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Minnesota Department of Labor and Industry

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January 13, 2006

Legislative Reference Library
Attn: Jess Hopeman
645 State Office Building
St. Paul, MN 55155

Re: **In The Matter Of Proposed Amendments to Rules Governing Apprenticeship Wages, *Minnesota Rules*, part 5200.0390**

Dear Librarian:

The Minnesota Department of Labor and Industry intends Adopt Rules Without A Public Hearing Unless 25 or More Persons Request a Hearing And Notice of Hearing If 25 or More Requests For Hearing Are Received.

We plan to publish a Notice of Intent To Adopt Rules Without A Public Hearing Unless 25 or More Persons Request a Hearing And Notice of Hearing If 25 or More Requests For Hearing Are Received in the January 17, 2006 State Register.

The Department has prepared a Statement of Need and Reasonableness. As required by Minnesota Statutes, sections 14.131 and 14.23, the Department is sending the Library a copy of the Statement of Need and Reasonableness at the time we are mailing our Notice of Intent to Adopt Rules.

If you have any questions, please contact me at 651-284-5565.

Yours very truly,

Laura Alsides

Laura Alsides
Legal Analyst
Department of Labor and Industry

Minnesota Department of Labor and Industry
Division of Labor Standards and Apprenticeship

STATEMENT OF NEED AND REASONABLENESS

Proposed Amendment to Rules Governing Apprenticeship, Apprenticeship Wages, Minnesota Rules, Part 5200.0390.

INTRODUCTION

Apprenticeship is a voluntary system of employee training. Small amounts of public dollars are involved in apprenticeship. The training combines classroom-related instruction with structured on-the-job training. Apprentices attend classes or their equivalent and are taught trade skills on the job. The on-the-job training utilizes a skilled technician or craftsman to help instruct apprentices. This person is referred to as a journeyman.

Apprenticeship training requires employment by an employer who has a direct need of the occupation being trained in the apprenticeship program and apprenticeship programs must be sponsored by an employer, group of employers, or employer-associated entity. An apprenticeship program is run in accordance with how an employer or groups of employers are organized. Apprenticeship can be jointly sponsored by a union and employers or just by employers or groups of employers. These are called joint and non-joint programs.

An Apprenticeship program is run and administered by the sponsor. There are certain minimum standards that an apprenticeship program must adhere to, but the program is run by the sponsor. One of the biggest misconceptions about apprenticeship is that it must be a union-administered training program. Minnesota has both non-union associated apprentices and union associated apprentices. Employers decide just how they want to structure and organize their companies. Apprenticeship can then be tailored to the way in which they are structured and organized.

Apprenticeship is a system of training that is established for the highly-skilled technician, craftsperson, or mechanic. It is for occupations that do not require a college degree, but do require both skill and knowledge. As a matter of practicality, apprenticeship programs are <u>not</u> established in occupations that do not pay well. Apprenticeship training, which usually takes three to four years to complete, requires at least 144 hours of related instruction and has been established in many occupations in Minnesota. Wages usually begin at about half the journeyman rate, but never below the minimum wage, and rise as the apprentice progresses through the program.

Apprenticeship is a system of training in which each Apprenticeship program is registered and monitored by the Minnesota Department of Labor and Industry, Labor Standards and Apprenticeship Division, Apprenticeship unit. The unit provides free assistance to the employer and to the apprentice by registering the training program and issuing certificates to the newly trained journeymen who have successfully completed their programs.

Apprenticeship is not a job training system for low-paying, low-skilled jobs; a job training system that is only for union affiliated employers; a job training system that is primarily driven by public funds; or a job training system that can be totally sponsored by a school district or school.

In Minnesota, Apprenticeship is governed by Minnesota Statutes, Chapter 178 and Minnesota Rules, Parts 5200.0290 through 5200.0420.

Federal and State government involvement in apprenticeship began with Public Law Number 308, 75th Congress, which was approved on August 16, 1937. The act authorized the U.S. Department of Labor to "formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices and to cooperate with the states in the promotion of such standards." The act was followed by the creation of the Federal Bureau of Apprenticeship, establishment of a field staff, and the appointment of national advisory committees composed of representatives of employers, labor, education and appropriate executive departments. The services of the Bureau of Apprenticeship and Training (BAT) in the U.S. Department of Labor were made available to the states and territories for the development of needed programs.

In 1939 Minnesota became the fifth state, preceded only by Wisconsin, California, Oregon and Massachusetts, to delegate to a division of its government the responsibility for administration of apprenticeship training activities. The Industrial Commission, pre-cursor of the department, appointed a State Apprenticeship Council (SAC) for the purpose of formulation of policy and establishment of standards, and a Director of Apprenticeship to administer apprenticeship matters in Minnesota under the supervision of the Commission and with the advice and guidance of the Council. Thus, the department's present Division of Labor Standards and Apprenticeship came into being as a part of the Department of Labor and Industry as well as the present Apprenticeship Advisory Council.

Apprentices, primarily in construction, must be paid a graduated scale of wages during the apprenticeship based on an increasing percentage of journey worker wage rates from time to time until the apprentice becomes a journey worker. Minn. Rule. 5200.0390 subp. 1. Under the current rule adopted in 1985, for non-union employers, the journey worker rate must be determined by county and must be the most current state or federal prevailing wage determination or existing apprenticeship agreement for that trade. Minn. Rule. 5200.0390, subp. 2. The majority of existing apprenticeship agreements are with union employers or groups of employers and many prevailing rates certified are also union wage rates. This journeyworker rate applies on prevailing wage jobs and private work.

Non-union employers and groups who would like to register apprenticeship programs and file apprenticeship agreements find the requirement to use union or prevailing journey worker wage scales as the base rate on both private work and state or federal funded work to be the largest stumbling block in starting an apprenticeship program. Under the current rule apprentices in the third or fourth year end up making more than the merit shop journeymen making registered apprenticeship programs economically unfeasible for merit shop contractors. Some of these potential sponsors do either a significant amount or majority of their work on private non-prevailing wage jobs.

