



Davis-Bacon Act New Regulations and Legal Challenges

AFL-CIO ULA West Coast Field
Meeting

November 18, 2024 ♦ 9:00 a.m.

By: Peter M. McEntee



AGENDA

□ AGENDA

- Davis-Bacon Act Overview
- 2023 New Regulations
- Legal Challenges and Injunction
- Outlook?

Davis-Bacon Act Overview

- ❑ Davis-Bacon Act (40 USC §3141, et. seq.)
 - **General:** Requires payment of prevailing wage for mechanics and laborers performing work on site pursuant to contracts with the federal government or District of Columbia.
 - **Purpose:** To prevent workers and communities from getting underbid by lower-paying contractors.

Davis-Bacon Act Overview

- ❑ When does it apply?
 - Contracts for construction, alteration or repair with federal government or D.C.
 - Contract is in excess of \$2,000.
 - The contract relates to a public building or public work.

Davis-Bacon Act Overview

- ❑ What is the prevailing wage?
 - The prevailing hourly wage and fringe benefits paid based on classifications in the local area.
 - The prevailing wage, pre- new regulations was:
 - The wage rate that is paid to at least 50% of employees in the area; OR
 - Average rate for the area.

Davis-Bacon Act Overview

□ How is the Rate determined?

- The Department of Labor Wage and Hour Division conducts surveys for each classification and local area.
- The Wage and Hour Division considers if there is a wage that is paid to at least 50% of the workers in the classification – if so, that will be the prevailing wage.
- If there is not a wage that is paid to 50% of the employees, then the Wage and Hour Division uses an average to determine the prevailing wage. (Same for Fringe benefits)

Davis-Bacon Act Overview

□ Survey Process:

- Separate surveys for categories of construction: Building, Residential, Highway, Heavy (catch-all)
- WHD analyzes the data received and determines the prevailing wage by county for each classification.
- Wage determinations can be found at www.SAM.gov

Davis-Bacon Act Overview

□ Enforcement

- Contractors and sub-contractors are required to submit certified payroll on a weekly basis to the contracting agency.
- Union, third parties, and workers can bring complaints to DOL.
- If DOL determines they are not complying, it can compute and order back wages and liquidated damages.
 - Contracting agency may withhold funds to cover back wages
 - May seek debarment of the contractor.
 - May suspend or terminate the contracts.

DB Related Acts

- There are several Davis-Bacon Related Acts that apply the Davis-Bacon Act to programs that provide federal assistance such as grants, loans, loan guarantees, and other programs.
 - Examples: National Housing Act, Federal-Aid Highway Act, Infrastructure Investment and Jobs Act.

2023 Regulations

- ❑ Effective October 23, 2023, the DOL issued a Final Rule amending the DBA regulations.
- ❑ First major amendments to DBA regulations since 1982.
- ❑ <https://www.dol.gov/agencies/whd/government-contracts/construction/rulemaking-davis-bacon>
- ❑ Significant changes in:
 - Prevailing Wages
 - Wage Determination
 - Definitions
 - Compliance
 - Enforcement

2023 Regulations – Prevailing Wages

- ❑ 29 CFR 1.2
 - New process for determining prevailing wage (30% rule):
 - If majority of wage rates in the classification are same, that is prevailing wage.
 - If not majority, then wage rate earned by at least 30% becomes prevailing wage.
 - If no wage earned by 30%, then use weighted average.
 - (Same formula for fringe benefits if more than 50% of workers are paid fringe benefits)

2023 Regulations – Prevailing Wages

- ❑ 29 CFR 1.7(c)
 - Allows WHD to use surrounding counties to determine the wage, regardless of designation as rural or metropolitan.
- ❑ 29 CFR 1.3(g)-(j)
 - Explicitly permits WHD to adopt state or local prevailing wage rates for highway and nonhighway construction under certain circumstances.

2023 Regulations – Wage Determinations

□ 29 CFR 1.6(c)(1)

- Adds provision authorizing periodic adjustment of out-of-date non-collectively bargained wage rates using BLS Employment Cost Index data. May adjust no more frequent than every 3 years.

□ 29 CFR 1.6 (c)(2)

- If determination is revised after contract is awarded, the original wage applies, except when:
 - The contract is changed to include additional substantial construction not within the scope of the work; or
 - The contract is changed to require contractor to perform work for an additional time period.

2023 Regulations - Definitions

- ❑ 29 CFR 5.2 – Demolition
 - Includes demolition in definition of construction if the demolition constitutes construction, alteration or repair OR when future construction is contemplated on the site.
- ❑ 29 CFR 5.2 – Public Building or Work
 - Amends current definition to include construction activity done where the entire building or work is not owned, leased or used by a federal agency.
- ❑ 29 CFR 5.2 – Flaggers
 - Clarifies that flaggers are covered as working on the site of the work if they work at an adjacent location.

