

2018

# PREVAILLING WAGE SEMINARS



**WAGE AND HOUR DIVISION**  
UNITED STATES DEPARTMENT OF LABOR



# **DBA/DBRA Compliance Principles**

# DBA/DBRA Compliance Principles

- Laborers and mechanics
- Site of the work
- Classification of Work
- Fringe Benefits
- Deductions
- Certified Payrolls

# Laborers and Mechanics

- Workers whose duties are manual or physical in nature;
- Includes apprentices, trainees and helpers; and
- For CWHSSA, includes guards and watchmen.

# Laborers and Mechanics

- Does not include:
  - Timekeepers, inspectors, architects, engineers; or
  - Bona fide executive, administrative, and professional employees as defined under FLSA.
- Working foremen are generally non-exempt:
  - must be paid the Davis Bacon (DB) rate for the classification of work performed if not 541 exempt.

# Site of the Work

- Davis-Bacon applies only to laborers and mechanics employed “directly on the site of the work.”
- A three-part definition applies to determine the scope of the term “site of the work.”

# Site of the Work Definition ¶1

- DBA applies only to workers “directly on the site of the work:”
  - The physical place or places where the construction called for in the contract will remain after work has been completed; and
  - Any other site where a **significant** portion of the building or work is constructed, *provided that* such site is established specifically for the contract.

# Site of the Work Definition ¶2

- “Site of the work” also includes job headquarters, tool yards, batch plants, borrow pits, etc., *provided* they are:
  - Located adjacent or virtually adjacent to the “site of the work” described in paragraph 1; and
  - Dedicated exclusively or nearly so to the performance of the contract or project.
  - Except if they are excluded – see next slide

# Site of the Work Definition ¶3

- “Site of the work” does not include a contractor’s or subcontractor’s:
  - permanent home office, branch locations, fabrication plants, tool yards, etc.;
  - whose location and continuance in operation are determined without regard to a particular covered project.

# Definition ¶3 (Cont'd.)

- Also not included in the “site of the work” are:
  - Fabrication plants, batch plants, job headquarters, tool yards, etc., of a commercial supplier established by a supplier of materials:
    - Before the opening of bids for a project; and
    - Not located on the actual site of the work.
  - Such permanent, previously established facilities, are not part of the “site of the work,” even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

# Truck Drivers

- Truck drivers of the contractor or subcontractor are covered by Davis-Bacon for time:
  - Spent working on the “site of the work;” and/or
  - Spent loading or unloading materials and supplies on the “site of the work,” if such time is more than *de minimis*.

(Slides coming up discuss material suppliers.)

# Truck Drivers

- Truck drivers are also covered when:
  - Transporting materials and supplies between a facility that is part of the “site of the work” and the actual construction site; or
  - Transporting portions of a building or work between a site where a significant portion of the project is being constructed and the physical place where the building or work will remain.

# Truck Drivers Owner-Operators

- DOL has an enforcement position with respect to *bona fide* owner-operators of trucks who are independent contractors (an owner-operator is a person who owns and drives a truck). Certified payrolls including the names of such owner-operators do not need to show the hours worked or the rates paid, only the notation “owner-operator.”
- This position does not apply to owner-operators of other equipment such as bulldozers, cranes, etc.

# Material Suppliers

- The manufacture and delivery to the work site of supply items such as sand, gravel, and ready-mixed concrete by bona fide material suppliers, are activities not covered by DBA/DBRA requirements (even though the materials are delivered directly into a contractor's work site mixing facilities).
- Bona fide material suppliers (including truck drivers) whose only contractual obligations for on-site work are to deliver materials and/or pick up materials are not considered contractors under the DBA/DBRA. Thus, their employees are not subject to the Davis-Bacon labor standards.

# Material Suppliers (cont'd.)

- However, laborers and mechanics employed at the site of the work by a material supplier, manufacturer, or carrier that undertakes to perform a part of a construction contract as a subcontractor:
  - Would be subject to Davis-Bacon labor standards in the same manner as those employed by any other contractor or subcontractor.
  - For enforcement purposes, if such a worker spends more than an incidental amount (20%) of his/her time in a workweek engaged in construction work on the site, he/she is covered for all time spent on the site during workweek.