All BAT states and most SAC states, including some with Little Davis-Bacon acts, have adopted "dual wage rates" so that non-union employers may base apprentice wage rates for private work on the journey worker wages normally paid for all work, private or public. Apprentice pay for prevailing wage jobs remains based on local state or federal prevailing wage determinations for

journey workers in the trade.

The proposal is to modify Minn. Rule 5200.0390 regarding journeyman wage rates for apprenticeship agreements where there is no collective bargaining agreement to provide for dual wage rates in Minnesota apprenticeship agreements. This will allow apprentices on non-prevailing wage jobs to be paid a graduated percentage of a journey worker rate normally paid for all work, public or private. The journey worker rate normally paid for all work will be determined by the director of labor standards and apprenticeship guided by the median Occupational Employment Statistics (OES) wage rate for the trade in the area, the prevailing wage rates, and wage rates in existing apprenticeship agreements in the area. The OES wage data are published by the Department of Employment and Economic Development and are available on the web. The requirement that apprentices be paid the graduated percentage of the prevailing wage journey worker rate while on prevailing wage jobs is retained.

The rulemaking process began with a Request for Comments published in the State Register on April 25, 2005 and mailed to the department's list of 300 stakeholders in Apprenticeship. The Request for Comments did not contain specific rule language, but sought comment generally about the possibility of using other factors in addition to prevailing wage rates and existing apprenticeship agreements to determine a journeyman wage rate for work other than construction of public works funded in whole or in part with State funds. The comment period ended on June 16, 2005. In response to the Request for Comments published and mailed, the department received 67 comments. Of the comments received, 28 were favorable and 39 were against.

The Department mailed a preliminary draft of a proposed rule to the 8 members of the Apprenticeship Advisory Council and also to the department's list of 300 Apprenticeship stakeholders approximately two weeks before the Advisory council's meeting on October 12, 2005. The preliminary draft, which indicated DEED's OES median wage data would be adopted as the journeyman wage rate, was discussed at the October 12, 2005 meeting of the Advisory Council. The Advisory Council voted 6-2 not to recommend approval of the rule to the commissioner and asked that an apprenticeship stakeholder meeting be held, before the rule was proposed.

Concurring with the suggestion of the Advisory Council, the department held a stakeholders meeting at the department's office on October 26, 2005. Members of the advisory council were invited and notices of the stakeholders meeting, including the preliminary draft of the rule were, sent to the department's list of 300 interested parties. The public input at the stakeholders meeting was transcribed by a court reporter. At the conclusion of the public input, the Apprenticeship Advisory Council reconvened and after some discussion voted 4-2, with one abstention to recommend to the commissioner that the rule not be adopted.

Subsequent to the Advisory Council meeting of October 12, 2005 and the stakeholder meeting of October 26, 2005 the department considered the public input by way of testimony and the 76 written comments received of which 43 were in favor and 33 opposed.

The department elected to revise the proposed rule by making DEED's OES median wage data one of the considerations for the director to consider in making the determination of the journeyman wage rate called for under Minn. Stat. §178. 03, subd . 8, rather than mandating the

adoption of OES median wage rate for journeyman wage rate for non-prevailing wage work. This decision was based on input from non-construction sponsors of apprenticeship programs such as manufacturers and because the OES wage data is missing in a minority of areas. The department published the Dual Notice of Intent to Adopt the proposed rule and Notice of Hearing in the State Register on January 17, 2006; sent copies of the Notice of Intent to Adopt and the proposed rule to its list of 300 apprenticeship stakeholders timed to arrive on the day of publication, and posted a copy of the Dual Notice of Intent to Adopt and Notice of Hearing and the proposed rules on its website. The department will consider all comments received during the comment period and all input received at rule hearing, if one is required, in making its decision on adoption.

ALTERNATIVE FORMAT

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact Jerry Briggs, Director of Labor Standards and Apprenticeship at the Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, Minnesota 55155, phone (651) 284-5194, and fax (651) 284-5740. TTY users may call the Department of Labor and Industry at (651) 297-4198.

STATUTORY AUTHORITY

All sources of statutory authority were adopted and effective prior to January 1, 1996, and this rulemaking is an amendment of rules, so Minnesota Statutes, section 14.125, does not apply. See Minnesota Laws 1995, chapter 233, article 2, section 58.

The Department's statutory authority to adopt the rules is set forth in Minnesota Statutes section 178.48, subdivision 1, which provides:

> "The commissioner may, upon receipt of the council's proposals, accept, adopt, and issue them by rule with any modifications or amendments the commissioner finds appropriate. The commissioner may refer them back to the council with recommendations for further study, consideration and revision. Additional rules may be issued as the commissioner may deem necessary."

Further statutory authority to adopt the rules is set forth in Minnesota Statutes section 175.171, which sets forth the powers and duties of the department including the power to:

> "to adopt reasonable and proper rules relative to the exercise of its powers and duties, and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings, which shall not be effective until ten days after their adoption, and a copy of these rules shall be delivered to every citizen making application therefore;"

Under these statutes, the Department has the necessary statutory authority to adopt the proposed rules.

REGULATORY ANALYSIS

A (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The primary affect of the proposed rule amendment is in the construction industry including construction workers; both represented and merit shop employees, and contractors, both union and non-union. Construction Industry groups and the construction trade unions are also affected. MN Department of Labor and Industry staff involved in apprenticeship and Labor standards are affected.

The affected classes will not bear any cost because of the proposed rule amendment. Apprenticeship programs and apprentices are not charged a fee for registration of apprenticeship programs or approval of an individual apprentice's agreement. New apprenticeship program sponsors and employers will continue to bear the costs of running their own programs, but these costs are not affected by the proposed rule amendment.

