This skilled labor pool in turn enables contractors to provide dependably excellent and cost-competitive services to their customers. And it bears repeating that the construction industry's system of registered programs—a cooperative effort between labor and management—is entirely self-supporting. It is difficult to imagine a system that would better reflect the objectives of the National Apprentice Act to promote “labor standards necessary to safeguard the welfare of apprentices” and “to bring together employers and labor for the formulation of programs of apprenticeship.”⁷

Against this backdrop, DOL's decision to limit Industry Programs, and federal funding for Industry Programs, to other sectors where registered programs are not already working makes perfect sense. Furthermore, DOL's concern that Industry Programs risk “undercutting” the construction industry's gold-standard programs is well-founded.⁸ A parallel system of apprenticeships operating with fragmented standards and without substantial agency oversight threatens to undermine the high-caliber training that construction industry registered programs currently provide. Industry Program participants would be guaranteed no more than the minimum wage, creating pressure to cut corners across the industry. And the availability of multiple accrediting entities would create a race to the bottom by Industry Program sponsors, diluting vital safety standards.

The resulting patchwork of training programs would also raise construction costs, because contractors would be required to separately vet their employees. It would sow confusion among customers, including the numerous federal, state, and local agencies that rely on the private construction industry to execute public works projects. And it would devalue the significant investment that union contractors and their

⁴ See Occupational Safety & Health Administration, *Construction Industry*, <https://www.osha.gov/doc/>.

⁵ 29 C.F.R. § 29.5.

⁶ 29 C.F.R. § 30.

⁷ 29 U.S.C. § 50.

⁸ Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations, 84 Fed. Reg. 29170, 29180 (June 25, 2019).

labor affiliates have made over the preceding decades to develop and maintain first-rate registered programs. We are aware of no benefits from Industry Programs that justify these substantial risks.

B. The Construction Exemption Should Be Permanent

For the same reasons that DOL created the construction exemption in the first place, the final rulemaking should make the exemption permanent.

The NPRM proposes to prohibit Industry Programs from being recognized in the construction industry only so long as the industry maintains “more than 25% of all federal registered apprentices per year on average over the prior 5-year period, or . . . has had more than 100,000 federal registered apprentices per year on average over the prior 5-year period, or both.”⁹ This standard is problematic, because it is not clear how often DOL would apply the test (annually? every 5 years?), and because DOL has determined that it is impossible to include the many programs registered through state agencies in the analysis.

More fundamentally, however, the standard is flawed because none of the risks presented by recognizing Industry Programs in the construction sector will change over time. Industry Programs threaten to dilute safety standards, diminish worker skills and productivity, increase the risk of accidents, and increase costs to contractors and customers, including the Federal Government and ultimately U.S. taxpayers. The bottom line is that Industry Programs have no place in the construction industry, now or ever, and the final rulemaking should make that clear.

C. The Construction Exemption Should Be Defined to Include Industrial Maintenance

TAUC also requests that the construction exemption be defined to include industrial maintenance. Industrial maintenance workers maintain and repair factory equipment and other heavy industrial machinery, and install, dismantle, repair, reassemble, and move machinery in factories and power plants and on construction sites.¹⁰ For example, TAUC industrial maintenance contractors can be found maintaining and repairing boiler systems in chemical refineries or removing and replacing the robotics and lines at automotive plants, switching from assembly of one vehicle type to another. You will also find them in the most challenging industrial environments in the country—relining blast furnaces and stoves in steel refineries and mills to keep our economic engine roaring, or installing complex pollution-control equipment at energy plants to ensure cleaner air and abundant power.

Industrial maintenance professionals face the same inherent dangers on the job as other construction workers, and apprentices in industrial maintenance already receive rigorous training to ensure their competence and safety through effective, privately-funded joint labor-management registered programs. However, the NPRM’s proposed definition of construction—“labor whereby materials and constituent parts may be combined on a building site to form, make, or build a structure”¹¹—is too narrow to protect these important programs. The NPRM definition is drawn from case law interpreting federal statutes (ERISA and the Labor Management Relations Act) that

⁹ *Id.* at 30015.

¹⁰ See Bureau of Labor Statistics, *Industrial Machinery Mechanics, Machinery Maintenance Workers, and Millwrights*, <https://www.bls.gov/ooh/installation-maintenance-and-repair/industrial-machinery-mechanics-and-maintenance-workers-and-millwrights.htm>.

¹¹ 84 Fed. Reg. at 29981 & n. 22.

have no relationship to the National Apprenticeship Act or its purpose to bring labor and management together to protect the well-being of apprentices.

