Frequently Asked Questions: Updating the Davis-Bacon and Related Acts Regulations Final Rule | U.S. Department of Labor (dol.gov)

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1. Why is the Department of Labor issuing the final rule Updating the Davis-Bacon and Related Acts Regulations?

This final rule updates the regulations that implement the Davis-Bacon Act and the Davis-Bacon Related Acts (collectively, the DBRA), which have not been comprehensively updated in nearly 40 years. In that time, Congress has added numerous new Related Act statutes, there have been an increased number of federally funded construction projects, and the federal contracting system has undergone significant changes. Given these developments, the Department of Labor (Department) is issuing this final rule to provide clarity to contracting agencies, contractors, and workers, and to enhance the effectiveness and consistency of the administration and enforcement of the DBRA.

2. Under the final rule, the Wage and Hour Division amends the methodology to determine the "prevailing wage." What is that methodology?

This final rule implements the Wage and Hour Division's (WHD) original methodology for determining prevailing wages, known as the "three-step process," that was in effect before 1983. According to the three-step process, in the absence of a wage rate paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. Only if no wage rate is paid to at least 30 percent of workers in a classification will a weighted average rate be used.

This final rule also permits WHD to count wage rates that may not be exactly the same, such as escalator-clause rates, zone rates, night-shift differential, and combined hourly-fringe rates, as the same rate—for the purpose of determining the prevailing wage—if those rates are functionally equivalent.

3. Does the final rule allow WHD to more frequently update wage rates?

Consistent with WHD's goal to increase the percentage of Davis-Bacon wage rates that are three years old or less, the final rule permits the Department to periodically adjust certain non-collectively bargained rates based on Employment Cost Index data published by the Bureau of Labor Statistics. Under this new provision, such rates may be adjusted no more frequently than once every three years, and no sooner than three years after the date of the rate's publication, continuing until the next survey results in a new general wage determination.

4. Does the final rule permit WHD to adopt state or local wage rates as Davis-Bacon prevailing wage rates?

To promote the publication of current Davis-Bacon wage rates while enabling WHD to avoid performing costly and duplicative prevailing wage surveys when a state or locality has already

performed similar work, the final rule adds a new provision which permits the WHD Administrator, under specified circumstances, to determine DBRA wage rates by adopting wage rates set by state and local governments. First, the state or local government must set prevailing wage rates, and collect relevant data, using a survey or other process that generally is open to full participation by all interested parties. Second, a state or local wage rate must reflect both a basic hourly rate of pay as well as any locally prevailing bona fide fringe benefits, and that each of these can be calculated separately. Third, state or local government must classify laborers and mechanics in a manner that is recognized within the field of construction. Finally, the state or local government's criteria for setting prevailing wage rates must be substantially similar to those the Administrator uses in making wage determinations.

5. Will this final rule affect conformance requests?

This final rule contains a new provision aimed at reducing the need for the use of "conformances,"—a process that currently is burdensome for contracting agencies, contractors, and the Department—typically at issue when WHD has received insufficient data to publish a prevailing wage for a classification of worker. This final rule codifies a new procedure through which WHD may identify (and list on the wage determination) wage and fringe benefit rates for certain classifications for which WHD received insufficient data through its wage survey program. The procedure will reduce the need for conformances of classifications for which conformances are now often required.

Under the final rule, if there are labor classifications for which WHD regularly receives conformance requests coupled with insufficient survey data for those classifications, WHD will be permitted to provide wage and fringe benefit rates for those classifications ahead of time. This will provide contracting agencies, contractors, and workers with advance notice of the minimum wage and fringe benefits required to be paid for those classifications of work.

WHD will list such classifications and wage and fringe benefit rates on wage determinations where: (1) the work to be performed by the requested classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined; (2) the classification is used in the area by the construction industry; and (3) the wage rate, including any bona fide fringe benefits, for the classification bears a reasonable relationship to the prevailing wage rates contained in the wage determination.

These rates will apply to the applicable classification without the need to submit a conformance request. However, if a contracting agency, contractor, union, or other interested party has questions or concerns about how particular work should be classified, and, specifically, whether the work at issue is performed by a particular classification included on a wage determination (including classifications listed pursuant to this proposal) as a matter of local area practice or otherwise, the contracting agency should still submit a conformance request.

6. How does the amended definition of “area” and the revision to the "scope of consideration" provision in the final rule affect wage determinations?

As has historically been the case under previous rules, the default area for the majority of wage determinations is the county. However, under this final rule, WHD is expressly authorized to issue multi-county project wage determinations with a single wage rate per classification, using data from all of the relevant counties in which a project will be performed. The final rule also permits WHD to use state highway districts or “similar State geographic subdivisions” as the area for a highway project.