The classes which will benefit are construction workers and contractors, primarily merit shop, who work primarily on private construction projects and now will be able to have apprenticeship programs with journeyworker rates closer to the rates actually paid in their areas on private work. The employers benefit from a formal and recognized method of developing and retaining a highly skilled journeyman employee base. Employees benefit by learning a valuable and transportable skilled trade and, for those who are veterans, the ability to utilize some of their veterans' benefits.

A (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The department does not expect to incur additional costs above and beyond the existing appropriation to the labor standards and apprenticeship unit for implementation and enforcement of this rule amendment. Currently there are 308 active apprenticeship programs in the state. At the stakeholders meeting conducted on October 26, 2005 the department received expressions of interest from 26 contractors. The apprenticeship unit staff ordinarily deals with 198 sponsors during each year in administering the existing programs and in the range of 5 to 10 prospective sponsors, and can absorb any expected increase in prospective program sponsors and apprentices.

The department does not predict any costs to any other agency for implementation and enforcement of the rule amendment.

The adoption of the proposed rule amendment has no direct affect upon anticipated state revenues. The expected increase in apprentices completing their programs and becoming journey workers may result in a minor increase in state income tax collections.

A(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule

The Labor Standards and Apprenticeship division does not charge a fee to apprenticeship program sponsors, employers or apprentices. The department has determined that its cost of adopting the rule amendment and implementing it is minimal and therefore concludes there is not a less costly method for achieving the purpose of increasing apprenticeship and eliminating the mandatory importing of prevailing wage rates onto private construction work.

Having a registered apprenticeship program is voluntary. Program sponsors and employers do have administrative responsibilities and costs for running their apprenticeship programs, but the implementation of the proposed rule amendment is not expected to have any intrusive affect on the operation or cost of any apprenticeship program.

A (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule

The proposed rule amendment to Minn. Rule 5200.0390, subpart 1 is a technical amendment changing reference to the place for filing apprenticeship agreements from the " Division of voluntary apprenticeship" to the "apprenticeship unit." This reflects the statutory change in Laws of Minnesota 2003, Chapter 128, sections 1-9 which combined the Department's divisions of Labor Standards and Voluntary Apprenticeship into one division of "Labor Standards and Apprenticeship." There is no substantive change in the subpart which deals with graduated schedule of wages in apprenticeship agreements. The purpose is merely to correct the reference to "apprenticeship unit" and the only alternative considered was not making any change. The change is proposed and the alternative of doing nothing was rejected because the subpart should have a current reference to where apprenticeship agreements are filed.

Alternative methods for achieving the purpose of the proposed rule amendment to Minn. Rule 5200.0390 subpart 2 were seriously considered by the department. The purpose of the rule amendments to this subpart is to allow an alternate basis for establishing the journeyworker rate to the prevailing wage or existing agreements for non-prevailing wage work. The amendments end the mandatory imposition of prevailing wage rates on non-prevailing wage work present in the rule since 1985. The amended rule follows the statute more closely and provides that the director, in making the determination required under the statute, must consider prevailing wage rates, existing apprenticeship agreements, and the journeyworker rate for all work in the area, public and private, as revealed in DEED's OES data for the trade. The department considered at least three alternatives to the proposed amendments to this part.

The Department considered making DEED's OES median wage data the mandatory standard journeyman wage rate for all non-prevailing wage work. This approach was present in the draft rule available at the time of the stakeholder meeting on October 26, 2005. The department elected not to mandate imposition of the OES rate because of input received at the stakeholder meeting and the October 12, 2005 Advisory Council meeting that the imposition of a rate from the OES data or the prevailing wage data did not make sense, particularly for non-construction apprenticeship programs in the manufacturing sector. Setting the journeyworker rate for manufacturing apprenticeship programs and other non-construction programs hasn't been affected by the current rule to the extent the construction craft programs have been affected because the mandatory imposition of the

prevailing wage rate is not applicable and the existing agreement mandate isn't as pervasive. The department elected to make use of the OES wage data, as a guideline and a consideration for the director, just as the prevailing wage data and existing agreements are under the statute.

The Department also considered proposing a rule amendment which in effect mirrored the statute, Minn. Stat § 178.03, subd. 3, in simply requiring the director to consider the factors required by the statute, prevailing wage rates, and existing apprenticeship agreements, and not requiring that the director consider DEED's OES median wage data for the trade in the area. This would leave out the best measure and only statistically valid measure of what rate is actually paid in the various areas for both private and public work. The only limitations on the journeyworker wage rate then for programs not connected with a collective bargaining agreement would be the two requirements in the statute that an apprentice rate can't be below the minimum wage rate and can't alter a rate in a collective bargaining agreement. The Department elected not to propose a rule amendment which merely mirrored the statute because consideration of the OES median wage data is a good measure of wages actually paid private construction and in non-construction trades and therefore is a valuable addition to the other factors in the statute.

The Department also considered not adopting clause B of Minn. Rule 5200.0390, subpart 2. However, by removing the rule provision in place since 1985 that mandates the adoption of the most current state or federal prevailing wage rate or current apprenticeship agreement as the journeyman wage rate and returning to the statutory scheme where the director considers several factors, failure to include clause B might result in apprentices working on prevailing wage jobs at rates not keyed to the prevailing wage rates. This is because of Minn. Rule 5200.1070, a prevailing wage rule which states in part:

> "Apprentices working on state projects are not subject to the prevailing wage determinations, except as they may be affected by registered apprenticeship agreements. The hourly rates of pay are established by the particular program to which the apprentice or trainee is subject."

The result under these proposed amendments, without the inclusion of clause B. in subpart 2, would be that, unless the apprenticeship agreement specified the prevailing wage rate, apprentices on prevailing wage jobs might not receive the appropriate percentage of the prevailing wage rate, but possibly a percentage of the journeyman rate which could be lower. Therefore, the department elected to support the policy of the prevailing wage law by including clause B., requiring the apprenticeship agreements to include the provision that apprentices will receive the appropriate percentage of the prevailing wage rate for work on public works projects funded in whole or in part with state funds.

