



# 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 worksites
- Clarifying the application of the “site of the work” principle to flaggers
- Revising the regulations to better delineate and clarify the “material supplier” exemption
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- 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



## DEFINITIONS

- **Prevailing wage**

The Department redefines the term “prevailing wage” to return to the original methodology (pre-1983) for determining whether a wage rate is prevailing. This original methodology has been referred to as the “three-step process.”

This three-step process identified as prevailing:

1. any wage rate paid to a majority of workers; and, if there was none, then
2. the wage rate paid to the greatest number of workers, provided it was paid to at least 30 percent of workers, and, if there was none, then
3. the weighted average rate.

The second step is referred to as the “30-percent rule,” pre-1983 “prevailing wage” means the current and predominant actual rate paid, and an average rate should only be used as a last resort.

- **Fringe benefits rate**

The Department clarifies that the same process for determining the prevailing wage rate (as described above) will be used for fringe benefits. That is, if 30 percent or more of the workers receive a certain fringe benefit, then that is the prevailing fringe wage rate. The new rule has also included language to clarify a longstanding practice that most fringe benefits must be “annualized.” Additionally, the final rule requires that contractors must obtain DOL review and approval of their existing fringe benefits within 18 months.

- **Area**

The Department revises the definition of area to address projects that span multiple counties and to address highway projects specifically. Accordingly, the Department adds language in the existing definition of “area”:

1. multi-county project wage determinations for projects in multiple counties where all included counties’ data will be combined and a single wage rate per classification issued for the project, and
2. for the highway category of construction, WHD may use state DOT highway districts or similar state geographic subdivisions used in lieu of counties as the initial area unit of a wage determination.

Section 1.5(b)(i) integrates the multi-county option into the section of the regulations addressing procedures for project wage determinations.

- **Building or work**

- **Energy infrastructure and related activities**

The Department clarifies the definition of the terms “building or work” by including solar panels, wind turbines, broadband installation, and installation of electric car chargers to the non-exclusive list of construction activities encompassed by the definition.<sup>1</sup>

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<sup>1</sup> This is in reference to energy infrastructure and related activities specifically under this final rule regarding the Davis-Bacon and Related Acts, not necessarily for the new prevailing wage requirements under the Inflation Reduction Act and the pending implementing regulations expected from the U.S Department of the Treasury.



- **Coverage of a portion of a building or work**

The Department adds language to the definitions of “building or work” and “public building or public work” to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement.

- **Construction, prosecution, completion, or repair —Demolition**

The Department also adds a new sub-definition to the term “construction, prosecution, completion, or repair,” to codify that demolition is covered by the Davis-Bacon labor standards when the demolition itself constitutes construction, alteration, or repair, or when future construction that will be subject to the DBRA is contemplated on a demolition site.

- **Contractor**

The Department creates a new definition for the term “contractor.” The definition of *contractor* includes within it any surety that is completing performance for a defaulted contractor pursuant to a performance bond. It does not include any entity that is a *material supplier*, except if that entity is performing work under a development statute.

The Department adds a definition for the term “prime contractor.” The definition begins by identifying as a prime contractor any person or entity that enters into a covered contract with an agency. This includes, under appropriate circumstances, entities that may not be understood in lay terms to be “construction contractors.”

- **Subcontractor**

The Department adds a new definition of the term “subcontractor.” The definition affirmatively states that a “subcontractor” is “any contractor that agrees to perform or be responsible for the performance of any part of a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced in § 5.1.” Like the current definition of “contract,” the definition of “subcontractor” also reflects that the Act covers subcontracts of any tier— and thus the definition of “subcontractor” would state that the term includes subcontractors of any tier.

- **Prime Contractor / Cross-Withholding against different legal entities**

The Department creates a new definition for *prime contractor*, which means 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.