# Wages & Fringe Benefits

- All laborers and mechanics employed or working upon the site of work must be paid at least the applicable prevailing wage rate for the classification of work performed, without regard to skill.

# Wages & Fringe Benefits

- Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed.” 29 CFR 5.5(a)(1)

# Wages & Fringe Benefits

- DBA: the terms “wages” and “prevailing wages” include:
  - The basic hourly rate (BHR);
  - Contractor contributions *irrevocably* made to a trustee or third party pursuant to a bona fide fringe benefit (FB) fund, plan, or program; and/or
  - The rate of costs the contractor reasonably anticipates in providing bona fide FB’s where certain conditions are met.

# Wage & Fringe Benefits

- Under DBA, FB's are a component of the DBA “prevailing wage.”
- The prevailing wage obligation may be satisfied by:
  - Paying the BHR and FB in cash (including negotiable instruments payable on demand);
  - Contributing payments to a bona fide plan; or
  - Any combination of the two.

# Wages & Fringe Benefits

- Must be paid weekly for all hours worked:
  - Unless the fringe benefits are paid into a bona fide FB plan and then contributions must be paid no less often than quarterly.
- Cash wages paid in excess of BHR may count to offset or satisfy the FB obligation (unlike under SCA).

# Prevailing Wage Example

- **BHR** **\$14.00**
- **FB** **\$ 1.00**
- **Total prevailing wage** **\$15.00**
  
- **The contractor may comply by paying:**
  - **\$15.00 in cash wages**
  - **\$14.00 in cash wages plus \$1.00 for FB**
  - **\$12.00 in cash wages plus \$3.00 for FB**

# Prevailing Wage Example

- An employee spent 32 hours working as an electrician, with a BHR of \$22.00 and an FBR of \$3.00, and 8 hours working as a laborer, with a BHR of \$14.00 and a FBR of \$1.00.
- The employee is due \$800.00 for his electrician work (32 hours X (\$22.00 + \$3.00)) and \$120.00 for his laborer work (8 hours X (\$14.00 + \$1.00)), for a total of \$920.00.
- The \$920.00 can be paid in any combination of cash wages and fringe benefit contributions.

# Deductions

- 29 CFR 3.5 lists deductions that an employer can make from the prevailing wage rate without the approval of the Secretary of Labor.
- Examples include Social Security and federal or state taxes, certain court-ordered payments, bona fide pre-payments of wages, certain payments of union dues, and voluntary charitable donations.

# Deductions

- 29 CFR 3.6 generally provides that the Secretary may approve other deductions whenever all of the following conditions are met:
  - The contractor does not profit directly or indirectly from the deduction
  - The deduction is not otherwise prohibited by law
  - Either the employee voluntarily consented to the deduction in writing in advance of the time that the work was performed or the deduction is under the terms of a collective bargaining agreement
  - The deduction serves the convenience and interest of the employee

# Payroll and Basic Records

- Payrolls and related basic records shall be maintained by the contractor during the course of the work and for three years thereafter for all laborers and mechanics working at the site of the work.
- Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. 29 CFR 5.5(a)(3)

# Certified Payrolls

Regulatory Provisions at 29 C.F.R. Part 3; &  
29 C.F.R. § 5.5(a)(3), (5), and (8), reiterated at  
FAR 48 C.F.R. §§ 52.222-8, 52.222-10 and 52.222-13

- **Davis-Bacon contract clause provisions:**
  - *“Payrolls and basic records”*: 29 C.F.R. § 5.5(a)(3)
  - Applicability of 29 C.F.R. Part 3: 29 C.F.R. §§ 5.5(a)(5) & (8).
- **Provisions in 29 C.F.R. Part 3:**
  - **29 C.F.R. § 3.3** – “Weekly statement with respect to payment of wages”
  - **29 C.F.R. § 3.4** – “Submission of weekly statements and the preservation and inspection of weekly payroll records.”

# Certified Payrolls

- Two separate contract clause requirements apply to “certified payrolls” for a project:
  - The contractor shall submit weekly for any week in which any contract work is performed a copy of all payrolls. 29 C.F.R. § 5.5(a)(3)(ii)(A).
  - Each weekly payroll submitted must be accompanied by a “Statement of Compliance.”  
29 C.F.R. § 5.5(a)(3)(ii)(B).