A (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The department does not believe there is any cost to any affected party of complying with these rule amendments. The Apprenticeship unit does not charge any fee to apprentices, sponsors, or employers to participate in the registered voluntary apprenticeship programs probable costs of complying with the proposed rule. Clearly employers and sponsors operating registered

apprenticeship programs have costs of operating the programs, but these investments in developing and retaining skilled workers are not affected by the rule amendments.

A (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.

The department has determined that there will be cost borne by any affected party of not adopting the proposed rule aments, just as it determined there would be no costs borne by any affected party of adopting the rule amendments. The consequences of not adopting the proposed rule amendment are that employers and sponsors who wish to have registered apprenticeship programs, but who have not adopted them or have terminated their apprenticeship programs because the importation of prevailing wage rates onto privately funded construction has rendered apprenticeship programs economically unfeasible will not be able to participate in a registered apprenticeship program.

A (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

There is one provision of federal apprenticeship regulations which bears directly on the proposed rule amendments. 29 CFR 29 (5) provides that an apprenticeship program must have:

> A progressively increasing schedule of wages to be paid to the apprentice consistent with the skill acquired. The entry wage shall not be less that the minimum wage prescribed by the by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable federal law, state laws respective regulation, or by collective bargaining agreement."

The state law on the subject, Minn. Stat. § 178.03, subd. 3 does have the limitations of the minimum wage and collectively bargained agreements which are in the proposed rule amendments. The statute also adds "the director shall have the authority to make wage determinations applicable to the graduated schedule of wages and journeyman wage rate, giving consideration to the existing wage rates prevailing throughout the state,...."

There is a need for the state rule to be different from the federal rule because of the different considerations required by the state statute. The rule as amended is reasonable because it conforms with the statute and the federal rule and, as proposed restates the federal rule.

PERFORMANCE-BASED RULES

Minn. Stat. § 14.002 Ensuring Maximum Flexibility for Regulated Parties

When developing rules, Minnesota Statutes, § 14.002 requires an agency to "emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals." Minnesota Statutes, § 14.131 requires an

agency to describe in its Statement of Need and Reasonableness how it considered and implemented and implemented the policy in § 14.002, sometimes called performance based rules.

The department proposes amending the rules on Determination of Apprenticeship Wages. The amendment to Minn. Rule. 5200.0390, subpart 1 is a technical one that simply deletes an outdated reference to the department's division of voluntary apprenticeship and replaces it with a reference to the department's apprenticeship unit as the place where apprenticeship agreements are filed.

The amendments to Minn. Rule 5200.0390, subpart 2 are substantive and the department has considered how these amendments promote the objectives of promoting and increasing the use of apprenticeship as a means for employers to train and retain skilled workers and maximizing the flexibility of apprenticeship for sponsors and apprentices.

One of the substantive changes is to remove the defacto importation of prevailing wage rates onto private construction work as a requirement of having an apprenticeship program. Over the years since 1985 when this feature was placed in the rule numerous potential sponsors of apprenticeship program have cited this problem as the major impediment to having a registered apprenticeship program because they cannot remain competitive on private work. Some employers in the construction industry, particularly those who do little or no prevailing wage work, including ones who testified at the October 26, 2005 stakeholder meeting, have terminated their programs for this reason. At the stakeholder meeting 26 different firms expressed intentions to form or join an apprenticeship program based on this change. The change proposed increases flexibility or apprenticeship programs and meets the department's objective of promoting apprenticeship.

Another substantive change in the subpart is to add the requirement for the director to consider DEED's OES median wage data for the employer's area as one factor to consider in addition to the state determined prevailing wage rates and existing apprenticeship agreements in the area in determining the journeyman wage rate in an apprenticeship agreement. The OES median wage data is from a statistically valid survey conducted by DEED for the United States Department of Labor. It is an accurate measurement of the central tendency of what is actually paid to workers in the area for both private and public work in the trade to be apprenticed. The DEED OES data is readily available through the DEED website for any sponsor or apprentice to see at http://www.deed.state.mn.us/lmi/tools/oes.htm. The director must also consider state prevailing wage rates and existing apprenticeship agreements in the area. Addition of the OES wage data as a consideration offers additional flexibility for both the department and apprenticeship sponsors.

The proposed rule amendment also changes the area used to make journeyman wage determination from the employer's county to the employer's Economic Development Region. There are 13 DEED economic development regions and the OES median wage data is available for most trades by economic development area. The use of 87 counties is cumbersome and often state and federal prevailing wage certifications are not available by county. Using DEED Economic Development Regions as the "area" from which to determine is less cumbersome; provides the most flexibility in actually having wage data to consider readily available on the web and, meet the department's objectives.

ADDITIONAL NOTICE

Minnesota Statutes, sections 14.131 and 14.23, require that the SONAR contain a description of the Department's efforts to provide additional notice to persons who may be affected by the proposed rules or explain why these efforts were not made.

The department has identified persons and organizations most likely to be affected by or have an interest in these apprenticeship rule amendments. Notice of Intent to Adopt the proposed apprenticeship rule amendments and a copy of the proposed rules will be mailed to all of the following:

1. The members of the Apprenticeship Advisory Council, with labor, employer and general public representatives appointed by the commissioner in accordance with Minn. Stat. 178.02. Advisory Council members also received mailed copies of the Request for Comments, and received copies of preliminary draft rules and notice of, and participated in the October 12, 2005 Advisory Council meeting and the October 26, 2005 stakeholder meeting.

2. All 198 sponsors of registered apprenticeship programs in Minnesota. The sponsors also received mailed copies of the Request for Comments and mailed copies of the preliminary draft of the proposed rule amendments and notice of the October 12, 2005 Advisory Council meeting and the October 26, 2005 stakeholder meeting.

