
MEMORANDUM

TO: The Associated General Contractors of America
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SUBJECT: Contractor Responsibility for Lodging and Meal Expenses under Davis-Bacon Act on Construction Projects

The topics of whether and when a construction contractor can be required to pay its employees' lodging and meal expenses or per diems when they work on projects which are located beyond commuting distances from their residences recently have become a major challenge for construction companies primarily working on projects covered by the Davis-Bacon Act or its related Acts. Similarly, it is becoming an enforcement initiative for the U.S. Department of Labor Wage and Hour Division (US DOL/WHD), and it is increasingly and aggressively pursuing these payments. The topic arose most recently in a ruling by the Administrative Review Board (ARB) of US DOL in a lodging and meal reimbursement case. *In the Matter of Weeks Marine, Inc.*, ARB Case Nos. 12-093, 12-095 (Apr. 29, 2015). The purpose of this memorandum is to provide an explanation of the current law on per diem payments to reimburse employees for lodging and meal expenses, to summarize US DOL/WHD's present enforcement policy, and to provide some compliance guidance for contractors while the government's current enforcement position is being further litigated.

Executive Summary

The legal requirements are developing on the question of whether contractors should pay the lodging and meal costs incurred by employees who work on projects covered by the Davis-Bacon Act and that are beyond a normal commute from their residences. The facts surrounding each project and a contractor's customary practices will be important. As a result of its recent enforcement actions and the ARB's *Weeks Marine* decision, US DOL/WHD's enforcement policy essentially consists of a two-step process. First, a balancing of the benefits test, or a

primarily benefits test, is used to determine whether employee-incurred lodging and meal costs are primarily for the benefit of the employee or contractor. Then, deciding upon whether such costs primarily benefits the contractor or employee, then the contractor either must reimburse an employee for such costs or must show that they customarily furnish such lodging and meal costs.

Current Law on Payment of Lodging and Meal Expenses

The Davis-Bacon Act (DBA), 40 U.S.C. §§ 3141-3148, and its implementing regulations in 29 C.F.R. Part 5, require that laborers and mechanics receive prevailing wages and fringe benefits unconditionally and without deduction. 40 U.S.C. § 3142(c)(1). (“unconditionally . . . without subsequent deduction or rebate . . .”). The DBA regulations state that “laborers and mechanics . . . will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate . . . the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination.” 29 C.F.R. 5.5(a)(1). General wage determinations impose prevailing wage and fringe rates based on the location of the construction project, not based on where the construction contractor’s employees performing the work may make their permanent residences.

Neither the DBA nor any general DBA wage determination mentions that contractors have a duty to pay their employees’ actual or reasonable lodging and meal expenses when they work at remote DBA-covered construction sites. There is little mention of the subject in the DBA regulations. For example, the implementing regulations only state that per diem payments “normally” do not qualify as a fringe benefit for which a contractor may take credit toward meeting DBA prevailing wage obligations. (While each situation must be separately considered on its own merits, payments made for travel, subsistence . . . are not normally payments for fringe benefits.”). 29 C.F.R. 5.29(f).

US DOL/WHD does have and has had a provision in its Field Operations Handbook (FOH) DBA Chapter for many years that addresses board, lodging and transportation costs. It reads as follows:

Where an employer sends employees who are regularly employed in their home community away from home to perform a special job at a location outside daily commuting distances from their homes so that, as a practical matter, they can return to their homes only on weekends, the assumption by the employer of the cost of the board and lodging at the distant location, not customarily furnished the employees in their regular employment by the employer, and of weekend transportation costs of returning to their homes and reporting again to the special job at the end of the weekend, are considered as payment of travel expenses properly reimbursable by the employer and incurred for its benefit. Such payments are not considered bona fide fringe benefits within the meaning of the DBRA, are not part of the employees’ wages, and do not constitute board, lodging, or other facilities customarily furnished which are deductible from the predetermined wage pursuant to 29 CFR §§ 3.5(j). See 29 CFR §5.29(f).