For the purposes of the cross-withholding provisions in § 5.5, which limit cross-withholding to other contracts held by the same prime contractor, any such related entities falling within the definition of prime contractor but holding different prime contracts are considered to be the same prime contractor. This procedure is discussed in a new paragraph at § 5.9(c).

- **Laborer or mechanic**

The Department clarifies that when considering whether a survey crew member performs primarily physical and/or manual duties, it is appropriate to consider the relative importance of the worker’s different duties, including (but not solely) the time spent performing these duties. Thus, survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics (provided that they do not meet the tests for exemption as professional, executive, or administrative employees under part



541). If their work meets other required criteria (*i.e.*, it is performed on the site of the work, where required, and immediately prior to or during construction in direct support of construction crews, and where the survey crew members are employed by contractors or subcontractors), it is covered by the Davis-Bacon labor standards.

## **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 worksites**

The Department revises definition of “site of the work” to include 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 period of time. The final rule provides clarification on the meaning of “significant portion,” explaining that term encompasses one or more entire portion(s) or module(s) of the building or work, such as a completed room or structure, but does not include materials or prefabricated component parts such as prefabricated housing components.

- **Clarifying the application of the “site of the work” principle to flaggers**

The Department also 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.

- **Revising the regulations to better delineate and clarify the “material supplier” exemption**

The Department defines the term *material supplier* and excludes material suppliers from the definition of *contractor*. The definition explains that material suppliers are entities whose only contractual responsibilities are the delivery of materials/supplies and activities incidental to those tasks. It specifies that although a material supplier may both deliver and pick up materials, an entity that is solely engaged in picking up and hauling away materials is not a material supplier.

The definition of material supplier eliminates the sub regulatory 20% threshold under which entities could perform a certain amount of non-delivery onsite construction work but still be classified as material suppliers. Rather, under the definition, 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).

- **Revising the regulations to set “clear” standards for DBA coverage of truck drivers**

Specifically, the Department codifies its current guidance that truck drivers employed by contractors or subcontractors must be paid applicable prevailing wage rates 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, as well as for any onsite time related to offsite delivery if such time is not *de minimis*. The final rule 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* may be added together. 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 *de minimis*.



## WAGE DETERMINATIONS

- **Adoption of state/local prevailing wage determinations**

The Department amends the regulations to explicitly permit WHD to adopt state or local prevailing wage rates for both highway and nonhighway construction under certain circumstances where doing so would be consistent with the purpose of the DBA (generally, the Administrator must determine 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).

- **Periodic adjustment for open-shop rates**

The Department adds a provision authorizing periodic adjustments of certain out-of-date non-collectively bargained prevailing wage rates and fringe benefit rates on general wage determinations, with the adjustments based on U.S. Bureau of Labor Statistics Employment Cost Index (ECI) data or its successor data. Such rates may be adjusted based on ECI data no more frequently than once every three years, and no sooner than three years after the date of the rate's publication.

- **Scope of consideration (use of “metropolitan” and “rural” wage data)**

The Department eliminates the ban on mixing rural and metropolitan data so that:

1. surrounding counties can be used when data is not sufficient at the county level, regardless of those surrounding counties' overall 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.

- **Frequently conformed rates**

The Department includes where WHD has received insufficient data through its wage survey process to publish a prevailing wage for a classification for which conformance requests are regularly submitted, WHD may list the classification and conformed wage and fringe benefit rates for the classifications (*i.e.*, supplemental wage rates) on the wage determination. Supplemental wage rates may be listed on wage determinations only if they meet the basic criteria for conformed rates.

In other words, for a classification for which conformance requests are regularly submitted, and for which WHD received insufficient data through its wage survey process, WHD would be expressly authorized to essentially “pre-approve” certain conformed classifications and wage rates, thereby providing contracting agencies, contractors and workers with advance notice of the minimum wage and fringe benefits required to be paid for work within those classifications.