3. Those persons who requested notice of the proposed rules in their response to the Request for Comments.

4. All persons attending the October 12, 2005 Advisory Council meeting and the October 26, 2005 stakeholder meeting who signed in with addresses and who were not already on the list of sponsors and interested parties.

5. The following list of associations and organizations. The Minnesota Chapter of the Associated General Contractors, the Minnesota Construction Trades Council, the Minnesota Chapter of the Associated Building Contractors, the Christian Labor Association, and the Union Advocate.

6. Those who have commented on the proposed rule amendments since the Request for Comments was published on April 25, 2005

In addition the department placed the Request for Comments on its website at the time of publication. Also the department will place the Notice of Intent to Adopt the rules, the proposed rule amendments, and the Statement of Need and Reasonableness on the Department's website at www.doli.state.mn.us at the time of publication.

This Additional Notice Plan was reviewed by the Office of Administrative Hearings and approved in a December 22, 2005 letter by Administrative Law Judge Steve M. Mihalchick.

The department's Notice Plan also includes giving notice required by statute. The department will mail the rules and Notice of Intent to Adopt to everyone who has registered to be on the Department's rulemaking mailing list under Minnesota Statutes, section 14.14, subdivision 1a. The department will also give notice to the chairs and ranking minority members of the legislative policy and budget committees with jurisdiction over apprenticeship issues as required by Minn. Stat. § 14.116.

Finally, since the statutory authority for adopting these rules has not been enacted or amended in the last two years, notice to legislative authors pursuant to Minn. Sta. § 14.116 is not required.

CONSULT WITH FINANCE ON LOCAL GOVERNMENT IMPACT

As required by Minnesota Statutes, section 14.131, the Department has consulted with the Commissioner of Finance. We did this by sending to the Commissioner of Finance copies of the documents sent to the Governor's Office for review and approval by the Governor's Office prior to the Department publishing the Notice of Intent to Adopt. We sent the copies on December 16, 2005. The documents included: the Governor's Office Proposed Rule and SONAR Form; almost final draft rules; and almost final SONAR. The Department of Finance sent a letter dated January 4, 2006 with its comments that the proposed rule amendments do not have an impact on local government.

COST OF COMPLYING FOR SMALL BUSINESS OR CITY

Agency Determination of Cost

Minn. Stat. § 14.127 requires the department to determine if the cost of complying with proposed rules in the first year after the rules take effect will exceed $25,000 for any small business or city. These rule amendments will not require expenditures by any small business or city. Apprenticeship programs are generally set up by private businesses. Some cities, including Minneapolis and some cities having municipal utility companies have registered apprenticeship programs. A significant number of small businesses have registered apprenticeship programs. Having an apprenticeship program is voluntary. The Apprenticeship Unit charges no fees to employers, sponsors or apprentices. The proposed rule amendments do not alter the costs of running an apprenticeship program. The department has determined that that the cost of complying with the proposed apprenticeship rule amendments in the year after the rules take effect will not exceed $25,000 for any small business or city.

OTHER REQUIRED INFORMATION

Minn. Stat. § 14.11: Farming operations; effect on Chicano/Latino people

Minn. Stat. § 14.11 imposes additional requirements if the proposed rules affect farming operations. These proposed amendments will not have any significant impact on farming operations, and therefore the requirements of Minn. Stat. § 14.11 do not apply. The requirements contained in

Minn. Stat. § 3.9223 do not apply because the proposed apprenticeship rule amendments do not have their primary effect on Chicano/Latino people.

Date Statement of Need and Reasonableness Made Available to Public

This statement of Need and Reasonableness was made available for public review on January 13, 2006.

LIST OF WITNESSES

If these rules go to a public hearing, the Department anticipates having the following witnesses testify in support of the need for and reasonableness of the rules:

1. Ms. Roslyn Wade, Assistant Commissioner of Workplace Services, Department of Labor and Industry will testify about the development of the proposed rule amendments, their need and reasonableness, and requests from potential apprenticeship program sponsors and employers to have apprenticeship programs with wage provisions closer to the wages actually paid in their areas for work, other than on public works projects funded in whole or in part with state funds.

2. Mr. Jerry Briggs, Director of Labor Standards and Apprenticeship will testify about the state of Apprenticeship, the practices of the apprenticeship unit, and the need and reasonableness of the proposed rule amendments and how the department will utilize the OES median wage data in the various DEED Economic Development Regions using the DEED website.

3. Ms. Theresa Van Hoomissen, Director of Research and Education, Department of Labor and Industry, will testify about the Department of Employment and Economic Development (DEED) Occupational Employment Statistics (OES) median wage data and the statistical validity of the survey from which the OES median wage data is derived.

4. William A. Bierman, attorney in the department's legal services unit will testify about the need for and reasonableness of the proposed rule amendments, the statutory and rule history regarding the rules changes and the procedural steps followed by the department in the rulemaking.

RULE-BY-RULE ANALYSIS

Part 5200.0390, subpart 1

The proposed rule amendment to Minn. Rule 5200.0390, subpart 1 is a technical amendment changing reference to the place for filing apprenticeship agreements from the " Division of voluntary apprenticeship" to the "apprenticeship unit." This reflects the statutory change in Laws of Minnesota 2003, Chapter 128, sections 1-9 which combined the Department's divisions of Labor Standards and

Voluntary Apprenticeship into one Division of "Labor Standards and Apprenticeship." There is no substantive change in the subpart, which deals with graduated schedule of wages in apprenticeship agreements. The purpose is merely to correct the reference to "apprenticeship unit." The amendment is necessary because of the law change combining the department's previously existing two divisions and to bring clarity to an obsolete reference. The amendment is reasonable because the apprenticeship unit in the new Division of Labor Standards and Apprenticeship is in fact the place where apprenticeship agreements are filed. No comments have been received in favor of or in opposition to this technical amendment.