TAUC appreciates the need for an authoritative, workable definition of construction to effectuate the construction exemption. For such a definition, we suggest that DOL look to the North American Industry Classification System (NAICS), the same system that DOL already uses to determine the number of registered apprentices by sector.¹² The NAICS definition of construction—NAICS Sector 23—correctly recognizes that “[t]he Construction sector comprises establishments primarily engaged in the construction of buildings or engineering projects (e.g., highways and utility systems)” and that “[c]onstruction work done may include new work additions, alterations, or *maintenance and repairs*.”¹³

We understand DOL to be concerned that reliance on NAICS codes could be under-protective, because some Industry Programs that do not have construction as their primary activity might not supply an NAICS construction code.¹⁴ But it should not be difficult for Standards Recognition Entities (SREs) to determine the actual jobs that proposed Industry Programs would train people for. SREs should be required to certify that they will not recognize Industry Programs that provide training for any jobs listed within the NAICS Sector 23 job classifications. This definition of the construction exemption is necessary to ensure the continued integrity of all construction industry registered apprenticeship programs, including those in industrial maintenance.

D. Industry Program Participants Should Not Be Recognized as Apprentices Under the Davis-Bacon Act.

Finally, in the event that DOL does not make the construction exemption permanent, TAUC requests that DOL reinforce the distinction it has drawn in the NPRM between Industry Programs and registered apprenticeship programs. TAUC agrees with DOL that registered programs, which are subject to continuous regulatory oversight, have a “special status” under the law that should not be accessible to Industry Programs.¹⁵ In particular, if the construction exemption is not made permanent, DOL should implement the Task Force’s *Recommendation 17: Inapplicability of the Davis-Bacon Act*, which provides that Industry Program participants “cannot be considered as apprentices for the purpose of meeting the Davis-Bacon Act wage requirements.”¹⁶

Davis-Bacon¹⁷ requires contractors performing on federal construction contracts valued at more than \$2,000 to pay workers on the contract at least locally prevailing wages. The purpose of the law is to protect workers and communities from underbidding on federal contracts by non-local contractors paying substandard wages. Contractors on Davis-Bacon projects must pay workers at least the wages specified in local wage determinations established by DOL.¹⁸

¹² *Id.* at 29980 & n.16.

¹³ 2017 NAICS Definition, Sector 23—Construction, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=23&search=2017%20NAICS%20Search> (emphasis added).

¹⁴ 88 Fed. Reg. at 29981 n.22.

¹⁵ *Id.* at 29981.

¹⁶ See Task Force on Apprenticeship Expansion, Final Report to: The President of the United States (May 10, 2018), <https://www.dol.gov/apprenticeship/docs/task-force-apprenticeship-expansion-report.pdf>.

¹⁷ 40 U.S.C. §§ 3141-3148.

¹⁸ DOL, Prevailing Wage Resource Book, Labor Standards Coverage, <https://www.dol.gov/whd/govcontracts/pwr/Tab3.pdf>.

DOL has long recognized a narrow exception to the prevailing wage requirement for apprentices. Apprentices working on a federal construction contract can be paid less than the Davis-Bacon prevailing wage, but *only* if they are in a registered apprenticeship program, and only if the program's apprentice-to-journeyworker ratios are maintained.¹⁹ When DOL created this exception more than 30 years ago, it did so "to encourage meaningful training of workers in the construction industry" and emphasized that "strict conditions must be maintained in order to prevent the circumvention of the Act's requirements, especially in the case of the young, minority, and female worker[s] against whom job and wage discrimination might otherwise be widespread."²⁰

Those same purposes justify excluding Industry Program participants from the Davis-Bacon apprentice exception. Industry Programs will provide inadequate protections for workers—lower quality training, less rigorous safety standards, no graduated wages, no apprentice-to-journeyworker ratios, no affirmative action obligations to expand opportunities to underrepresented populations. They also create unfair competition for those contractors that have already invested heavily in creating first-rate registered apprenticeship programs. Excluding Industry Programs from the Davis-Bacon apprentice exception is necessary to reduce, if only modestly, the uneven playing field that would be created by allowing Industry Programs to compete alongside privately funded registered apprenticeship programs in the construction sector.

III. CONCLUSION

TAUC appreciates the opportunity to provide comments on this issue of vital importance to our members. Thank you for considering our comments, and if you need additional information or would like to discuss these matters, please do not hesitate to contact me.

Sincerely,



Stephen R. Lindauer
Chief Executive Officer

¹⁹ 29 C.F.R. § 5.5(a)(iv)(i).

²⁰ Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act), 46 Fed. Reg. 4380-01, 4381 (Jan. 16, 1981).