- **Publication of general wage determinations and procedure for requesting project wage determinations.**

The Department clarifies that general wage determinations are the default and project wage determinations are the exception. The final rule also sets out criteria for when project wage determinations are appropriate.

- **Functionally equivalent rates**

The Department creates a new paragraph to explain that the Administrator can count variable rates that are “functionally equivalent” (as explained by one more collective bargaining agreements (CBAs) or written policies of a contractor or contractors) to be counted together as the same wage for the purpose of determining whether a single wage rate prevails.



## COMPLIANCE & ENFORCEMENT

- **Operation of Law**

The Department designates the Davis-Bacon and Related Acts contract clauses and applicable wage determinations (WD) as effective by “operation of law” even if those provisions are not explicitly included in a covered contract. Currently, in order for a contractor to have a contract covered by the DBA or DBA Related Acts, the government contracting or funding agency must include as a contract clause the requirements and the applicable WD(s). If the government agency fails to do so, DOL cannot hold the contractor liable or enforce the requirements unless and until the government agency amends the contract to add the required clauses and WD(s).

- **Cross-Withholding**

The Department 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. The final rule also adds a provision explaining that withholding for workers’ back wages have priority over most other competing claims.

(Note: Under the new definition of *prime contractor* in § 5.2, the cross-withholding provisions will also allow cross-withholding on contracts held by certain affiliates of the nominal prime contract (e.g., controlling shareholders or members of an entity, or the joint venturers or partners in any joint venture or partnership, holding a prime contract), or by a contractor (e.g., general contractor) that has been delegated all or substantially all of the responsibilities for overseeing and/or performing the construction anticipated by the prime contract, as explained also in § 5.9(c)).

- **Omissions of wage determinations and contracts clauses**

The Department revises the treatment of omitted wage determinations in § 1.6(f) and adds new language at § 5.6(a)(1) to expressly require the incorporation of any omitted contract clauses.

§ 1.6(f) and § 5.6(a)(1) contain parallel provisions that clarify 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.

The final rule includes a deadline of 30 days from the Administrator’s request for contracting agencies to take the required actions. The final rule continues to require compensation to the contractor when the clauses and/or WDs are retroactively incorporated.

Finally, the final rule 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.

- **Anti-Retaliation**

The Department adds anti-retaliation provisions to discourage contractors, responsible officers, and any other persons from engaging in—or causing others to engage in—unscrupulous business practices that may chill worker participation in investigations or other compliance actions and enable prevailing wage violations to go undetected.

- **Debarment**

The Department harmonizes “debarment” standards so that the same conduct will warrant debarment (prohibition from participating in future covered contracts) under both DBA projects and Related Acts projects, eliminating the heightened Related Act regulatory “aggravated or willful” debarment standard. 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.

- **Flow-down**

The Department clarifies that upper-tier subcontractors (in addition to prime contractors) may be liable for lower-tier subcontractors' violations. Both prime contractors and any responsible upper-tier subcontractors are required to pay back wages on behalf of their lower-tier subcontractors. The final rule also clarifies that lower-tier subcontractors' violations may subject prime and upper-tier contractors to debarment in appropriate circumstances. The final rule explains that prime contractors are responsible for back wages of subcontractors regardless of intent, but upper-tier subcontractors must have some degree of intent (recklessness, knowledge) in order to be held liable for back wages of their lower-tier subcontractors.

- **Recordkeeping— Workers' contact information and copies of contracts, contract modifications, and subcontracts**

The Department clarifies the distinction between “regular payrolls” and “other basic records” that contractors must make and maintain, and the “certified payroll” documents and statements of compliance that contractors must submit weekly.

The final rule adds requirements that contractors and subcontractors maintain DBRA contracts and related documents, as well as worker telephone numbers and email addresses.

The final rule clarifies that the required records must be retained for at least 3 years after all work on the prime contract is completed.

The final rule also codifies WHD's longstanding policy that certified payrolls may be signed and submitted electronically.