Part 5200.0390, subpart 2

The amendments to subpart 2 of the rule are the operative parts of these proposed rule amendments. The amendments to the subpart consist of eight basic changes as follows:

1. The subpart is divided into two clauses, clause A. and B. This change is necessary because the subpart, as amended, is intended to provide direction on how the determination of the journeyman wage rate in apprenticeship agreements where no bargaining agreement exists and to effectuate the purpose of amendments to provide for dual wage rates in Minnesota apprenticeship agreements. This will allow construction apprentices on non-prevailing wage jobs to be paid a graduated percentage of a journey worker rate normally paid for all work, public or private. Clause A as proposed deals with apprenticeship programs where no bargaining agreement exists and applies to non-prevailing wage construction work and to all non-construction work, such as manufacturing, service work and all other non- construction apprenticeable trades. Clause B relates to the journeyman wage rate for all construction work on public works projects funded in whole or part with state funds. This is necessary for continued assurance that all apprentices working on prevailing wage projects are paid the appropriate percentage of the prevailing wage on projects covered by prevailing wage projects. The change is reasonable because it retains the prevailing wage as the basis of apprenticeship compensation on state funded construction, thus allowing union and non-union contractors an equal basis to compete for state funded projects. It is also a reasonable interpretation of Minn. Stat. 178.03, subd, 3, because the statute provides that wage rates prevailing throughout the state are to be considered by the director, but does not mandate the adoption of state certified prevailing wage rates for use on non-state-funded construction. No commenters objected to Clause B, but a number of commenters have objected clause A, primarily on other changes made.

2. The second change in the subpart is to change the " county" to "area" this change is necessary because the use of county-based wage data has become cumbersome and the data is unavailable at times. It is also necessary because one of the other changes made in this subpart is to adopt DEED OES median wage data as an additional consideration. The DEED OES median wage data is available by area. The changes are reasonable if DEED OES median wage data is to be utilized as an additional measure of wage rates in the state because that data is available by area and not by county. Commenters have not objected specifically on using areas instead of counties. The

Statute, Minn. Stat. 178.03, subd 3, speaks of areas.

3. The third change in the subpart is adopting the DEED Economic Development Regions as the "areas" to be used in making Journeyman wage determinations. The EDRs are trade areas in the state as determined by DEED. It is necessary to adopt the DEED EDRs in order to utilize DEED OES median wage data as another source of data for the director to consider in making journeyman wage rate determinations. The change is reasonable because DEED EDRs are the most local unit for which OES wage data are available.

4. The fourth change in the subpart is to eliminate the existing language as seen on page 1, lines 9 through 19 of the proposed rule amendments. This change is necessary to more closely follow the language of the statute and eliminate the mandate to adopt prevailing wage rates or existing agreement rates in apprenticeship agreements where no collective bargaining agreements exists. It is also necessary to effectuate the major purpose of the rule which is to promote registered apprenticeship to those in construction who are discouraged from participating now because of the mandate that prevailing rates be utilized on non-prevailing wage construction.

Over the years since 1985 when the current rule was adopted numerous potential sponsors of apprenticeship programs have cited this problem as the major impediment to having a registered apprenticeship program because they cannot remain competitive on private work. Employers find themselves in the position of having to pay third or fourth year apprentices more than they pay their journeymen and more than journeyman are paid in their areas for non-prevailing wage in order to have a registered apprenticeship program. Some employers in the construction industry, particularly those who do little or no prevailing wage work, including one who testified at the October 26, 2005 stakeholder meeting, have terminated their programs for this reason. At the stakeholder meeting 26 different firms expressed intentions to form or join an apprenticeship program based on this change. If all 26 firms registered apprentices, this would be a 100% increase in the number of non-union construction firms with registered apprentices. The change is necessary to promote more apprenticeship programs. Contrary to the comments expressed by some it does not lower wages for any apprentices. The requirement that the director not change any wage rate in a collectively bargained agreement is retained; the certified prevailing wage rates continue to be mandated for state funded construction; and, the addition of OES median wage data as an additional consideration helps assure reasonable earnings for the apprentices based on wages actually paid for public and private work.

The affect of the deleted language was to import Davis-Bacon rates onto private construction not funded in whole or in part with state funds. The statute giving the director the authority to set the journeyman wage rate instead merely requires consideration of "existing wage rates prevailing throughout the state" and does not mandate the adoption of the prevailing wage rate or existing agreements, whichever is most current. The change is reasonable because the fact that statute allows the director authority to make the determination after consideration of certain factors should not be seen as a vehicle to require importation of prevailing wage rates onto private construction

projects, as a condition of having a registered apprenticeship program. It is also reasonable because of the degree to which collectively bargained wage rates have become the certified state prevailing wage rates and have become prevalent in "existing" apprenticeship agreements in the state, thereby mandating their adoption as journeyman wage rates for registering apprentices in non-union programs and to learn their crafts while performing non-state funded construction.

The deleted language mandates adoption of the certified prevailing wage rate or an existing apprenticeship agreement rate whichever is most current. Minnesota has 147 different prevailing wage master job classifications. The department attempts to certify prevailing wage rates for commercial construction funded in whole or in part with state funds for these 147 job classifications in each of our 87 counties, and for highway/heavy construction funded in whole or in part by state funds, attempts to certify prevailing wage rates in 10 regions for each of the 147 job classifications. In 2005 the department certified 13,175 prevailing wage rates for the 147 different job classifications in the 87 counties and 10 regions. Of these 13,175 prevailing wage rates certified, 6,591 or a bare majority were union rate. 6,584, or a bare minority, were not union rates. At the October 26, 2005 stakeholder meeting there was testimony, albeit disputed, that today more than 80% of the construction workforce works with merit shop contractors.

