ABC Davis-Bacon Compliance Guide

August 2023 Final Rule Revises Davis-Bacon Prevailing Wage Regulations

On Aug. 8, 2023 the U.S. Department of Labor released a final rule, Updating the Davis-Bacon and Related Act Regulations, which makes drastic ABC-opposed revisions to the Davis-Bacon Act and Related Acts regulations that apply to federal and federally assisted construction projects funded by taxpayers.

Key changes in the final rule include:

- Lowering the definition of "prevailing wage" to a wage paid to at least 30% of workers in a locality, down from 50%
- Allowing the DOL to mix urban and rural wage rates and/or adopt state or local prevailing wage rates as DBA wage rates
- Imposing automatic periodic wage escalators and imposing "conformance" rates for job classifications without survey data
- Expanding the coverage of the DBA to unauthorized categories of workers and beyond the site of the work
- Imposing discriminatory requirements on non-union fringe benefits
- Expanding debarment standards
- Making DBA requirements effective by "operation of law," meaning even if a federal agency fails to include DBA clauses in a contract, contractors are still required to pay prevailing wages
- Adds new anti-retaliation provisions to DBA contracts

ABC submitted nearly 70 pages of comments on the DOL's proposed rule and its more than 50 significant changes, urging the DOL to withdraw the proposal.

The final rule took effect on Oct. 23, 2023. Therefore, contracts executed after that date are impacted, and the DOL began implementing the final rule's changes to the wage determination process to WDs completed after the effective date.

On Nov. 7, 2023, ABC and the Southeast Texas Chapter announced the filing of a complaint in the U.S. District Court for the Eastern District of Texas, challenging the DOL's final rule. A ruling is expected in 2025.

While lawsuits by ABC and other groups are still pending, contractors should expect to comply with the final rule's provisions (outside of those currently blocked by a court order, as outlined below) in the immediate future. Below, this Guide includes guidance on how a number of these changes impact prevailing wage compliance.

AGC Lawsuit – What does this mean for compliance?

ABC applauded a June 24, 2024, decision by the U.S. District Court for the Northern District of Texas that granted a nationwide preliminary injunction blocking some provisions of the August 2023 final rule, in response to Associated General Contractors of America's lawsuit.

According to the U.S. Department of Labor:

> On June 24, 2024, the U.S. District Court for the Northern District of Texas issued a nationwide preliminary injunction impacting the following three provisions of the final rule: (1) the provision

within 29 CFR 5.2 codifying a distinction between material suppliers and contractors/subcontractors; (2) the provision within 29 CFR 5.2 requiring contractors and subcontractors to pay prevailing wages to delivery truck drivers they employ for onsite time that is more than de minimis; and (3) the provision at 29 CFR 5.5(e) directing that the DBRA apply via operation of law if a contracting agency erroneously omitted the provisions from covered contracts. In light of this injunction, these three provisions may not be implemented or enforced at this time. The remainder of the Department's final rule remains in effect.

DOL has appealed the injunction, but until further proceedings in this AGC lawsuit unfold, contractors do not need to comply with the provisions outlined above. However, the vast majority of the August 2023 rule was not challenged by AGC's lawsuit and remains in place. ABC's lawsuit may block some or all of the provisions of the new rule, pending the outcome of its litigation.

COVERAGE OF THE ACT

What does the Davis-Bacon Act require?

The Davis-Bacon Act requires covered contractors and subcontractors to pay laborers and mechanics employed on government-funded contracts at wage rates determined by the DOL secretary to be "prevailing" for employees engaged on similar projects in the locality. The statute can be found at 40 U.S.C. §3141, et seq. DOL has published regulations governing enforcement of the law at 29 C.F.R. Part 5. The department's interpretation of the act is also contained in its Field Operations Handbook, which can be found at www.dol.gov. As previously mentioned, the DOL substantially revised its Davis-Bacon regulations in 2023 and updated guidance in the online Prevailing Wage Resource Book in 2024. Litigation filed by ABC over the recent changes remains pending. See also ABC's online resources at www.abc.org/davisbacon.

Which contractors does the Davis-Bacon Act apply to?

The act applies to contractors and subcontractors performing contracts in excess of $2,000 for the construction, alteration and/or repair of public buildings or public works, including painting and decorating, where the United States or the District of Columbia is a direct party to the contract. The act's requirements also have been written into many federal laws that provide federal financial assistance for different types of construction. Among many such laws, federal prevailing wage requirements come into play in the construction of hospitals, housing complexes, sewage treatment plants, highways and airports (the Davis-Bacon Related Acts), certain "clean energy" projects and private construction owners receiving federal grants in support of computer chip manufacturing. Contracts for lease agreements with the government may also be covered where the costs of construction under the lease are a significant aspect of the lease. See *Building and Constr. Trades Dept., AFL-CIO v. Turnage* (D.C. Cir. 1988). Agency contract bid specifications are required to put contractors on notice that they are subject to the act, though this does not always occur. In 2022, Congress for the first time imposed prevailing wage (and apprenticeship) requirements on private projects regardless of government funding, as a condition of receiving tax credits under the Inflation Reduction Act. For further information, see abc.org/ira.

