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October 10, 2023

Webinar: Practical Guide to Davis-Bacon and Related Acts Final Rule

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A Practical Guide to the Davis-Bacon and Related Acts Final Rule

Presented by:

Robert (Bob) Roginson – Los Angeles

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Agenda



- **Effective Date and Applicability Dates**
- **Prevailing Wages**
- **Wage Determinations**
- **Definitions**
- **Compliance Principles**
- **Enforcement**

Effective Date and Applicability Dates

- Final Rule is effective on **October 23, 2023**
- Final Rule generally applies only to ***new contracts*** that are ***entered into after October 23, 2023.***
- Final Rule applies to narrow subset of existing contracts (contracts entered into prior to October 23, 2023).
 - Existing indefinite-delivery-indefinite quantity (IDIQ) contracts (and other similar long-term contracts that are not tied to the completion of a particular project);
 - Existing contracts *where new out-of-scope covered construction added to the contract or where an additional unobligated time period added to the project.*
- Final Rule provisions affecting ***methodology*** by which the prevailing wage rates are set applied to wage surveys where data collection is completed ***on or after October 23, 2023.***

Prevailing Wage Rate - Methodology

Existing Regulation/Policy	Final Rule
<p>Two steps:</p> <ol style="list-style-type: none"><li data-bbox="155 501 1212 672">1. Identify if there was a single wage rate paid to more than 50% of workers in a classification, and then,<li data-bbox="155 691 1174 801">2. If not, rely on a <i>weighted average</i> of all the wage rates paid in the classification.	<p>Reverts to the pre-1982 “3-step process” for determining a prevailing wage:</p> <ol style="list-style-type: none"><li data-bbox="1276 565 2354 736">1. If a majority (over 50%) of wage rates in a classification are the same, that is the prevailing wage,<li data-bbox="1276 755 2328 993">2. If no majority, then the wage rate earned by the greatest number of workers, provided that at least 30% earn that rate, is the prevailing wage and<li data-bbox="1276 1012 2277 1183">3. If no wage rate is earned by at least 30% of workers in the classification, use a weighted average.

Prevailing Wage Rate – Scope of Consideration

Existing Regulation/Policy	Final Rule
<p>Data from surrounding counties is considered in determining the wage rate for a county without sufficient data.</p> <p>However, data from metropolitan counties cannot be used to determine a rural counties' rates, and vice versa.</p>	<p>Eliminates the strict ban on mixing rural and metropolitan data so that:</p> <ol style="list-style-type: none">1. Surrounding counties can be used when data is not sufficient at the county level, regardless of those surrounding counties' specific designation as rural or metropolitan, and,2. Rural and metropolitan data can be combined at the supergroup level, or at the statewide level as a last resort, before concluding that no sufficient data exists for a classification.

Prevailing Wage Rate – State or Local Rates

Existing Regulation/Policy	Final Rule
<p>Do not explicitly authorize WHD to adopt state or local rates.</p>	<p>Amends the regulations to explicitly permit WHD to adopt State or local prevailing wage rates for both highway and nonhighway construction doing so would be consistent with the purpose of the DBA.</p> <p>To adopt State or local rates, the Administrator must determine that that the State or local government’s method and criteria for setting prevailing wage rates are substantially similar to those the WHD uses in making wage determinations.</p>

Significance / Take-Aways

- Changes in prevailing wage methodology makes it easier to adopt the wage and fringe benefit rates set forth in union collective bargaining agreements (CBAs).
- Will see more alignment between state and federal prevailing wage rates where state rates are based upon union CBA rates.
- May see increase in rates in rural areas where WHD is able to tie rates to nearby metropolitan area rates.

Wage Determinations – Multiple Wage Determinations

Existing Regulation/Policy	Final Rule
<p>Current guidance states that multiple wage determinations are required when work in the other category is substantial, a threshold that will generally be met when the cost of work in the other category of construction exceeds either \$2.5 million or 20% of total project costs.</p> <p>The \$2.5 million threshold is to be adjusted based on inflation.</p>	<p>Adds language that the solicitation and contract must incorporate the applicable wage determination for each type of construction involved that is anticipated to be substantial.</p> <p>DOL will continue to define the thresholds for “substantial” in subregulatory guidance.</p>

Significance / Take-Aways

- Increased focus in determining whether more than one type of determination applying to a project.
- Four types of construction categories: building, residential, highway, and heavy.
 - Building Construction.
 - Residential Construction.
 - Highway Construction.
 - Heavy Construction.