Under the rule, most wage determinations will continue to use the county as the basic geographic unit for determining the prevailing wage. In the event that there is not sufficient wage data for a given county, this final rule permits WHD to use data from nearby counties, even if one county could be characterized as “metropolitan” and the other as “rural.” Eliminating the strict bar on mixing metropolitan and rural county data will result in geographic groupings that better account for the realities of relevant construction labor markets.

7. Do wage determinations still apply for the life of the contract?

Generally, yes. The final rule, however, clarifies that , if a contract is modified to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order, or requires the contractor to perform work for an additional time period not originally obligated, including where an agency exercises an option provision to unilaterally extend the term of a contract, then the most recent version of any applicable wage determination(s) must be incorporated into the contract.

8. How often must wage determinations be updated on indefinite-delivery-indefinite-quantity (IDIQ) contracts?

The final rule codifies the Department’s interpretation that contracting agencies must incorporate the most up-to-date applicable wage determination(s) on an annual basis into IDIQ contracts or other contracts that require construction work over a period of time that is not tied to the completion of any particular project.

9. When are multiple wage determinations incorporated into a contract?

The final rule codifies current guidance, where, if a construction contract includes work in more than one “area” and there is no applicable multicounty project wage determination, then the wage determinations for each area must be incorporated into the contract to ensure that workers are paid the applicable prevailing wage rate for the area where they perform work. Multiple wage determinations are also generally applicable, as per the final rule, when a project has more than one “type of construction” (e.g., residential, building, highway, or heavy). In that case, the contracting agency must incorporate the applicable wage determination for each type of construction where the total work on the project in that type of construction is substantial. See All Agency Memorandum 236 for further guidance as to what is considered “substantial.”

10. Is a contracting agency required to report information regarding their construction program(s) under the final rule?

Yes. Under the final rule, agencies that use wage determinations under the DBRA are required to submit to WHD an annual report outlining proposed construction programs for the upcoming three fiscal years. The final rule also clarifies that a federal agency's report may be based on information in that agency's possession at the time it furnishes its report.

11. Does this final rule modify the types of projects subject to the DBRA?

No, the final rule clarifies the types of projects subject to the DBRA to eliminate any potential confusion as to whether energy infrastructure projects could be considered "buildings or works" as defined under the DBRA where other coverage requirements are also met. Under the final rule, the Department provides examples of those types of projects in a non-exhaustive list. Solar panels, wind turbines, broadband installation, and installation of electric car chargers are all subject to Davis-Bacon labor standards if they are built as a part of a contract with a federal agency or otherwise covered by a Related Act. The rule also specifies that coverage may apply even if the construction activity involves a portion of a building or work.

12. Is demolition work subject to DBRA requirements?

The final rule clarifies that demolition and removal activities are subject to DBRA labor standards when such activities in and of themselves constitute construction, alteration, or repair of a building or work. If the demolition is part of a contract for construction of a building or work or if such construction is contemplated as part of a future contract, then the demolition is also within the scope of the DBRA labor standards. This provision is already reflected in current DBRA sub regulatory guidance and the Service Contract Act regulations and does not expand coverage or increase burdens or complexity.

13. Did the final rule alter the applicability of DBRA standards to survey crews?

No. The Department has historically recognized that members of survey crews who perform primarily physical and/or manual work while employed by contractors or subcontractors on a DBA or Related Acts covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers or mechanics subject to the Davis-Bacon labor standards. Whether or not a specific survey crew member is covered by these standards is a question of fact, which considers the actual duties performed and whether these duties are "manual or physical in nature" including the "use of tools or . . . work of a trade." 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.

14. How does the revised definition of “site of work” affect construction projects?

Under the final rule, DBRA labor standards will apply at a “secondary construction site,” which is defined as any other site where a significant portion of the building or work is constructed, provided that such construction is for specific use in that building or work and does not simply reflect the manufacture or construction of a product made available to the general public, and provided further that the site is either established specifically for the performance of the contract or project, or is dedicated exclusively, or nearly so, to the performance of the contract or project for a specific period of time. The regulations further define a “significant portion” of a building or work to mean one or more entire portions or modules of the building or work, such as a completed room or structure, with minimal construction work remaining other than the installation and/or final assembly of the portions or modules at the place where the building or work will remain. As the regulations explain, a “significant portion” does not include materials or prefabricated component parts such as prefabricated housing components.

15. Do DBRA requirements apply to “flaggers”?

Yes, it is a longstanding interpretation that the DBRA requirements may apply to “flaggers.” Often, particularly for heavy and highway projects, it is necessary to direct pedestrian or vehicular traffic around or away from the primary construction site. Certain workers, typically called “flaggers” or “traffic directors,” may therefore engage in activities such as setting up barriers and traffic cones, using a flag and/or stop sign to control and direct traffic, and/or performing related activities such as helping heavy equipment move in and out of construction zones. The final rule codifies the Department’s understanding that workers performing flagger activities adjacent or nearly adjacent to worksites are working on the site of the work under the DBA. Such work ensures that construction work in and around the active worksite proceeds in a safe and efficient manner, in part by protecting the laborers and mechanics doing the work, the flaggers themselves, and the public around the worksite.