Which employees are covered?

The act applies to all "laborers and mechanics" performing construction or repairs at the site of the work. Only these employees must be paid at the prevailing wage rate. The act does not cover

supervisors or managers, and typically does not apply to professional and clerical personnel. There are special rules, discussed below, concerning helpers and apprentices.

Where does the act apply vis-a-vis the "site of the work?"

A court of appeals has held that neither delivery drivers nor batch plant operators are covered by the act if they perform all but an incidental portion of their work off the site of actual construction. See *Building and Const. Trades Dept., AFL-CIO v. U.S. Dept. of Labor* (Midway Excavators) (D.C. Cir. 1991); *Ball, Ball & Brossamer v. Reich*, (D.C. Cir. 1994). As discussed above, the DOL revised its rules in 2023 to cover some off-site work performed by truck drivers, but a federal court issued a nationwide injunction against that rule change. See 29 C.F.R. 5.2(i).

DETERMINING THE PREVAILING WAGE RATES

How is the prevailing wage rate determined?

The DOL secretary is responsible for determining the prevailing wage rate for each class of laborer or mechanic in a given locality. The secretary determines the proper rate on the basis of periodic wage surveys, as well as information supplied by contractors, trade associations and unions. If the secretary determines that 50% of employees in a given classification in the area are paid at a certain rate, then that rate will be deemed to be "prevailing." If no single rate is paid to 50% of the employees, then the 2023 regulations (subject to a court ruling on ABC's legal challenge) allow the secretary to calculate the prevailing wage based on the rates paid to 30% of the employees; and if no single rate is paid to 30%, then the secretary will calculate a "weighted average" of the wage rates found to be paid in the area. The General Accountability Office recently reported that the DOL's wage survey process is "seriously flawed," but the courts continue to defer broadly to these wage determinations.

Where is the prevailing wage published?

The DOL's Wage and Hour Division publishes general wage determinations for every locality in the country. These area wage determinations can be found online at sam.gov. Separate wage determinations are issued for four categories of construction: residential, building, heavy industrial and highway. Special wage determinations for particular projects also may be attached to the bid specifications for the project.

How are job classifications defined in wage determinations?

Under a 1977 DOL decision in the case of *Fry Brothers Inc.* (WAB 1977), the department applies union work rules and job descriptions to any classification for which the union wage rate is found to "prevail." Often these job duties are not published anywhere, but nonunion contractors are frequently penalized for assuming that their understanding of commonly used craft terms like "carpenter," "electrician" and "roofer" are correct. On the other hand, if the union wage scale does not prevail for a given trade listed in the wage determination, then the DOL will conduct an area practice survey to resolve disputes over which classification should perform the work. Contractors are held to be fully liable for incorrectly determining which job classification should perform each assigned task under the project, and only the position of the DOL, not the contracting officer, controls the outcome.

What about fringe benefits?

The secretary determines what amounts of fringe benefits costs are prevailing in each locality. These are published along with the wage rates. Special rules apply to such costs, as further discussed below. See 29 C.F.R. §5.20-5.32.

What if the published wage rate seems wrong?

DOL regulations permit contractors and other interested parties to challenge published wage rates that the contractor believes to be incorrect. Challengers must be prepared to supply additional wage information to the DOL and should do so in a timely manner (i.e., before contract award or construction starts). Later attempts to contest the published wage rate, such as during a DOL investigation, will be rejected as untimely.

What if the prevailing wage rate changes while a project is still ongoing?

Under 29 C.F.R. 1.6 of the DOL rules enforcing Davis-Bacon's requirements, a wage determination, once incorporated into a contract, generally applies for the life of the contract, with three limited exceptions. The three exceptions are: (1) where there is substantial additional out-of-scope construction not within the scope of the original contract; (2) where there is an additional time period not previously obligated, such as when an option is exercised; or (3) where the contract is an indefinite-delivery-indefinite-quantity (IDIQ) or similar long-term contract, in which case DOL requires contracting agencies to update wage determinations annually.

PAYING THE PROPER RATES

How do contractors comply with the prevailing wage requirements?

A contractor may fulfill prevailing wage obligations under the act by: (1) paying for both designated wages and fringe benefits in a single cash payment; (2) paying the prevailing wage rate in cash and contributing amounts specified in the wage determination toward "bona fide" fringe benefits; or (3) paying some combination of both wages and fringe benefits that adds up to the total of wages and benefits set forth in the wage determination. For example, if a wage determination lists a basic hourly wage of $30 per hour and a fringe benefit rate of $5 per hour, then a contractor is entitled to pay $35 in cash wages, or $30 in cash plus $5 in any "bona fide" fringe benefit (see 29 C.F.R. §5.31). Under a 2021 executive order, which is currently under review by the courts, government contractors must also pay employees above a minimum wage, and the rate will continue to increase annually as long as the executive order remains in effect. See dol.gov/agencies/whd/government-contracts/eo14026.

How much credit do contractors receive for fringe benefit contributions?