Wage Determinations – Updates After Contract Award

Existing Regulation/Policy	Final Rule
<p>A wage determination modification issued after contract award or the start of construction will generally not apply to the contract.</p> <p>However, in certain circumstances, such as substantial contract modifications or the exercise of options, an updated wage determination modification must be included in the contract after contract award.</p>	<p>Adds language explaining wage determinations must be updated after contract award when:</p> <ul style="list-style-type: none">• the contract or order is changed to <i>include additional, substantial construction</i> not within the scope of work, or• the contract or order is changed to <i>require the contractor to perform work for an additional time period</i> not originally obligated, including when an option is exercised. <p>Also provides that wage determinations in contracts requiring construction over a period of time <i>that are not tied to the completion of any particular project</i> must be updated annually.</p>

Significance / Take-Aways

- Contractors need to assess whether their contracts are subject to updated wage determinations.
- Assess whether change orders or other amendments to a contract may trigger application of an updated wage determination:
 - the contract or order is changed to include *additional, substantial construction not within the scope of work*, or
 - the contract or order is changed to require the contractor to perform work for *an additional time period not originally obligated*, including when an option is exercised

Definitions – Building or Work

Existing Regulation/Policy	Final Rule
<p>Generally includes <i>construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work</i>, and applies to buildings, structures, and improvements of all types.</p> <p>The regulation provides a non-exclusive list of examples of such activities.</p>	<p>Clarifies that the term includes <i>modern construction activities</i> such as <i>solar panels, wind turbines, broadband installation, and installation of electric car chargers</i> to the non-exclusive list of examples of construction activities.</p> <p>Clarifies that the term includes a <i>portion of a building or work, or the installation</i> (where appropriate) of <i>equipment or components</i> into a building or work.</p>

Definitions – Construction, prosecution, completion, or repair - Demolition

Existing Regulation/Policy	Final Rule
<p>Long-standing policy is that standalone demolition work is generally <i>not covered</i>.</p> <p>However, the DOL has understood the DB labor standards to cover demolition and removal <i>when such activities themselves constitute construction, alteration, or repair of a public building or work</i>, such as the removal of hazardous materials, or when <i>future construction that will be subject to the DB labor standards</i> is contemplated on the demolition site.</p>	<p>Adds a new sub-definition to the term construction, prosecution, completion, or repair to codify DOL’s long-standing guidance that <i>demolition work is covered under DBRA when the demolition itself constitutes construction, alteration, or repair</i>, or when future construction that will be subject to the DBRA is contemplated on a demolition site.</p>

Definitions – Contracting Officer

Existing Regulation/Policy	Final Rule
<p>Limits the definition of contracting officer to <i>individuals authorized to enter into contracts on behalf of a federal agency.</i></p>	<p>Reflects that a contracting officer may <i>also mean someone involved in the contract award process for a state or local agency, or other entity awarded federal funding and issuing contracts, not just someone who awards contracts for a federal agency.</i></p>

Significance / Take-Aways



- Contractors should take initiative in determining from the project owner or funding source who is the designated or appropriate *contracting officer*.

Definitions – Public Building or Work

Existing Regulation/Policy	Final Rule
<p>Do not expressly state that a public building or public work may include the construction of a portion of a building or work.</p>	<p>Clarifies that public building or public work includes <i>construction activity</i> involving just a <i>portion of a building or work</i>, including the <i>installation of equipment or components</i> into a building or work, even where the entire building or work is not owned, leased by, or to be used by a federal agency, so long as the other requirements of the definition are met</p>

Definitions – Prime Contractor

Existing Regulation/Policy	Final Rule
No definition for prime contractor.	Creates a new definition for prime contractor , which means <i>any person or entity that enters into a contract with an agency, and also includes the controlling shareholders or members of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, and any contractor (e.g., a general contractor) that has been delegated responsibility for overseeing all or substantially all of the construction anticipated by the prime contract.</i>

Significance / Take-Aways

- Significant broadening of what constitutes a *prime contractor*.
- This expansion impacts who or what entity may be subject to withholdings and cross-withholdings.

Definitions – Contractor and Subcontractor

Existing Regulation/Policy	Final Rule
<p>No definition for contractor or subcontractor under the existing regulations.</p> <p>Contains only a definition of contract, which includes any prime contract and any subcontract of any tier thereunder.</p>	<p>Creates new definitions for <i>contractor</i> and <i>subcontractor</i>.</p> <p><i>Contractor</i> includes within it <i>any surety that is completing performance for a defaulted contractor pursuant to a performance bond</i>. (Does not include any entity that is a material supplier, except if that entity is performing work under a development statute.)</p> <p><i>Subcontractor</i> means any contractor that agrees to perform or be responsible for the performance of any part of a contract.</p>

Definitions – Site of Work – Material Suppliers

Existing Regulation/Policy	Final Rule
<p>Long understood to exclude material suppliers, who are not considered contractors or subcontractors.</p> <p>While current regulations incorporate this exception to some degree, they do not define material suppliers and do not explicitly except them from the definition of contractor.</p>	<p>Defines <i>material supplier</i> and excludes material suppliers from the definition of contractor: material suppliers are entities whose <i>only contractual responsibilities are the delivery of materials/supplies and activities incidental to those tasks.</i></p> <p>Although a material supplier may both deliver and pick up materials, <i>an entity that is solely engaged in picking up and hauling away materials is not a material supplier.</i></p>