16. Does the final rule affect the applicability of the DBRA requirements to truck drivers?

The final rule codifies the Department’s current guidance that requires contractors and subcontractors to pay DBRA wages to delivery drivers for onsite time related to offsite delivery if such time is not de minimis. The Department has generally excluded periods of a few minutes onsite just to drop off materials as de minimis. However, 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—should be considered in determining whether the driver’s onsite time was de minimis.

17. How does the final rule define the material supplier exemption?

While not explicitly set out in the statute, the DBA has long been understood to exclude from coverage employees of bona fide “material suppliers,” or employers whose only obligations for work on the contract or project are the delivery of materials, articles, supplies, or equipment.

The final rule clarifies that activities that are incidental to material supply, such as loading, unloading, and pickup (when performed in conjunction with delivery), do not constitute construction activity that would render the material supply exemption inapplicable.

18. Does the final rule affect recordkeeping requirements?

Yes. The final rule revises existing recordkeeping requirements to clarify that payrolls and other basic records must be kept for at least three years after all the work on the prime contract is completed. The final rule also requires that records include each worker's last known telephone number and email address. Contractors and subcontractors must maintain records of each worker's correct classification or classifications of work actually performed and the hours worked in each classification. The final rule also requires contractors, subcontractors, and funding recipients to maintain Davis-Bacon contracts, subcontracts, and related documents. In addition, the final rule codifies the Department's long-standing policy that valid electronic signatures and electronic certified payroll submission methods are permitted.

19. How does the final rule affect apprentices?

The final rule clarifies that contractors and subcontractors must comply with the apprentice wage and ratio standards of the locality where the work is actually performed. That is the case whether multiple apprenticeship programs are registered in the same state, or the contractor or subcontractor performs work in a locality other than the one in which its program is registered.

20. What happens if the contracting agency omits the DBRA requirements from a covered contract?

In the final rule, the Department includes an operation-of-law provision that applies the DBRA labor standards and/or applicable wage determinations to any DBRA-covered contract (retroactively to the date of the contract award or beginning of construction, whichever occurs first) regardless of whether the appropriate contract clause or wage determination was incorporated (physically or by reference) into the contract. If the Department must invoke the operation-of-law provision, then the contractor is required to receive compensation from the contracting agency to account for any increase in the contractor's costs caused by the application of the wage determination.

The operation-of-law provision at § 5.5(e) will be generally applicable only to new contracts entered into after the effective date of the final rule. The same applicability date will apply for § 3.11(e), which makes the requirements of part 3 of the regulations effective by operation of law "as set forth in § 5.5(e)." For any contracts awarded prior to the effective date of the final rule that are missing required contract clauses or wage determinations, the Department will seek to address any omissions solely through the already existing post-award modification provisions in § 1.6(f). For any contracts that are entered into after the effective date of the final rule but before the effective date of any amendment to the Federal Acquisition Regulation contract clauses, §

5.5(e) incorporates by operation-of-law the FAR contract clauses that are mandatory under the FAR regulation in effect at the time the contract was entered into.

21. How does the annualization requirement affect how fringe benefits may be calculated?

The final rule codifies and clarifies the requirement that fringe benefits should be annualized. Annualization is the method of calculating the hourly equivalent amount of a contractor's contributions to fringe benefits plans that may be credited against the contractor's fringe benefits obligations under the DBRA. Annualization is particularly important when the contractor's workers perform work on both DBRA-covered projects and projects that are not subject to DBRA requirements (referred to as "private" work or projects) in a particular year or other period. The final rule also sets a process for obtaining WHD approval for an exception from the annualization requirement under certain circumstances. Contributions to defined contribution pension plans (DCPPs) are excepted from the annualization requirement so long as they meet certain requirements.

22. When are unfunded plans creditable against the fringe benefit obligations under the DBRA?

Unfunded plans must be approved by the Secretary of Labor to qualify as a bona fide fringe benefit plan. The final rule clarified the Department's policy that a contractor must seek written approval prior to claiming credit for the reasonably anticipated costs of an unfunded benefit plan towards its Davis-Bacon prevailing wage obligations, including with respect to vacation and holiday plans. Unfunded plans that are not approved by the Secretary of Labor are not creditable against the fringe benefit obligations under the DBRA.