FOH par. 15f19 (Oct. 25, 2010). This same “special job” language appeared in the prior version of the DBA chapter in the FOH as paragraph 15f18, dated June 29, 1990, and rarely has been challenged by contractors. The FOH is viewed as internal guidance issued by US DOL/WHd to instruct investigators on various enforcement positions for conducting investigations as well as interpretive assistance for employers and employees. A court will not blindly follow the FOH when reviewing a DBA lodging and meal expense case, but there is a presumption that it can provide useful and potentially persuasive guidance on a particular DBA subject. *William J. Lang Land Clearing, Inc.*, 520 F.Supp.2d 879 (E.D. Mich. 2007).

In the *Lang* case, the court upheld an ARB lodging and food expense ruling. The ruling involved remote DBA projects, applied the FOH “special job” provision noted above, and refused to permit a contractor to pay less than the governing DBA wage and fringe rates to take into account the actual cost of employer-provided board and lodging. Significantly, the contractor chose to pay the employees’ remote lodging and meal expenses “rather than increase the pay for its employees while they were out of town,” and the employees testified that had the company not reimbursed them that “they would have quit.” 520 F. Supp.2d at 881.

Construction companies should understand also that there is no legal distinction between making a deduction of a cost from an employee’s wages and shifting or transferring that cost to an employee in circumstances where the employer cannot legally deduct such cost from an employee’s wages. In other words, it is illegal for an employer to deduct the cost of certain facilities, including lodging or meals, that benefit an employer from an employee’s wages where the deduction results in an employee earning less than minimum wage and now presumably the prevailing wage. It is equally illegal for an employer to require an employee to pay for such facilities, including lodging or meals, that benefit an employer where it results in an employee earning less than minimum wage and now presumably the prevailing wage. In the prevailing wage context, shifting a cost to an employee that cannot be deducted as part of an employee’s wages is an unlawful *de facto* deduction when it results in an employee earning less than the prevailing wage.

In the DBA context, legally permissible deductions from an employee’s wages are regulated by the Copeland Act, 18 U.S.C. § 874, and its implementing regulations in 29 C.F.R. Part 3. These regulations implementing the Copeland Act identify permissible deductions from an employee’s wages, one of which is the “reasonable cost of board, lodging or other facilities” as defined in section 3(m) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(m). 29 C.F.R. § 3.5(j). These regulations were issued “to aid in the enforcement of the minimum wage provisions of the [DBA]” and authorize construction contractors, at least in some traditionally-recognized instances, to pay their laborers and mechanics less than the governing DBA prevailing wage rate to take into account the “reasonable cost of [employer-provided] board [and] lodging.” 29 C.F.R. §§3.1 and 3.5. Since the reasonable cost of board, lodging or other facilities is a permissible deduction under the Copeland Act in some situations, then it seems that the cost also could be counted to meet a DBA prevailing wage requirement in certain situations.

The FLSA further defines the term “wage” as an amount paid to an employee and it can include the “reasonable cost” to the employer of furnishing such employee with board, lodging or other facilities, “if such board, lodging or other facilities are customarily furnished” to the

employer's employee. 29 U.S.C. § 203(m). The FLSA regulations that define the term "reasonable cost", however, state that where the facilities, which would include board and lodging, are found to be primarily for the benefit or convenience of an employer, then the cost of furnishing such facilities is not reasonable and may not be included in the computation of an employee's wage. 29 C.F.R. §531.3(d)(1). Since the reasonable cost of facilities that primarily benefit the employer cannot constitute part of wages, then it cannot be shifted to the employee to bear either or it would constitute an impermissible deduction.

US DOL/WHd's Enforcement Policy

a. Weeks Marine Case

The issue over the payment of per diems by contractors to reimburse an employee for their lodging and meal expenses has been lurking in US DOL/WHd's enforcement practices but has not gained much traction until the investigation of Weeks Marine, Inc., and the DBA beach replenishment project it performed at Fire Island in New York during late 2007 and early 2008. In the *Weeks Marine* case, the company used unionized employees who did not live within a commuting distance of the project and these employees, who were employed seven days a week on the project, arranged for their own lodging by renting hotel rooms, etc. Weeks Marine did not reimburse most of these employees for their lodging costs, with one or two exceptions. There was a collective bargaining agreement (CBA) in place which obligated Weeks Marine to pay these away-from home employees working on the Fire Island beach replenishment project a travel allowance of \$250 each way and a \$35 per diem subsistence stipend (\$245 per week) to cover, lodging, board and other costs. This per diem subsistence did not cover the lodging and meal costs for these union employees and they paid the difference in the lodging and meal costs out of their pockets.