Definitions – Site of Work – Material Suppliers

Existing Regulation/Policy	Final Rule
	<p>Definition of material supplier <i>eliminates the subregulatory 20% threshold</i> under which entities could perform a certain amount of non-delivery onsite construction work but still be classified as material suppliers.</p> <p>Under the new definition, <i>an entity that engages in other construction work at the site of the work is not a material supplier (i.e., the entity is a contractor or subcontractor under the DBA).</i></p>

Significance / Take-Aways

- Creates a brighter line between contractors and subcontractors, who are subject to DBA and material suppliers, who are not.
- Actually narrows who might be considered a material supplier.
- Significant new restriction that an entity that engages in other construction work at the site of the work is not a material supplier.
 - Impacts contractors and subcontractors that also have material supplier divisions or operations (e.g. aggregate) that may service the same project.

Definitions – Site of Work – Truck Drivers

Existing Regulation/Policy	Final Rule
<p>While current regulations state that truck drivers are not covered for delivery time spent driving to or from the site of the work, the Department’s position regarding DBRA coverage of truck drivers is primarily set forth in FOH 15e.</p>	<p>Codifies current guidance that truck drivers employed by contractors or subcontractors must be paid applicable prevailing wage rates</p> <ul style="list-style-type: none">• For all onsite driving time unrelated to offsite delivery (e.g., hauling materials from one location on the site of the work to another),• For any time spent transporting “significant portions” of public works from secondary construction sites,• For any time spent transporting materials to or from adjacent or virtually adjacent dedicated support sites;

Definitions – Site of Work – Truck Drivers

Existing Regulation/Policy	Final Rule
	<ul style="list-style-type: none">• For any onsite time related to offsite delivery if such time is not de minimis. <p>Clarifies that where workers spend a significant portion of their day or week onsite, short periods of time that in isolation might be considered de minimis <i>may be added together</i>.</p> <p>The total amount of time a driver spends on the site of the work during a typical day or workweek—not just the amount of time that each delivery takes—is relevant to a determination of whether the onsite time is <i>de minimis</i>.</p>

Significance / Take-Aways

- Final Rule makes clear that transportation applies to contractors and subcontractors, and not material suppliers.
- Challenging record keeping and compliance obligation since Final Rule requires contractors to aggregate a driver's total time on the worksite during the day or week to determine whether it is de minimis.
 - No clear standard when aggregate time may be compensable.

Definitions – Site of Work – Significant Portion

Existing Regulation/Policy	Final Rule
<p>Site of the work includes <i>a site away from the location</i> where the building or work will remain where a <i>significant</i> portion of a building or work is constructed at the site, provided that the site is <i>established specifically for the performance of the contract or project</i>.</p>	<p>Revised definition also includes <i>any site where a significant portion of a building or work is constructed if the site is dedicated exclusively or nearly so to the performance of a single DBRA-covered project or contract for a specific period of time</i>.</p> <p>Provides clarification on the meaning of “significant portion,” explaining that term <i>encompasses one or more entire portion(s) or module(s) of the building or work</i>, such as a completed room or structure, but does not include materials or prefabricated component parts such as prefabricated housing components</p>

Significance / Take-Aways

- Final Rule does not include several provisions including in the original NPRM expanding the DBA to modular manufacturing.
- This expansion, however, is not as clearly defined as needed.
 - DBA may be determined to apply to off-site fabrication of project components where a fabrication facility is *dedicated exclusively or nearly so* to manufacturing of components of a DBA project, e.g. bridge building.

Definitions – Site of Work - Flaggers

Existing Regulation/Policy	Final Rule
<p>The Department has understood flaggers working adjacent or virtually adjacent to the construction site as being on the site of the work and subject to DBA, but this principle is <i>not specifically addressed in the existing regulations.</i></p>	<p>Clarifies that flaggers—even if they are not working precisely on the site where the building or work will remain—are working on the site of the work if they work at a location adjacent or virtually adjacent to the primary construction site, such as a few blocks away or a short distance down a highway.</p>

Definitions – Survey Crews

Existing Regulation/Policy	Final Rule
<p>Historically recognized that members of survey crews who perform primarily physical and/or manual work on a DBRA covered project on the site of the work <i>immediately prior to or during construction</i> in direct support of construction crews may be laborers or mechanics subject to the DB standards.</p>	<p>Clarifies that when considering whether a survey crew member performs primarily physical and/or manual duties, should consider the relative importance of the worker’s different duties, including time spent performing these duties.</p> <p>Thus, survey crew members who spend most of their time on a covered project taking or assisting in taking measurements likely covered.</p>

Compliance Principles – Record Keeping

Existing Regulation/Policy	Final Rule
<p>Contractors are required to maintain basic records, which include, but are not limited to, payroll (sometimes referred to as “in-house” payroll), certified payrolls, and additional records relating to fringe benefits and apprenticeship and training.</p>	<p>Clarifies the distinction between “regular payrolls” and “other basic records” that contractors and subcontractors must make and maintain, and the “certified payroll” documents and statements of compliance that contractors must submit weekly.</p> <ul style="list-style-type: none">- Adds requirements that contractors and subcontractors maintain DBRA contracts, subcontracts, and related documents, as well as worker <i>telephone numbers</i> and <i>email addresses</i>.- Clarifies that must be retained for at least 3 years after all the work is completed.- Codifies that certified payrolls may be signed and submitted electronically.