Currently most Minnesota registered apprentices in construction crafts are in unions and participate in joint apprenticeship programs sponsored by construction craft unions and their signatory contractors through what are known as joint apprenticeship councils or JAC's. There were 8,637 apprentices in the whole system as of November 2005. At that time there were 26 non-union affiliated apprenticeship sponsors in the system and together they had 72 apprentices. The union related JAC's tend to have state-wide or regional boundaries and their rates are often the current existing rate across the state or regions of the state. Hence, even if there is no prevailing wage rate for a trade, there is very likely an existing apprenticeship agreement from a JAC. The present rule mandates this rate as the rate for all registered apprenticeship programs, if it is the most current, even though the statute doesn't even mention existing apprenticeship agreements as a consideration.

The propose rule amendment requires consideration of prevailing wage rates and existing apprenticeship agreements, but eliminates the mandate that the most current of the two be adopted. This change in conjunction with addition of an additional wage measure as a consideration is reasonable because it conforms with the statute and meets the need to encourage apprenticeship participation.

5. The fifth change is to add the DEED OES median wage data as a statistically valid indicator of wages for the various apprenticeable trades actually paid in the EDR areas to be used by the director in making the journeyman wage rate for apprenticeship agreements not part of a collective bargaining agreement. The change is necessary to provide an accurate and statistically valid measure of wages actually paid in the trade including private and public work to use as an additional consideration in determining a journeyman wage rate, for work other than construction work on public projects funded in

whole or in part with state funds.

The Occupational Employment Statistics-Wage survey is conducted cooperatively by the USDOL Bureau of Labor Statistics (BLS) and state workforce agencies (in Minnesota it is the Department of Employment and Economic Development). The program provides employment and wage estimates by industry at the national, state, and sub-state area level as well as cross-industry wage rates by occupation for every Metropolitan Statistical Area and several balance-of-state areas per state. A major source of funding for wage collection is the Foreign Labor Certification (FLC) program at the USDOL Employment and Training Administration (ETA), which uses the information for federal prevailing wage determinations.

The OES program uses a statistically sound random sampling method and follows-up to achieve a 75% response rate, thus providing data that is representative of the population of workers in each industry/occupation/area. Employment and wage data are gathered semi-annually with a sample size of roughly 3,700 in each semi-annual panel. Wage estimates are based on three years (six panels) of data, and as a result, published data is based on information from over 20,000 Minnesota employers. Each year, wage data from the previous two years are "updated" using the BLS's Employment Cost Index (ECI).

The mean, median and mode are different measures of central tendency. The mean is easily influenced by outliers, so it is best avoided when the data being characterized is skewed. Data on salaries is often skewed because there are often a few high outliers ("stars") in an occupation that pull the mean upward. The mode presents a problem when there are one or two data values with many representatives; the mode in this case may not be at the center of the distribution at all. Data on salaries often suffers from this problem in occupations with collective bargaining agreements. The median is literally the center point of a distribution-half of all observations are higher and half lower-and is a good measure when the data is possibly skewed or there are "hot points" along the range.

The Minnesota Regional Development Act of 1969 provided for the creation of regions to facilitate intergovernmental cooperation and to insure the orderly and harmonious coordination and development of programs on a regional basis. The boundaries of these regions transcend the boundaries of local government units. The original boundaries were constructed following research by Professor John Hoyt of the U of M (now deceased) who based his recommendations on "analysis of economic and trade patterns. They were first created as 12 regions by Executive Order in 1969, in response to the Minnesota Regional Development Act of 1969. The regions are defined in MN Statutes 462.385.

The adoption of the OES median wage data as an additional consideration for the director in making the wage determinations required by the statute, for work other than construction on public works funded in whole or in part by state funds, is reasonable because the OES data is obtained through a statistically valid survey and the median is a

good measure of a central tendency in salary data. It is also reasonable because it is a good measure of wages actually paid on public and private work. The OES median wage data is reasonable because it provides it provides this statistically valid wage data for trades outside of construction such as in manufacturing or service trades, and there is often little or no guidance for these trades from the prevailing wage certifications or existing agreements.

6. The sixth change in the rule is to drop reference to the federal prevailing wage rate as a consideration. This change can be seen in the deleted language on in proposed subpart 2, clause A., on page 1, line 9. The federal prevailing wage rates are generally lower than the state certified prevailing wage rates and are not as readily accessible. The federal rates are calculated on a weighted average basis and tend to have more missing rates than the state certified rates. Also, the federal rates are certified on a sporadic and somewhat infrequent basis because they are done when needed. The state rates are certified annually, usually in December, and are usually more current than the federal rates. The department has not utilized federal rates in the past. The change is necessary to conform the rule the department's longstanding practice of using the state certified prevailing wage rates. The change is reasonable because it conforms with the statute as well as the longstanding department practice. Additionally it is reasonable because the state certified rates tend to be the most current prevailing wage rates in most cases.

7. The seventh change is simply to retain the notion that the prevailing wage rate is the journeyman wage rate for construction on public works projects funded in whole or in part by state funds in apprenticeship agreements where no collective bargaining agreement exists. The department considered not adopting subpart 2 B. on page 2 of the rules, lines 1 to 3. The result would be that, unless the apprenticeship agreement specified the prevailing wage rate, apprentices on prevailing wage jobs might not receive the appropriate percentage of the prevailing wage rate, but possibly a percentage of the journeyman rate which could be lower. The decision was to support the policy of the prevailing wage law by including clause B., requiring the apprenticeship agreements to include the provision that apprentices will receive the appropriate percentage of the prevailing wage rate for work on public works projects funded in whole or in part with state funds. The clause is necessary to continue the requirement that state certified prevailing wage rates be the journeyman wage against which the appropriate percentages are applied in all apprenticeship agreements where no collective bargaining agreements exists for construction work on state funded construction. The change is reasonable because it supports the policy of the Minnesota prevailing wage law. It is also reasonable because, if the statute allowed mandating the prevailing wage rate as the basis for apprentice wages on private work imposed in the 1985 rule, it certainly allows retaining the requirement on prevailing wage jobs.