Beginning in January, 2008, US DOL/WHd conducted an investigation of the Weeks Marine Fire Island project and found a violation of the DBA prevailing wage requirements, based on its position that the contractor had a duty under the DBA to reimburse employees working on the project for their actual lodging and meal costs (among other violations not related to the lodging and meal per diem payments issue). It assessed backwages in an August, 2008, letter based upon the actual lodging and meal costs less a credit for the per diem payments the employees received under the CBA. Weeks Marine protested the lodging-based DBA prevailing wage violation and a trial was held before an Administrative Law Judge (ALJ). The ALJ issued a Decision and Order three years later in 2012, finding that Weeks Marine violated the DBA for failing to reimburse employees for the difference in their lodging costs over and above the amount of the per diem payments. *In the Matter of Weeks Marine*, Case No. 2009-DBA-00006 (June 26, 2012). The ALJ, however, did not calculate damages for the DBA violation based on the actual lodging costs incurred by these employees; rather, she applied a "reasonable" rate based upon the lowest lodging rate incurred by these employees that she determined after hearing all of the testimony.

Both sides appealed the ALJ's decision to the ARB; the company appealed the finding of a violation while the US DOL/WHd appealed the damages calculations that were not based upon the employees' actual costs. On appeal, the ARB concluded that Weeks Marine would be in

violation of the DBA for failing to pay prevailing wages unconditionally because it did not pay the employees' out-of-pocket lodging costs provided US DOL/WHd could prove that the lodging and meal expenses primarily benefited Weeks Marine. Because the ALJ failed to identify the rationale for its decision, the ARB sent the case back to the ALJ to make factual findings using a balancing of the benefits test. We are presently awaiting a decision from the ALJ on that matter.

b. US DOL/WHd's Developing Enforcement Policy

While it still has not announced its enforcement position in published guidance such as the FOH other than in its brief, US DOL/WHd's evolving enforcement policy concerning the reimbursement of lodging and meals expenses is guided by the ARB's analysis in the *Weeks Marine* case, the DBA and its implementing regulations, the FOH "special job" provision, the FLSA, and a few DBA cases that never reached court and in which US DOL/WHd challenged attempts by contractors to pay less than the prevailing wage rates to take into account lodging and meal costs.

This enforcement policy leverages the language in the DBA requiring federal contractors to pay laborers or mechanics their prevailing wages "unconditionally" and "without subsequent deduction" and similar language in the FLSA requiring that employees be paid their wages "free and clear" or unconditionally and finally. The FLSA definition of "wage" also is subject to a qualification that authorizes an employer to pay less than the FLSA minimum wage to take into account the "reasonable" cost of employer-provided board, lodging or other facilities based upon a showing by the employer that such board, lodging or other facilities are customarily furnished to employees.

Consequently, US DOL/WHd's DBA enforcement policy imports from the FLSA a balancing of the benefits standard, also known as the "primarily benefits" test, because it does **not** view all employee costs for lodging and meals as primarily for the benefit of an employee. In fact, the special job provision in the FOH suggests that employee lodging and meal costs are incurred for an employer's benefit. US DOL/WHd's DBA historical enforcement policy, and the approach taken by the ARB in *Weeks Marine*, begins with a rebuttable presumption that contractors do not have a legal obligation to pay their employees' costs for lodging and meals because these living expenses primarily benefit the employee. Just as under the FLSA, this presumption, however, may be overcome and rebutted if US DOL/WHd can introduce sufficient evidence to show that these lodging and meal expenses primarily benefit the contractor or are a burden upon employees in furthering their employer's business as opposed to primarily benefitting the employees, using a balancing of the benefits test.