Significance / Take-Aways



- Expands the record keeping obligations.
- Adds requirement to retain workers' telephone numbers and emails.

Compliance Principles – Apprenticeship

Existing Regulation/Policy	Final Rule
<p>Provides that where a contractor performs construction on a project in a different locality from where the apprenticeship program is registered, the apprentice rates and ratios reflected in the registered program apply.</p> <p>Allows the payment of less than the predetermined rate for trainees working under ETA approved training programs.</p>	<p>Requires contractors working outside of the locality in which their apprenticeship program was registered to follow the ratio and wage rate standards of the locality where the project is taking place.</p> <p>Clarifies where no registered program in the locality of the project, the rates and ratios under the contractor’s registered program apply.</p> <p>Removes references to trainees and training programs.</p>

Compliance Principles – Flow-Down Requirements

Existing Regulation/Policy	Final Rule
<p>Existing DBRA and CWHSSA contract clauses contain explicit contractual requirements for prime contractors and upper-tier subcontractors to flow-down the required contract clauses into their contracts with lower-tier subcontractors.</p> <p>State that prime contractors are “responsible for the compliance by any subcontractor or lower tier subcontractor.” WHD interpreted this to mean that prime contractors are jointly and severally liable for any back wages owed by subcontractors.</p>	<p>Clarifies that <i>upper-tier subcontractors (in addition to prime contractors) may be liable for lower-tier subcontractors’ violations</i>. Both prime contractors and any responsible upper-tier subcontractors are required to pay back wages on behalf of their lower-tier subcontractors.</p> <ul style="list-style-type: none">- Clarifies that lower-tier subcontractors’ violations may subject prime and upper-tier contractors to debarment in appropriate circumstances.

Compliance Principles – Flow-Down Requirements

Existing Regulation/Policy	Final Rule
<p>Does not discuss what responsibility upper-tier subcontractors have other than to flow-down the contract clauses and WDs..</p>	<p>- Explains that <i>prime contractors</i> are responsible for back wages of subcontractors <i>regardless of intent</i>, but <i>upper-tier subcontractors must have some degree of intent</i> (recklessness, knowledge) in order to be held liable for back wages of their lower-tier subcontractors.</p>

Significance / Take-Aways

- Creates new liability for upper tier subcontractors.
- Increases risk of prime contractor debarment for subcontractor DBA violations.

Enforcement – Omissions of Wage Determinations and Contracts Clauses – Operation of Law

Existing Regulation/Policy	Final Rule
<p>Current language requires agencies to modify contracts retroactively if the applicable wage determination has been omitted.</p>	<p>Includes a provision that makes contract clauses and wage determinations effective by <i>operation of law</i> even where they have been mistakenly omitted from a contract.</p> <p>Revises the contract clause to state that wage determinations are effective by operation of law pursuant to the new operation-of-law provision even if they have not been attached to the contract.</p>

Compliance Principles – Incorporation by Reference

Existing Regulation/Policy	Final Rule
<p>Requires contract clauses to be "insert[ed] in full" into contracts and requires wage determinations to be attached.</p>	<p>Amends to acknowledge that, while contracting agencies are still generally required to insert contract clauses in full, it is permissible for contracts under the FAR to be incorporated by reference.</p> <p>Clarifies that contract clauses and applicable wage determinations are effective when they are incorporated by reference, even though contracting agencies are still required to insert them in full.</p>

Enforcement – Omissions of Wage Determinations and Contracts Clauses

Existing Regulation/Policy	Final Rule
<p data-bbox="155 439 1230 929">Discusses post-award modification of contracts, but only when wage determinations (not contract clauses) are omitted; WHD can instruct agencies to take necessary steps to incorporate missing wage determinations and may instruct that they be in effect retroactively, provided that the contractor is compensated for any increase in wages.</p> <p data-bbox="155 1008 1217 1182">WHD has interpreted this provision to authorize the incorporation of missing contract clauses as well as missing wage determinations.</p>	<p data-bbox="1266 439 2181 672">Revises the treatment of omitted wage determinations and adds new language to expressly require the incorporation of any omitted contract clauses.</p> <p data-bbox="1266 751 2339 1115">Clarifies that contracting agencies also have the authority to retroactively modify contracts to include missing correct WDs (but if they do, they must notify the Administrator) and contract clauses, and that the provisions extend to Related Act contracts as well as direct DBA contracts.</p>