8. The eighth change is the inclusion of the word "base" on page 2, line 3. The department has used the prevailing wage base rate when determining that a certified prevailing wage is the journeyman rate for an apprenticeship agreement where no bargaining agreement exists consistently since at least 1976. The practice was re-confirmed by the Apprenticeship Advisory Council in 1981 and by the Director in 1985. The reason was the many different fringe benefit provisions. Many trades had their fringe benefits based on

seniority. Many independent apprenticeship training sponsors already provide their employees with various fringe benefits such as vacation, insurance, holidays, pensions or 401K plans, and even trucks for personal and business use. The change is not a substantive change in practice. The inclusion of word "base" is necessary to conform with practice and for clarification. It is reasonable because it conforms with the statute and for the same reasons it was adopted an re-affirmed by the Apprenticeship Advisory Council.

Statutory History

For many years after the adoption of the apprenticeship statute in Minnesota there was no statutory requirement that the director of apprenticeship consider any particular thing or things in making the wage determinations for apprenticeship agreements, or even specific authority to make wage determinations. The precursor to the current statute, Minn. Stat. §178.03, subd 3, was Minn. Stat. 178.04. Minn. Stat. 178.04 had no specific authority or considerations regarding wages, but did contain the same provision as the current law stating that the director "is authorized ....(among other things)...; to approve, if in his opinion approval is for the best interest of the apprentice, any apprenticeship agreement which meets the standards established hereunder;" The federal regulation, referred to on page 8 in the Regulatory analysis, 29 CFR 29 (5) (5) has long provided that an apprenticeship program must have:

> "A progressively increasing schedule of wages to be paid to the apprentice consistent with the skill acquired. The entry wage shall not be less that the minimum wage prescribed by the by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable federal law, state laws respective regulation, or by collective bargaining agreement."

Thus, prior to the enactment of the current statute, the department followed the federal rule as part of being a BAT approved State Apprenticeship program. This meant that the wage limitations were that apprentices must at least receive the minimum wage and that wages in apprenticeship agreements were required to follow the provisions of collective bargaining agreements where applicable.

In 1973 the legislature enacted the Minnesota prevailing wage law or Little Davis Bacon Act, Minn. Stat. §§ 177.41 – 177.44. The following year, in 1974 the legislature passed Laws of Minnesota for 1974, Chapter 144, which made a number of changes to the apprenticeship statute. For one thing the previous statute regarding the directors authority, Minn. Stat, §178.04 was repealed and reenacted as part of the current statute regarding the director's authority, Minn. Stat. 178.03, subd 3. The newly enacted subdivision added the director's specific authority to make wage determinations. The new language added was the same as the current statute;

> "The director shall have the authority to make wage determinations applicable to the graduated schedule of wages and journeyman rate for apprenticeship agreements, giving consideration to the existing wage rates prevailing throughout the state, except that no wage determination by the director shall alter an existing wage for apprentices or journeymen that is contained in a bargaining agreement in effect between an employer and an organization of

employees, nor shall the director make any determination for the beginning rate for an apprentice that is below the wage minimum established by state or federal law."

Rule History

The current rule was adopted on March 11, 1985. Prior to the 1985 change the rule read:

"5200.0390, Subpart 2. Journeyman wage rate. The journeyman wage rate for apprenticeship agreements where no collectively bargained agreement exists shall be determined by counties, for all trades and for the building trades, consideration shall be given to the current established so-called federal Davis Bacon rate for that county, wage determinations that have been established under Laws of Minnesota 1973, chapter 274, and existing apprenticeship agreements on file in the Minnesota Division of Apprenticeship at St. Paul, Minnesota."

This language was adopted sometime shortly after the passage of the Minnesota prevailing law, or little Davis Bacon Act and was contained in "the Division of Voluntary Apprenticeship Rule and Regulations, ApDiv 21" prior to the codification of Minnesota Administrative Rules

Since the March 1985 rule change the subpart has read:

"5200.0390, Subpart 2. Journeyman wage rate. The journeyman wage rate for apprenticeship agreements where no bargaining agreement exists shall be determined by counties, for all trades. If there is either a state or federal prevailing wage determination or apprenticeship agreement for a trade, the most current rate of the determination or the agreement must be used as the journeymen wage rate."

The SONAR in support of the March 1985 rule change which mandated the use of the current state or federal prevailing wage rate simply stated that:

"Subpart 2. of this part was amended to more clearly state the current rule. The rule requires that apprentice wages must be set according to the most current wage regulation under state and federal law. It is reasonable to use the current established wage rates to fairly compensate the apprentice. The (then) current language of the rule is clarified by the amendment which provides a straight forward explanation of the wage calculation."

However, the actual language of the 1985 amendment did more than "clearly state the current rule." It was more than a clarification, and for the first time mandated the adoption of prevailing wage rates or existing agreement rates, which previously had been "considerations," in apprenticeship agreements where no collective bargaining agreements exists. The affect was to import Davis Bacon rates onto private construction not funded in whole or in part with state funds, for those employer's who wished to participate in apprenticeship. The rule was adopted without a hearing because less than 25 requests were received in the comment period. The statute giving the director the authority to set the journey worker wage rate instead merely requires consideration of "wage rates prevailing throughout the state" and does not even call for consideration of the rates in existing agreements, as reflected in the proposed rule. To the department's knowledge, no other state,

or perhaps only one or two other states in the country, require prevailing wage rates to be the basis of apprenticeship compensation on private construction projects, either by law or by rule.

CONCLUSION

Based on the foregoing, the proposed rules are both needed and reasonable.

January 13, 2006 Minnesota Department of Labor and Industry