New Regulations - Definitions

- 29 CFR 5.2 - Material Suppliers
 - Defines “material suppliers” and excludes from definition of “contractor”.
 - Def. – entity that meets following:
 - Only work on contract is delivering materials or pickup of the same, and incidental activities.
 - Facilities are not located on site or secondary site and was established before opening of bids.
 - If entity engages in other activities, such as construction, or repairs, it is not a material supplier.
 - Eliminates practice of applying 20% threshold where an entity could perform some construction work and still be a “material supplier.”

2023 Regulations - Definitions

- 29 CFR 5.2 – “Covered Transportation”
 - DB applies to truck drivers employed by contractors/subcontractors for: 1) transportation on site of work unrelated to offsite delivery; 2) transportation of a significant portion of work between secondary site and primary site; 3) transportation done by laborers and mechanics.
 - New regulation includes work performed by truck drivers on the site of work that are essential or incidental to the transportation of materials or supplies, as long as not de minimis.
 - Such as: loading, unloading, waiting for materials to be loaded or unloaded.

2023 Regulations - Compliance

- ❑ 29 CFR 5.5(a)(1), 5.5(e) – Operation of Law
 - The new rule makes contract clauses and wage determinations effective by operation of law even when they have been mistakenly omitted from a contract.
 - Will make easier for workers to obtain backpay in these circumstances.

2023 Regulations - Compliance

- ❑ 29 CFR 5.6 (a)(3) – Recordkeeping
 - Requires payroll records to be retained for at least 3 years after all work on prime contract is complete.
- ❑ 29 CFR 5.5(a)(6), (b)(4)
 - Clarifies that upper-tier subcontractors may be liable for lower-tier subcontractors' violations. Prime and upper-tier subcontractors required to pay back wages for lower-tier subcontractors.
- ❑ 29 CFR 5.5(a)(11), (b); 5.18
 - Adds anti-retaliation provisions in the contract clauses and corresponding remedies.

2023 Regulations - Enforcement

- ❑ 29 CFR 5.10(a) – Interest
 - Add language that requires interest on back wages and monetary relief to be at the IRS rate and compounded daily.
- ❑ 29 CFR 5.6(b), 5.12 – Debarment
 - Harmonizes the standards for debarment under DBA and Related Acts. Specifies for both:
 - Debarment for disregard of obligations to workers. Removes “aggravated or willful” standard for Related Acts.
 - Debarment is for mandatory 3 years.
 - No early removal.
 - Includes debarring responsible officers of an entity, and related entities.

AGC Litigation

- ❑ Associated General Contractors filed suit in the Northern District of Texas seeking a nationwide injunction related to specific provisions of the regulations.
 - Case No. 5:23-CB-0272-C.
- ❑ Specifically, seeking injunction of the changes regarding “material suppliers”, “covered transportation”, and the Operation of Law provisions.

AGC Litigation

- ❑ The Northern District of Texas issued a nationwide preliminary injunction regarding:
 - §5.2 – definition of “covered transportation”
 - §5.2 – definition of “material supplier”
 - 5.5(e) – operation of law provision
- ❑ [*Associated Gen. Contractors of Am. v. U.S. Dep't of Lab.*](#), No. 5:23-CV-0272-C, 2024 WL 3635540 (N.D. Tex. June 24, 2024)

AGC Litigation

- ❑ Court's rationale:
 - The regulations went beyond the statutory jurisdiction of the statute.
 - The Departments acted in a legislative capacity.
 - The DOL violated the Regulatory Flexibility Act (RFA).
 - Specifically focused on the burden on employer, particularly small businesses.
- ❑ DOL appealed the injunction.

ABC Litigation

- ❑ Associated Builders and Contractors (ABC) filed suit seeking declaratory and injunctive relief in Eastern District of Texas, Beaumont Division. Case 1-23-cv-00396
- ❑ ABC makes similar legal arguments as AGC:
 - The rule is arbitrary and capricious
 - The rule goes beyond the parameters of the statute.
 - Julie Su was an improperly appointed official.

Outlook?

- Given the election, unclear what will happen over next few months.

AFL-CIO ULA West Coast Field Meeting

Peter M. McEntee

pmcentee@beesontayer.com



www.beesontayer.com

492 Ninth Street, Suite 350

Oakland, CA 94607

510.625.9700 (v) ♦ 510.625.8275 (f)

520 Capitol Mall, Suite 300

Sacramento, CA 95814

916.325.2100 (v) ♦ 916.325.2120 (f)