Enforcement – Omissions of Wage Determinations and Contracts Clauses

Existing Regulation/Policy	Final Rule
<p>Do not state that agencies can take action on their own initiative to incorporate the correct WD, and some agencies have questioned whether they have the authority to do so.</p> <p>Do not expressly state that the provision applies to Related Act contracts as well as direct DBA contracts.</p> <p>Do not contain any deadlines for contracting agencies to take the required actions.</p>	<p>Includes a deadline of 30 days from the Administrator’s request for contracting agencies to take the required actions.</p> <p>Requires compensation to the contractor when the clauses and/or WDs are retroactively incorporated.</p> <p>Contains new language instructing agencies that before they terminate a contract with missing contract clauses or wage determinations, they must withhold, cross-withhold, or otherwise identify and obligate sufficient funds through a termination settlement agreement to pay any necessary back wages.</p>

Significance / Take-Aways

- “Operation of law” standard will make it more difficult to determine whether a contract is subject to DBA
- Important to review bid specifications closely.
 - Look for DBA provisions
 - Look for federal funding that trigger or may trigger DBA (e.g. Inflation Reduction Act, CHIPS Act, etc.)
- Issue Requests for Information to owners and upper-tier contractors confirming application or non-application of DBA

Compliance Principles – Fringe Benefits

Existing Regulation/Policy	Final Rule
<p>Generally requires contractors to “annualize” contributions to fringe benefit plans to compute an hourly equivalent of fringe benefits when the contractor’s workers perform work on both DBRA-covered projects and private projects.</p> <p>One exception to this general rule is that annualization is not required for defined contribution pension plans (DCPPs) that provide for immediate participation and essentially immediate vesting.</p> <p>Annualization is not addressed in the regulations.</p>	<p>Codifies annualization when the contractor’s workers work on both DBRA-covered and private (non-DBRA) work.</p> <p>Contractors, plans, and other interested parties may request an exception from the annualization requirement by submitting a request to WHD.</p> <p>Annualization requirement will not apply to contributions to defined contribution pension plans (DCPPs) as long as the DCPP contributions meet the exception requirements and the DCPP provides for immediate participation and essentially immediate vesting.</p>

Compliance Principles – Fringe Benefits—Admin Expenses

Existing Regulation/Policy	Final Rule
<p>Do not address the extent to which administrative costs associated with the provision of fringe benefits are creditable.</p> <p>Under existing WHD policy and under regulations issued under the Service Contract Act, a contractor or subcontractor may not take credit for its own administrative expenses incurred in connection with fringe benefit plans.</p>	<p>Codifies existing policy that a contractor's <i>own administrative costs are not creditable</i> as fringe benefits, even when the contractor pays a third party to perform such tasks.</p> <p><i>Costs incurred by third parties</i> directly related to the administration and delivery of bona fide fringe benefits to the contractor's laborers and mechanics <i>are creditable</i>.</p>

Compliance Principles – Fringe Benefits - Apprenticeship

Existing Regulation/Policy	Final Rule
<p>Do not address when a contractor may take credit for such contributions to apprenticeship program or how to properly credit such contributions against a contractor’s prevailing wage obligations.</p>	<p>States that the following requirements must be met for a contractor to claim a fringe benefit credit for the costs of an apprenticeship program:</p> <ul style="list-style-type: none">• The program must be registered with ETA, Office of Apprenticeship (OA), or with a State Apprenticeship Agency recognized by the OA.• The contractor’s apprenticeship contributions bear a “reasonable relationship” to the cost of apprenticeship benefits provided to the contractor’s workers.

Compliance Principles – Fringe Benefits - Apprenticeship

Existing Regulation/Policy	Final Rule
	<ul style="list-style-type: none">• Costs incurred for the apprenticeship for one classification of laborer or mechanic may not be used to offset costs incurred for another classification.• When computing the allowable hourly fringe benefit credit, the contractor must divide the cost of the program by the total number of hours worked by laborers and mechanics in the apprentice's classification and may only apply the credit to those laborers in mechanics in that classification.

Significance / Take-Aways

- Narrows the ability to take a full credit against the required prevailing wage rate for costs/expenses paid for fringe benefits and non-union affiliated apprenticeship programs.
- Be sure to calculate the credit carefully and “show your work.”

Compliance Principles – Anti-Retaliation

Existing Regulation/Policy	Final Rule
No anti-retaliation provisions in the existing regulations.	Adds anti-retaliation provisions in the contract clauses, as well as corresponding remedies (make-whole relief and remedial actions).