The reasonable cost of lodging and meals incurred by an employee working at a project beyond their commuting distance turns on a balancing of the benefits test of whether the lodging and meal costs are primarily for the benefit or convenience of an employer or an employee. Thus, depending upon the specific facts of each case, US DOL/WHd's enforcement policy as expressed by the ARB in *Weeks Marine*, and the accompanying balancing test, can be summarized as follows:

- If the lodging and meal costs are found to be of primary benefit to the *employer*, then, (a) where the employer incurred such costs, the employer may not deduct such costs from employee wages, and (b) where the employee incurred such costs, the employer must reimburse the employee for the actual costs incurred even when the contractor paid its employees the DBA prevailing rate for their work on the remote project.
- If the lodging and meal costs are found to be of primary benefit to the *employee*, then, where the employer incurred such costs, such costs are deemed reasonable and may be deducted from an employee's wages, but only if the contractor can demonstrate that its customary practice, or the prevailing practice in its industry, is to pay for such employees' lodging and meal costs.

Thus, whether a contractor must reimburse employees who do not live within a commuting distance of a project for their lodging and meal costs consists of a two-step process. The first prong involves a balancing of the benefits to determine whether such costs are primarily for the benefit or convenience of the employer or employee. If the lodging and meal costs primarily benefit the employer, then the employer is obligated to reimburse the employees for such costs; otherwise, the failure to make the reimbursement would be an improper deduction from the employee's wages. On the other hand, if the costs primarily benefit the employee, then the second prong is that an employer must show that it or other employers in the same business customarily furnish lodging and meal costs to its employees.

This evolving enforcement position creates a quandary for contractors to avoid liability for failing to pay prevailing wages under the DBA because it did not reimburse employees for their lodging and meal costs. First, a contractor needs to structure how it promotes or advertises jobs that are beyond the commuting distance of employees' residence so that the lodging and meal costs are primarily for the benefit or convenience of the employee. Secondly, the facts need to demonstrate that a contractor or other contractors in the same business customarily furnishes such costs to employees. In other words, the second aspect requires a contractor to pay such costs to demonstrate that lodging and meal costs are customarily furnished to employees in order to apply such payment to meet the prevailing wage requirement. Thus, under either scenario, the apparent result of US DOL/WHD's enforcement position is that a contractor may subsidize the lodging and meal costs incurred by away-from-home employees working at a remote project. The outstanding question will be whether a contractor can apply such costs to meet its DBA prevailing wage requirements.

Steps Contractors Should Consider to Comply

An initial challenge to formulating compliance guidance is that US DOL/WHD has not had to defend its evolving DBA enforcement position in court yet. The DBA is generally interpreted to bar employees from suing employers in court to remedy alleged DBA prevailing wage violations. As for potential strategies for a construction contractor to consider, there are several options but the facts of various strategies will be important in applying a balancing of the benefits test. For example, a contractor could change its per diem practices to reimburse away-from-home employees for their lodging and meal costs in an effort to comply with US

DOL/WHd's apparent lodging and meal reimbursement enforcement position. Another approach could be for a contractor to provide lodging and meals and deduct the "reasonable" costs from employees' weekly DBA prevailing wages. Under this scenario, the result of the primarily benefits test must show that these expenses primarily benefit a contractor's employees and that it (or competitors) customarily furnishes such lodging and meal costs on projects outside the commute area from employee's residences.

If the contractor plans to hire employees from outside a normal commute from their residence, then the contractor may want to investigate available lodging within commuting distance and negotiate rates. Contractors may want to examine other living options or alternatives in order to prescribe dictate the living arrangements.

Another possible strategy would be for a construction company to continue to pay its employees at least the prevailing wage and fringe benefit rates required by the wage determination applicable to the project without reimbursing employees for their remote lodging and meal costs beyond any per diem the company may have in place while awaiting the outcome of the *Weeks Marine* litigation. In addition, the contractor could formally advise the contracting officer in advance that the firm will seek adjustment relief if it is required to absorb employee lodging and meal expenses. Should *Weeks Marine* prevail in its challenge, a contractor would be considered to have paid its employees "unconditionally" at or above the prevailing rate and without "subsequent deduction" and, therefore, should be found DBA compliant. On the other hand, should US DOL/WHd prevail, the contractors would need to re-evaluate their pay practices. Regardless, it will be important to reevaluate any interim compliance approach as soon as there is a final agency ruling in the *Weeks Marine* case.

ABR:dhpsd