23. Are costs of apprenticeship programs creditable against the fringe benefit obligations under the DBRA?

Consistent with the Department's longstanding position, the final rule clarifies that the cost of apprenticeship programs may be credited against the fringe benefit obligations under the DBRA. The final rule also provides that, in the absence of evidence to the contrary, the Department will presume that amounts the employer is required to contribute by a collective bargaining agreement, or by a bona fide apprenticeship plan (whether or not the plan is collectively bargained), are creditable against fringe benefit obligations under the DBRA. However, contributions to apprenticeship plans that are unreasonable are not creditable against the fringe benefit obligations under the DBRA.

24. Does the final rule permit a contractor or subcontractor to take Davis-Bacon credit for administrative expenses incurred in connection with the administration of a fringe benefit plan?

Consistent with the Department's longstanding position and with SCA regulations, under the final rule, a contractor or subcontractor may not take DBRA credit for its own administrative expenses incurred in connection with the administration of a fringe benefit plans. However, credit for costs incurred by a contractor's insurance carrier, third-party trust fund, or other third-party administrator that are directly related to the administration and delivery of bona fide fringe

benefits to the contractor's laborers and mechanics may be eligible for a Davis-Bacon credit. Should questions arise as to whether an expense is creditable towards a fringe benefit plan, the final rule directs the contractor or subcontractor to consult with WHD prior to claiming a credit.

25. How do the final rule's new anti-retaliation provisions improve worker protections?

The final rule's new anti-retaliation provisions are intended to discourage contractors and subcontractors from engaging in—or causing others to engage in—unscrupulous business practices that may chill worker participation in WHD investigations or other compliance actions and enable Davis-Bacon labor standards violations to go undetected. These regulatory provisions also are intended to enhance enforcement, compliance, and deterrence, and make workers whole who suffer reprisals for taking, or being perceived to have taken, certain actions related to Davis-Bacon labor standards protections.

26. How do the revised cross-withholding provisions improve worker protections?

The final rule clarifies that funds may be cross-withheld from any contract held by the same prime contractor, even if the violations occurred on a different contract. Moreover, the final rule also explains that the Department has priority over various other competing claims to funds withheld for workers' back wages. Lastly, the final rule strengthens the Department's ability to cross-withhold when contractors use single-purpose entities, joint ventures, or other similar vehicles to secure DBRA-covered contracts.

27. How do the revised debarment provisions improve worker protections?

The final rule revises the debarment provisions to apply the same debarment standard under both the DBA and Related Acts. In essence, the final rule establishes that the DBA statutory debarment standard (i.e., "disregard of obligations to employees or subcontractors") applies in all debarment cases, including Related Act-covered contracts. The heightened Related Acts regulatory "aggravated or willful" debarment standard has been eliminated.

The final rule also revises the Related Acts debarment regulations to mirror the DBA debarment provisions (e.g., mandatory three-year debarment period for Related Acts cases, elimination of process for early removal from debarment list for Related Acts contractors, and debarment of entities in which contractors, subcontractors, or responsible officers have an interest).

28. How does the revised definition of "site of the work" affect the costs of affordable housing?

The final rule revises the definition of "site of the work" to include "secondary construction site[s]," defined as off-site facilities where significant portions of a public building or work are being constructed, but only when the facility is either established specifically for the performance of the contract or project, or is dedicated exclusively, or nearly so, to the performance of the contract or project for a specific period of time. Because the existing definition already covered these facilities when they were established specifically for the performance of the contract or project, this change should only cause a modest increase in coverage. In addition, "significant

portion" is limited to cases where entire portions or modules of a building or work, such as a completed room or structure, are constructed off-site with minimal construction work remaining at the primary site of construction. It does not include offsite manufacturing of materials or prefabricated component parts. Given the limited scope of this revision, the Department believes that any increases to the cost of affordable housing construction will be minimal, and that this revision will not discourage the use of modular construction technology in affordable housing.

29. How does the definition of "prime contractor" improve the enforcement of worker protections on affordable housing projects?

The definition of prime contractor clarifies that, in addition to the person or entity who enters directly into a federal or federally assisted contract for construction, other entities are also considered to be "prime contractors" for that contract for the limited purpose of enforcing the Davis-Bacon labor standards. These include: (1) the controlling shareholders or members of any entity holding a prime contract, (2) the joint venturers or partners in any joint venture or partnership holding a prime contract, and (3) any contractor (e.g., a general contractor) that has been delegated the responsibility for overseeing all or substantially all of the construction anticipated by the prime contract. The final rule further notes that where cross-withholding is necessary to obtain back wages for workers, funds may be cross-withheld from any other federal or federally assisted contract held by any of these entities, where all other requirements are met. This will enable the Department to enforce the payment of prevailing wages more effectively for workers on projects where the project owner or developer is a single-use entity, as is frequently the case for affordable housing projects, among others.