# Certified Payrolls

- Weekly payrolls must include specific information as required by 29 C.F.R. § 5.5(a)(3).
- Weekly payroll information may be submitted in any form desired.
  - Optional Form WH-347 is available for this purpose
  - The WH-347 form, with instructions, is at:  
*<http://www.dol.gov/whd/forms/wh347instr.htm>*

# WHD Internet Sites

- Wage Determinations – <http://www.wdol.gov>
- Wage and Hour Division - <http://www.dol.gov/whd/index.htm>
- Resource Book - <http://www.dol.gov/whd/recovery/pwrp/toc.htm>
- Office of the Administrative Law Judges Law Library - <http://www.oalj.dol.gov>
- Administrative Review Board - <http://www.dol.gov/arb>

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# DBA/DBRA Fringe Benefits

# Examples of Fringe Benefits

- Life Insurance;
- Health Insurance;
- Pension;
- Vacation;
- Holiday; and
- Sick Leave.

# Funded Fringe Benefit Plans

- Contractors may take credit (without prior approval from DOL) for bona fide FB fund contributions made to third-party trustees or insurers that:
  - Are *irrevocably* paid; and
  - Are made regularly, not less often than *quarterly*.
- Credit is for payments made for individual workers eligible to participate in the plan, program, or fund.

# Unfunded Fringe Benefit Plans

- Costs for an “unfunded” FB plan count towards WD obligation if specific criteria are met:
  - The contributions reasonably anticipate the cost to provide a bona fide FB;
  - Contributions are made pursuant to an enforceable commitment;
  - That is carried out under a financially responsible plan; and
  - The plan has been communicated in writing to affected workers.
  - The plan has been approved by WHD

# Eligibility and Participation

- Employers may not take credit for contributions for employees who are not eligible to participate in the fringe benefit plan.
- Employers may take credit for contributions made on behalf of employees who will likely become participants in a plan but are not yet eligible to receive benefits (for example, a health insurance plan with a 30 day waiting period for new participants)

# Administrative Expenses

- The administrative expenses incurred by a contractor or subcontractor in connection with the administration of a bona fide fringe benefit plan are not creditable towards the prevailing wage under the DBA.

# Annualization Principle

- Davis-Bacon credit is based on the effective annual rate of contributions for all hours worked in a year (both Davis-Bacon and non-Davis-Bacon work).
- Davis-Bacon work may not be used as the exclusive or disproportionate source of funding for a benefit in effect during both covered and non-covered work.

# Annualization –

## Computing the creditable hourly rate

- Determine the hourly rate of contribution that is creditable towards a contractor's Davis-Bacon prevailing wage obligation by:
  - Dividing the total annual contributions by the total annual hours worked (both Davis-Bacon and non-Davis-Bacon work).

# Annualization – Exception

## Certain Defined Contribution Pension Plans

- An exception to annualization applies to:
  - Defined contribution pension plans that provide:
    - immediate participation; and
    - essentially immediate vesting (100% vesting after an employee works 500 or fewer hours).
- This exception allows full credit for the amount of contributions made on Davis-Bacon work.

# Annualization – Example 1

## Pension Plan with 5-Year Vesting Schedule

- This pension plan does not provide for immediate or essentially immediate vesting.
- A contractor who wishes to receive a \$2 per hour credit for contributions, must:
  - Contribute at that rate for all hours worked during the year; or
  - Make regular contributions at least quarterly that would result in a \$2 average contribution to the plan based on all hours worked in the year.

# Annualization — Example 2

## Defined Contribution Pension Plan

- A firm's contribution for an employee's pension plan that does not provide for immediate vesting was computed at \$2,000 a year.
  - The employee worked 1,500 hours on a Davis-Bacon project and 500 hours on other jobs not Davis-Bacon covered.

Credit per hour:  $\$2,000 / 2000 \text{ (hours)} = \$1.00$

## Computing hourly fringe benefit equivalents creditable for contributions made weekly, monthly, quarterly, etc.

- In determining cash equivalent credit for fringe benefit payments, the period of time to be used is the period covered by the contribution.
  - If contributions are made weekly, cash equivalents should be computed weekly.
  - If contributions are made quarterly, cash equivalents should be computed quarterly, etc.