Enforcement – Restitution

Existing Regulation/Policy	Final Rule
<p data-bbox="155 436 1182 551">Do not discuss whether or how interest should be assessed on back wages.</p> <p data-bbox="155 625 1154 805">The ARB and the Department’s ALJs have held that interest calculated from the date of the underpayment or loss is generally appropriate.</p>	<p data-bbox="1268 436 2295 676">Add language requiring interest to be calculated on back wages or monetary relief at the rate established in the Internal Revenue Code (26 U.S.C. § 6621).</p> <p data-bbox="1268 751 2295 805">Clarifies that interest will be compounded daily.</p>

Enforcement – Debarment Standard

Existing Regulation/Policy	Final Rule
<p>Under the DBA, contractors are debarred for <i>disregard of obligations</i> to workers or subcontractors.</p> <p>Responsible officers and entities in which they have an interest are debarred for a mandatory 3-year period.</p> <p>For DBRA debarment, violations must be <i>willful or aggravated</i>.</p>	<p>Harmonizes the DBA and the DBRA debarment-related regulations by applying the same debarment standard (<i>disregard of obligations standard</i>) and related provisions to the Related Acts; thus, eliminating the heightened Related Act regulatory “aggravated or willful” debarment standard.</p>

Enforcement – Debarment - Mandatory 3-year Period

Existing Regulation/Policy	Final Rule
<p>Debarment under the DBA is for three years, but Related Act debarment regulations say that debarment may be “for a period not to exceed 3 years.”</p>	<p>Applies the DBA mandatory 3-year debarment period to Related Acts.</p>

Enforcement – Debarment - Early Removal from Debarment List

Existing Regulation/Policy	Final Rule
<p>Parties debarred under a Related Act may request removal from the debarment list after 6 months if they meet certain criteria regarding existing responsibility to comply based on a WHD investigation</p>	<p>Eliminates the regulatory provision about possible early removal from debarment list for Related Acts debarments.</p>

Enforcement – Debarment - Interest

Existing Regulation/Policy	Final Rule
<p>Entities in which DBA debarred entities or individuals have an “interest” may also be debarred, while under the Related Acts regulations, entities in which debarred parties have a “substantial interest” may be debarred.</p>	<p>Applies the DBA provision (entities in which debarred parties have an “interest” may also be debarred) to the Related Acts.</p>

Enforcement – Debarment of Responsible Officers

Existing Regulation/Policy	Final Rule
<p>Regulations about debarment for Related Acts make no express reference to debarment of responsible officers of contractors and subcontractors.</p>	<p>Codifies current law by expressly stating that responsible officers may be debarred under both the DBA and Related Acts.</p>

Enforcement – Withholding

Existing Regulation/Policy	Final Rule
<p>Authorize cross-withholding from any federal or federally-assisted contracts with the same prime contractor through a contract clause, but do not specifically state that any other contract with the same prime contractor includes contracts entered into or assisted by other federal agencies.</p>	<p>Adds language clarifying that cross-withholding can be from any contract held by the same prime contractor, even if awarded or assisted by a different agency from the contract where the violations occurred.</p> <p>Adds a provision explaining that withholding for workers' back wages has priority over most other competing claims.</p>

Enforcement – Withholding

Existing Regulation/Policy	Final Rule
	<p>Cross-withholding provisions will also allow cross-withholding on contracts held by certain affiliates of the nominal prime contract (e.g., <i>controlling shareholders or members of an entity, or the joint venturers or partners in any joint venture or partnership</i>, holding a prime contract), or by a <i>contractor</i> (e.g., general contractor) that has been delegated the responsibility for overseeing all or substantially all the construction anticipated by the prime contract).</p>

Significance / Take-Aways



- Increased risk of debarment and cross-withholdings for non-compliance.

Helpful Resources

- WHD Webpage – Final Rule: Updating the Davis-Bacon and Related Act Regulations
 - <https://www.dol.gov/agencies/whd/government-contracts/construction/rulemaking-davis-bacon>
- WHD Frequently Asked Questions
 - <https://www.dol.gov/agencies/whd/government-contracts/construction/rulemaking-davis-bacon>
- WHD Comparison Chart
 - <https://www.dol.gov/agencies/whd/government-contracts/construction/rulemaking-davis-bacon/dba-comparison-charts>
- WHD Small Entity Compliance Guide
 - <https://www.dol.gov/sites/dolgov/files/WHD/government-contracts/DBRA-Small-Entity.pdf>

Questions

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What Can You Do?

Construction Contractors Guide to Completing a Davis-Bacon Wage Survey:

Why YOU Should Participate & How

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IMPACTING DAVIS-BACON WAGE DETERMINATIONS

A Guide for Contributing to the Accuracy of Published Prevailing Wage Rates in Construction

Contractors and other interested parties have the ability to impact the wages that are reported on construction wage determinations. Wage determinations are listings of wage rates and fringe benefit rates for each classification of laborers and mechanics established by the U.S. Department of Labor (DOL) as prevailing in a given area for a particular type of construction (e.g., building, heavy, highway, or residential). The Davis Bacon and Related Acts (referred to simply as "Davis-Bacon" hereafter) requires all contractors and subcontractors performing work on federal or District of Columbia construction contracts or covered federally assisted contracts in excess of \$2,000 to pay their workers no less than the rates set forth in those wage determinations. The Davis-Bacon "prevailing wage" is the combination of the basic hourly rate and any fringe benefits listed in a Davis-Bacon wage determination.