The DOL prohibits employers from using fringe benefit contributions that benefit employees on nongovernment work to discharge the contractor's obligations on Davis-Bacon jobs. This frequently means that non-union contractors receive only an "annualized" (reduced) percentage of credit for fringe benefit contributions, such as health insurance and apprentice training costs (see DOL Field Operations Handbook 15f13). In the past, an exception was made and full credit was allowed for pension or profit-sharing contributions, to the extent that they irrevocably vest on behalf of employees working on government work. This exception was reaffirmed in the case *Tom Mistick & Sons, Inc. v. Reich* (D.C. Cir. 1995). In its 2023 revisions to the DBA rules, the DOL also declared that "self-funded" or "unfunded" insurance plans must be approved by the Wage and Hour Administrator before a nonunion contractor will be allowed to take credit for such costs as "bona fide" fringe benefits (see 29 C.F.R. 5.28). Contractors should also be aware that providing such items as tools, bonuses and per diems are generally not considered by the DOL to be bona fide fringe benefits. Again, state prevailing wage laws

differ in the amount of fringe benefits they allow contractors to take credit for and the practice of annualizing such credits.

How do contractors receive credit for apprenticeship training costs?

The DOL takes the position that contractors may receive credit for the costs of bona fide apprenticeship programs, including those sponsored by ABC. However, the department limits contractors to receiving credit only for the actual costs incurred for each employee actually engaged in apprenticeship training, on an annualized basis, and only for the classification of labor or mechanic actually performing work on the project. The DOL's position was upheld in the case *Miree Const. v. Dole* (11th Cir. 1991).

Are separate wage rates recognized for helpers?

Under revised rules issued by the DOL in 1982 and 1989, semi-skilled helper classifications were supposed to be recognized as prevailing and were to be paid a wage rate lower than journeypersons if the number of journeypersons and helpers working on projects in the area exceeded the number of journeypersons working without helpers in the area. However, the DOL later reversed course and declared that helpers will be recognized only in the rare situation where their job duties are "separate and distinct" from those of journeypersons and the separate helper classification can be proven to prevail. For all practical purposes, helpers are no longer recognized on federal projects covered by the Davis-Bacon Act (29 C.F.R. § 5.5).

Can contractors pay different wage rates to employees working in multiple job classifications?

Contractors are entitled to pay the prevailing wage rate for the actual hours an employee spends in each of several classifications, but only if the work performed is truly capable of separation into more than one classification, and only if time records are kept in accordance with actual hours spent in each classification. Contractors should never assume their standard practices and employee cross-training will be accepted by government regulators.

PAYROLL REPORTING REQUIREMENTS

What payroll reports are contractors required to file on publicly financed jobs?

Contractors and subcontractors are required to maintain accurate payroll records showing the wage rates and other contributions for all covered laborers and mechanics. Contractors also are required to submit weekly statements of compliance along with their certified payrolls to the contracting agency (see U.S. Form WH-347). Finally, contractors are restricted—and in many cases, prohibited—from deducting wages from their employees' paychecks on government jobs.

What about union job-targeting (subsidy) programs?

Unionized contractors are prohibited from deducting union job-targeting assessments from their employees' paychecks on Davis-Bacon projects for use in subsidizing private sector work elsewhere. See *BCTD v. Reich* (D.C. Cir. 1994). Nor can unions fine or discipline their members who refuse to let their paychecks on public work be rebated for use in job-targeting programs. See *IBEW Local 357 v. Brock* (9th Cir. 1995). See also *NLRB v. IBEW* (2003).

What are the penalties for not complying with the act?

Contractors that fail to pay the prevailing wage rate, take improper credit for benefit contributions or fail to comply with the payroll reporting requirements may be penalized by having to pay back wages or

being debarred from government work. General contractors are held responsible for their subcontractors' delinquencies. Payments due for work already performed also may be withheld pending the outcome of a government investigation. There are also criminal penalties for willful violations of the acts.

INFLATION REDUCTION ACT

How do new Inflation Reduction Act tax credits for clean energy projects dependent on satisfying prevailing wage rates set by Davis-Bacon rates intersect with existing Davis-Bacon Act regulations?

To qualify for enhanced tax benefits under the Inflation Reduction Act, taxpayers must comply with the prevailing wage requirements of the Inflation Reduction Act by ensuring that laborers and mechanics performing construction, alteration, or repair on a facility are paid at least the applicable prevailing wage rate established under the Davis-Bacon Act.

The Inflation Reduction Act is a separate law from the Davis-Bacon Act and the Related Acts. While the IRA requires the IRS to incorporate DOL's prevailing wage requirements, the IRS is charged with enforcing compliance with the IRA's prevailing wage mandate, not the DOL. So weekly submission of certified payrolls to government agencies and debarment penalties enforced by DOL do not apply to IRA projects. Instead, IRS has imposed separate record-keeping requirements on taxpayers, which are typically passed down to contractors and subcontractors by contractual agreements.

The IRS has published "Final Guidance" on compliance with the IRA (89 FR 53184 on June 25, 2024).

Resources for contractors seeking to comply with the DBA and/or the IRA:

- DBA Resources: www.abc.org/davisbacon
- DOL's Prevailing Wage Resource Book: www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book
- ABC's IRA Resources and Guidance: www.abc.org/ira