Davis-Bacon Final Rule Changes

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

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1-866-4-US-WAGE

Prevailing Wages and Wage Determinations

Prevailing Wage Rate

Final Rule Reg Cite	Final Rule
§ 1.2	The final rule reverts to the pre-1982 "3-step process" for determining a prevailing wage: 1) if a majority (over 50%) of wage rates in a classification are the same, that is the prevailing wage, 2) if there is 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 (note if exactly 30%, count as prevailing) and 3) if no wage rate is earned by at least 30% of workers in the classification, use a weighted average.

Fringe Benefit Rate

Final Rule Reg Cite	Final Rule
§ 1.2	The changes to the fringe benefits determination process mirrors the changes in § 1.2 for determining the prevailing wage rate using the 3-step process. No changes were made to the relevant language in § 5.30. Thus, WHD will continue to use the existing method of first asking whether the payment of fringe benefits prevails over the payment of no fringe benefits. This is a 50% majority question, even under the 30% rule. 1) If more than 50% of workers are not paid any fringe benefits, then the rate on the WD will be zero. 2) If more than 50% of the workers are paid fringe benefits, then WHD will look only at the workers who are paid fringe benefits and determine if any one rate among them prevails under § 1.2. If there is such a rate, that is the rate to be paid on the WD. 3) If fringe benefits overall prevail, but no single rate is paid to more than 30% of the workers who receive fringe benefits, then to come up with the fringe benefit rate for the WD, WHD will average the fringe benefits of those workers who are paid fringe benefits.

Area

Final Rule Reg Cite	Final Rule
§ 1.7(a), § 1.2, § 1.5(b)(i)	The final rule adds alternatives for specific circumstances to 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.

Scope of Consideration

Final Rule Reg Cite	Final Rule
§ 1.7(b) § 1.7(c)	The final rule 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.

Functionally Equivalent Rates

Final Rule Reg Cite	Final Rule
§ 1.3(e)	The final rule creates a new paragraph at § 1.3(e) to explain that the Administrator can count variable rates that are "functionally equivalent" (as explained by one more 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.

Supplemental Wage Rates

Final Rule Reg Cite	Final Rule
§ 1.3(f) § 5.5(a)(1)	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.

State or Local Rates

Final Rule Reg Cite	Final Rule
§ 1.3(g)–(j)	The final rule 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 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 Adjustments

Final Rule Reg Cite	Final Rule
§ 1.6(c)(1)	The final rule 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 3 years, and no sooner than 3 years after the date of the rate's publication.

Multiple Wage Determinations

Final Rule Reg Cite	Final Rule
§ 1.6(b)	The final rule 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. The final rule notes that the Department will continue to define the thresholds for "substantial" in subregulatory guidance.

WD Updates After Contract Award

Final Rule Reg Cite	Final Rule
§ 1.6(c)(2) and (c)(3)	The final rule adds language explaining wage determinations must be updated after contract award when: • the contract or order is changed to include additional, substantial construction not within the scope of work • 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 on a contract or order. • Contracts requiring construction over a period of time that are not tied to the completion of any particular project (such as IDIQ contracts, schedule contracts, or long-term operations and maintenance contracts) must be updated annually.

Compliance Principles

Prime Contractor

Final Rule Reg Cite	Final Rule
§ 5.2 § 5.5 § 5.9	In § 5.2, the final rule 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, 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).

Operation of Law

Final Rule Reg Cite	Final Rule
§ 5.5(a)(1) § 5.5(e) § 3.11(e)	The final rule revises the contract clause at § 5.5(a)(1) to state that wage determinations are effective by operation of law pursuant to the new operation-of-law provision at § 5.5(e) even if they have not been attached to the contract.

Site of the Work – Secondary Sites

Final Rule Reg Cite	Final Rule
§ 5.2	Under the final rule, the revised definition also includes 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.

Site of the Work – Flaggers

Final Rule Reg Cite	Final Rule
§ 5.2	The final rule 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.

Site of the Work – Truck Drivers

Final Rule Reg Cite	Final Rule
§ 5.2	The final rule codifies the Department's current guidance that truck drivers employed by contractors or subcontractors must be paid applicable prevailing wage rates for all 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.

Site of the Work – Material Suppliers

Final Rule Reg Cite	Final Rule
§ 5.2	The final rule 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 subregulatory 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).

Survey Crew Members

Final Rule Reg Cite	Final Rule
§ 5.2	The final rule 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

Recordkeeping

Final Rule Reg Cite	Final Rule
§ 5.5(a)(3)	The final rule 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.

Apprenticeships

Final Rule Reg Cite	Final Rule
§ 5.5(a)(4)	The final rule 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. The final rule also clarifies that where there is no registered program in the locality of the project establishing applicable apprentice wage rates and ratios, the rates and ratios under the contractor's registered program apply. The final rule removes the references to trainees and training programs throughout parts 1 and 5, except that the final rule retains the text currently found in § 5.2(n)(3), which states that the regulatory provisions do not apply to trainees employed on projects subject to 23 U.S.C. sec. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. sec. 113(c).

Fringe Benefits – Administrative Expenses

Final Rule Reg Cite	Final Rule
§ 5.26 § 5.33	The final rule codifies existing policy that a contractor's own administrative costs are not creditable as fringe benefits, even when the contractor pays a third party to perform such tasks. However, costs incurred by third parties directly related to the administration and delivery of bona fide fringe benefits to the contractor's laborers and mechanics are creditable. The new regulatory provision provides examples of creditable and noncreditable expenses. Questions as to whether an expense is creditable should be submitted to WHD for review.

Anti-Retaliation

Final Rule Reg Cite	Final Rule
§ 5.5(a)(11) § 5.5(b)(5) § 5.18	The final rule adds anti-retaliation provisions in the contract clauses in § 5.5, as well as corresponding remedies (make-whole relief) in new § 5.18.

Debarment

Final Rule Reg Cite	Final Rule
§ 5.6(b) § 5.12	The final rule harmonizes the DBA and the Related Act debarment-related regulations by applying the same debarment standard (the longstanding DBA disregard of obligations standard) and related provisions to the Related Acts; thus, eliminating the heightened Related Act regulatory "aggravated or willful" debarment standard. The final rule applies the DBA mandatory 3-year debarment period to Related Acts and eliminates the possibility for early removal from the debarment list for Related Act debarments.