This guide will explain how DOL establishes Davis-Bacon wage and fringe benefit rates, how participation and involvement in the survey process by contractors and interested parties can make a difference, and how to challenge a wage determination.

How DOL Establishes Davis-Bacon Wage and Fringe Benefit Rates

Davis-Bacon prevailing wages are established by the Secretary of Labor by trade classification, type of work and geographic location. Prevailing wages are primarily set using data submitted voluntarily by means of Davis-Bacon wage surveys (form WD-10) or adopting wages paid pursuant to collective bargaining agreements (CBAs.) When data provided as a result of a survey or CBA are insufficient, other means are used to determine federal prevailing wage rates. For example, with regard to highway construction, DOL now uses data collected from Davis-Bacon certified payrolls to determine the federal prevailing wage rate in an area.

Data Collection and Analysis

DOL uses several procedures to determine if it has sufficient information from collected and verified surveys to designate a wage rate as prevailing. In cases where the prevailing rate is also a collectively bargained, or union rate, the rate is determined to be "union-prevailing" and adopted as the overall prevailing wage rate. This typically occurs when either the union rate is indeed prevailing, or when survey data provided by open-shop contractors is insufficient in determining a true prevailing wage rate. The failure of construction contractors to provide sufficient data through the survey process can have long-lasting consequences on open-shop contractors if the union rate is erroneously adopted as the prevailing wage rate in an area when the open shop rate is actually prevailing. Once the union rates are used, the wage determination can be updated as often as the CBA is updated, sometimes multiple times

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Surveys in Active Data Collection

State	Survey Type	Construction Timeframe	Collection Period Start	Collection Period Cutoff	Status	Wage Survey Form	Subcontractor Form
ARIZONA	STATEWIDE HEAVY AND HIGHWAY	10/1/2022 to 12/29/2023	9/15/2023	1/15/2024	New Survey	Add Data	Add Data

Surveys in Pending Publication

State	Survey Type	Construction Timeframe	Collection Period Start	Collection Period Cutoff	Status
ARIZONA	STATEWIDE BUILDING		5/3/2019	10/31/2019	Survey Published
FLORIDA	STATEWIDE HIGHWAY		9/30/2022	1/30/2023	Processing WD-10s
GEORGIA	STATEWIDE HIGHWAY		8/26/2022	12/30/2022	Processing WD-10s
GUAM	BUILDING, HEAVY, HIGHWAY & RESIDENTIAL		4/1/2022	8/31/2022	Aggregate Data Processing
MAINE	METRO BUILDING SURVEY		7/15/2022	10/14/2022	Aggregate Data Processing
MICHIGAN	BUILDING (METRO)		8/3/2018	3/15/2019	Aggregate Data Processing
MISSOURI	BUILDING (METRO)		11/8/2019	6/30/2020	Aggregate Data Processing
NEVADA	STATEWIDE HIGHWAY		12/3/2022	9/30/2022	Aggregate Data Processing
NEW HAMPSHIRE	HEAVY		7/8/2022	10/7/2022	Aggregate Data Processing
NORTH CAROLINA	BUILDING - METRO COUNTIES		9/28/2018	5/31/2019	Aggregate Data Processing
OREGON	STATEWIDE BUILDING		7/13/2018	12/21/2018	Aggregate Data Processing
PUERTO RICO	BUILDING, HEAVY, HIGHWAY AND RESIDENTIAL SURVEY		5/3/2019	11/4/2019	Aggregate Data Processing
US VIRGIN ISLANDS	BUILDING, HEAVY, HIGHWAY, AND RESIDENTIAL SURVEY		5/3/2019	11/4/2019	Aggregate Data Processing
WASHINGTON	BUILDING & HEAVY (Metro Counties)		4/27/2018	9/28/2018	Aggregate Data Processing
WEST VIRGINIA	STATEWIDE HIGHWAY		8/19/2022	12/18/2022	Processing WD-10s



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Davis-Bacon Resources

Updated: August 16, 2023



Topline Takeaways of U.S. Department of Labor's Final Rule to Update the Davis-Bacon and Related Acts (DBRA)

AGC VICTORIES IN THE FINAL RULE INCLUDE BUT ARE NOT LIMITED TO:

- ✓ **Relief to multijurisdictional highway projects:** allowing use of one wage rate per classification for entire project (instead of county-by-county) and the ability to use non-counties data.
- ✓ **Exemption for certain material suppliers:** exempting material suppliers from DBRA coverage if their only contractual responsibility is product delivery and they are not solely dedicated to the project.
- ✓ **Sensible, periodic adjustment for open-shop rates:** allowing for automatic update non-collective bargained rates that are three or more years old in certain circumstances.
- ✓ **Allow for reduction of prevailing wage jurisdictional differences:** permitting U.S. DOL to adopt prevailing wage rates set by state or local officials after review.
- ✓ **Improvement in conformed rates:** publishing pre-approved, frequently conformed classifications and wage rates, providing advance notice of wage and fringe benefits required within those classifications.