# Computing the Hourly Equivalent Fringe Benefit Credit – Medical Insurance

- Employer provides medical insurance at \$200 per month to an electrician on a Davis-Bacon project. The WD requires \$16.00 plus \$2.50 in FB's, or \$18.50 an hour. Employee works 160 hours a month
  - $\$200/160 \text{ hours} = \$1.25$  credit per hour for the FB
  - No other benefit provided
  - Electrician is due: \$17.25 in cash wages per hour  
( $\$18.50 - \$1.25 = \$17.25$ )

# Fringe Benefit Payments in Advance – converting to hourly cash equivalents

- Where the contractor pays monthly health insurance premiums in advance on a lump sum basis, the total hours worked in the previous month or in the same month in the previous year may be used to determine (i.e. estimate) the hourly equivalent credit per employee during the current month.
  - Any representative period may be used, provided the period selected is reasonable.
  - However, keep in mind that If the employer contributes at different rates, such as under a health insurance plan for single and family plan members, credit cannot be taken based on an across the board average, but rather must be computed to reflect the cash equivalent to be credited for each individual employee.

# Fringe Benefit Payments in Advance – converting to hourly cash equivalents

- On occasion, a contractor may offset the annual cost of a particular fringe benefit by converting such costs to an hourly cash equivalent
  - Since construction workers often do not work a full year (2,080 hours), if a contractor makes annual payments in advance to cover the coming year cost, and actual hours worked will not be determinable until year-end, total hours worked by DB-covered workers in the preceding year (or plan year) can be considered representative of a normal work year in the computation.
  - Example: Assume total annual cost of pension program is \$15,000, and that the total working hours (DB and non-DB) for the workers on whose behalf the employer made contributions in the previous year was 15,000.  $\$15,000/15,000 \text{ hours} = \$1.00 \text{ per hour cash equivalent}$



# DBA/DBRA Certified Payrolls

# Certified Payrolls

- Two separate contract clause requirements apply to “certified payrolls” for a project:
  - The contractor shall submit weekly for any week in which any contract work is performed a copy of all payrolls. 29 C.F.R. § 5.5(a)(3)(ii)(A).
  - Each weekly payroll submitted must be accompanied by a “Statement of Compliance.” 29 C.F.R. § 5.5(a)(3)(ii)(B).

# Certified Payrolls

- Weekly payrolls must include specific information as required by 29 C.F.R. § 5.5(a)(3).
- Weekly payroll information may be submitted in any form desired.
  - Optional Form WH-347 is available for this purpose
  - The WH-347 form, with instructions, is at:  
*<http://www.dol.gov/whd/forms/wh347instr.htm>*.

# Certified Payrolls

- Weekly, the contractor must submit “a copy of all payrolls” to:
  - The federal agency; or
  - If the federal agency is not a party to the contract, to the applicant, sponsor, or owner for transmission to the federal agency).

29 C.F.R. § 5.5(a)(3)(ii)(A).

# “Statement of Compliance”

- The certification “Statement of Compliance” attached to each weekly payroll must be:
  - On page 2 of the WH-347 Form “Payroll (For Contractors Optional Use)”; or
  - On any form with identical wording.

# “Statement of Compliance” Certification for weekly payrolls

- The properly signed “Statement of Compliance” submitted or transmitted to the appropriate federal agency certifies that:
  - The payroll for the payroll period contains the information required to be provided;
  - The appropriate information is being maintained;
  - Such information is correct and complete;
  - Each laborer or mechanic has been paid the full weekly wages earned; and
  - Each laborer or mechanic has been paid not less than the applicable wages, as specified in the applicable wage determination incorporated into the contract.

# “Statement of Compliance”

- Must be executed by the contractor or subcontractor or by an authorized officer or employee of the contractor or subcontractor who supervises the payment of wages. 29 C.F.R. § 3.3(b).
- Each weekly statement must be delivered or mailed by the contractor or subcontractor, within seven days after the regular payment date of the payroll period, to a representative of a Federal or State agency contracting for or financing the building or work. 29 C.F.R. § 3.4(a).