WHERE U.S. DOL MISSES THE MARK:

WAGE RATES

- * **Fails to address speed and accuracy of wage determination process:** Instead of focusing on collecting more accurate data and determining wages that are truly prevailing, U.S. DOL made it easier for itself to set wage determinations using less or inappropriate existing data under the 30 percent rule.
- * **Return the 30 percent rule:** return to the pre-1983 methodology for determining whether a wage rate is prevailing where the likely rate will be determined when it was paid to at least 30 percent of workers.
- * **Mixing rural and metro rates:** eliminates the ban on mixing rural and metropolitan data when there is not enough data to determine specific rates. In most instances, rural rates will be artificially inflated to reflect urban rates.

SCOPE OF WORK

- * **Expands DBRA coverage to:**
 - * A material supplier if any work is performed beyond delivery of product to a site.
 - * Truck drivers calculated by adding up cumulative idle time on-site over an undefined period.
 - * Worksites where "significant portions" of a project (e.g., prefabrication manufacturing facilities) are produced.
 - * Flaggers.
 - * Clean energy and demolition work.
- * **Limits the material suppliers' exemption:** companies performing construction on a covered project that own their own material delivery arm and use it on-site would have to treat that material arm as a subcontractor and be covered under Davis Bacon.

MORE ENFORCEMENT, LIABILITY & COMPLIANCE

- * **Applies even when contract fails to include it:** DBRA contract clauses and applicable wage determinations are as effective by "operation of law" even if they are not explicitly in a covered contract.
- * **Expands contractors' liability:** upper-tier subcontractors, in addition to prime contractors, may be liable for lower-tier subcontractors' violations.
- * **"Harmonizes" debarment standards:** the same conduct will warrant debarment under both DBA projects and Related Acts projects, a 3-year debarment will be mandatory under both the DBA and Related Acts, and the current provision allowing early removal from the debarment list under the Related Acts will be eliminated.
- * **Includes cross withholding:** cross-withholding can be from any contract held by the same prime contractor, even if awarded or assisted by a different agency from the contract where the violations occurred.



AGC of America Summary of U.S. Department of Labor's Final Rule to Update the Davis-Bacon and Related Acts

Background

On August 8, 2023, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) announced a [final rule](#) to significantly revise the regulations implementing the Davis-Bacon Act and its prevailing wage for the first time in nearly 40 years. The Davis-Bacon Act and 71 Related Acts collectively apply to an estimated \$217 billion in federal and federally assisted construction spending per year and provide minimum wage rates for an estimated 1.2 million U.S. construction workers. Final rule goes into effect 60 days upon publishing in the Federal Register (on or about October 23, 2023).

AGC of America Action

Back in 2015, an AGC of America member-led task force developed a comprehensive list of considerations for Davis-Bacon reform, which it subsequently shared with WHD. The association also met with WHD directly in the pre-rulemaking period in 2021 to provide further construction industry stakeholder input. On May 17, 2022, AGC then submitted significant official [comments](#) to the proposed rule. AGC was cited over 60 times in the final rule addressing many considerations and concerns, including but not limited to:

- Providing the ability to automatically update non-collective bargained rates that are three or more years old;
- Providing relief to highway projects that cover multiple counties and wage determinations;
- Permitting DOL to adopt prevailing wage rates set by state or local officials after review;
- Limiting significant expansion to the site of the work coverage; and
- Federal clarity and a single set of standards.

AGC of America has prepared this informal summary document of the final rule as outlined below.

DEFINITIONS

- Prevailing wage
- Area
- Building or work
 - Energy infrastructure and related activities
 - Coverage of a portion of a building or work
 - Construction, prosecution, completion, or repair
- Contractor
- Subcontractor
- Prime contractor
- Laborer or Mechanic

SITE OF THE WORK AND RELATED PROVISIONS

- Revising the definition of "site of the work" to further encompass certain construction of significant portions of a building or work at secondary workites
- Clarifying the application of the "site of the work" principle to flaggers
- Revising the regulations to better delineate and clarify the "material supplier" exemption
- Revising the regulations to better delineate and clarify the "material supplier" exemption

- Revising the regulations to set clear standards for DBA coverage of truck drivers.

WAGE DETERMINATIONS

- Adoption of state/local prevailing wage determinations
- Periodic adjustment for open-shop rates
- Scope of consideration
- Proposals for use of "metropolitan" and "rural" wage data
- Frequently conformed rates
- Publication of general wage determinations and procedure for requesting project wage determinations.
- Functionally equivalent rates

ENFORCEMENT

- Operation of Law
- Cross-Withholding
- Anti-Retaliation
- Debarment
- Flow-down
- Recordkeeping