# Availability of Certified Payroll

- The contractor or subcontractor shall make the records required available for inspection, copying, or transcription by authorized representatives of the contracting agency or the Department of Labor
- If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to suspend any further payment, advance, or guarantee of funds.
- Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12

# Certified Payrolls & Signatures

- The signature on each weekly “Statement of Compliance” may be either an original handwritten or an electronic signature.
- A contracting agency or prime contractor may permit or require contractors to submit the weekly payrolls, each with the accompanying “Statement of Compliance” through an electronic system.

# Certified Payrolls & Signatures

- Photocopies or “pdf” copies of the “Statement of Compliance,” faxed “Statements of Compliance,” or an electronically scanned “Statement of Compliance” e-mailed to an agency do not satisfy the requirement that each “Statement of Compliance” be:
  - “signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract.”

# Certified Payrolls & Signatures

- The importance of the “Statement of Compliance” requirement is clear in that:
  - “The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.”

29 C.F.R. § 5.5(a)(3)(ii)(D),  
reiterated at FAR 48 C.F.R. § 52.222-8(b)(4).

# Certified Payrolls & Electronic Signatures

- Under pertinent provisions of the Copeland Act and the Government Paperwork Elimination Act (Pub. L. 105-277, Stat 2681, codified at 44 U.S.C. § 3504, note):
  - WHD affirms that the use of electronic signatures is sufficient for compliance purposes under the Copeland Act.

# Certified Payrolls & Electronic Signatures

- **WHD encourages all government agencies to:**
  - submit certified payrolls electronically or allow access to appropriate agency approved limited access Web-based portals providing the required information and certification.
- **Some agencies and contractors have set up systems to comply electronically.**
- **Contracting agencies determine electronic submission options.**

# Certified Payrolls & Electronic Signatures

- Web-based systems for the electronic submission of certified payrolls.
  - Often include compliance monitoring tools; and
  - Can improve efficiency in the review of data reported, as well as reducing recordkeeping burdens and storage expenses.

# DBA/DBRA

## Apprentices and Trainees

### Apprentices

- Persons individually registered in a bona fide apprenticeship program registered with DOL's Employment Training Administration (ETA) Office of Apprenticeship (OA) or a State Apprenticeship Agency recognized by OA.
- Individuals in their first 90 days of probationary employment as an apprentice in such a program.
- Regulations: 29 C.F.R. §§ 5.2(n)(1) and 5.5(a)(4)(i).

# Trainees

- Persons registered and receiving on-the-job training in a construction occupation under a program approved in advance by DOL's Employment Training Administration (ETA).
- Regulations: 29 C.F.R. §§ 5.2(n)(2) and 5.5(a)(4)(ii).

# Employment Training Administration Office of Apprenticeship

- <https://www.dol.gov/featured/apprenticeship/employers>
- <https://www.doleta.gov/OA/links.cfm>

# Apprentices and Trainees

- Are laborers and mechanics; not listed on WDs.
- Permitted to work on covered projects and be paid less than the journey level WD rate when:
  - Individually registered in an approved apprenticeship or training program;
  - Paid the percentage of hourly rate required by the apprenticeship or training program;

# Apprentices and Trainees

- Paid the FB's specified in approved program; if the program is silent, the full amount of FB's listed on the WD; and
- Are employed within the allowable ratio specified in approved program for the number of apprentices or trainees to journeymen.
  - Note: ETA apprenticeship regulations were revised in 2008; questions about portability of wages and ratios on DBA/DBRA covered projects may require careful consideration by WHD. *See* 29 C.F.R. § 29.13(b)(7).

# Ratios

- “The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program.” 29 CFR 5.5(a)(4)(i)
- Compliance with the ratio is determined on a daily, not a weekly basis
- The use of fractions in computing the ratio is not permitted unless specified in the

# Understanding Apprenticeship Agreements





# Identifying Apprenticeship Issues

# Helpers

- May be employed if:
  - Duties are clearly defined and distinct from other classifications on the WD;
  - An established prevailing practice in the area; and
  - Not employed in an informal training program.
- May be added to WD if all above conditions are met; and no WD class performs the work.

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