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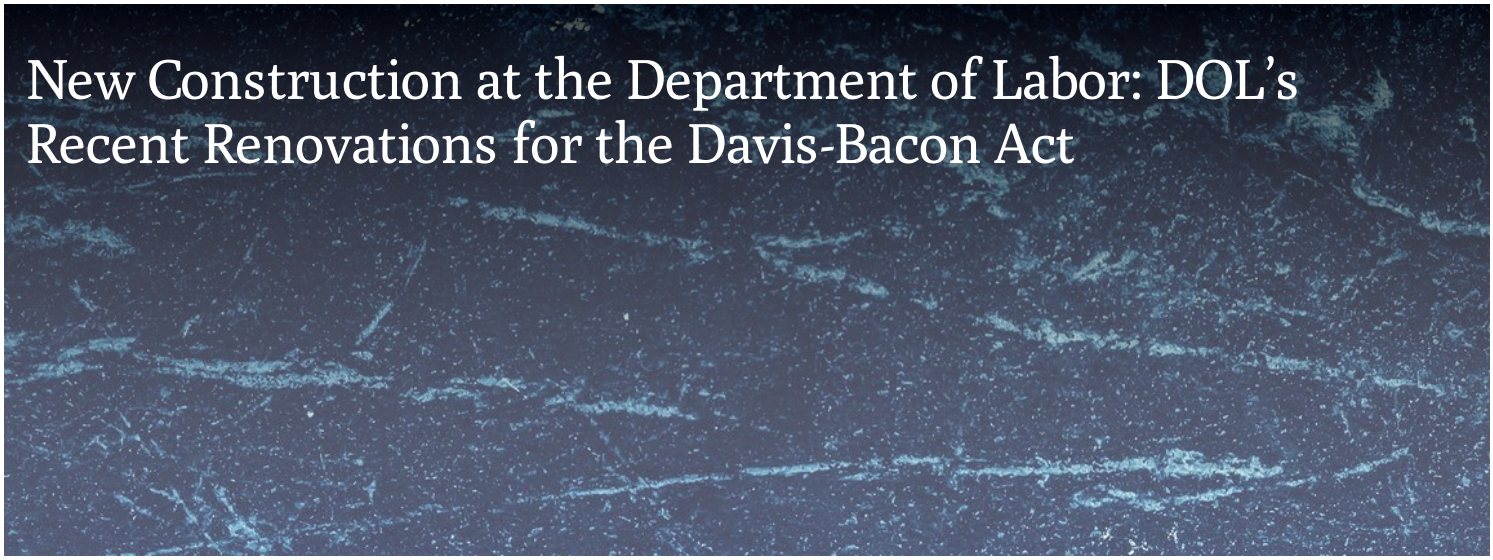
BLOG

New Construction at the Department of Labor: DOL's Recent Renovations for the Davis-Bacon Act



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On October 23, 2023, the United States Department of Labor (DOL) updated the Davis-Bacon and Related Acts (DBRA) regulations. The Davis-Bacon Act (DBA)[1] and the Davis-Bacon Related Acts (Related Acts)[2] apply to contracts and grants entered into by federal agencies and the District of Columbia for the "construction, alteration, or repair of public buildings or public works" in excess of $2,000, and to certain other construction projects where federal funding or assistance is provided.[3] the DBA and Related Acts also apply to federal grant recipients and state recipients performing federally funded construction projects such as, for example, infrastructure projects funded by the Bipartisan Infrastructure Law or Inflation Reduction Act. The DBA and Related Acts also apply to certain federal loans for construction projects.

The changes to the DBRA regulations are the first updates since 1983. The DOL's Wage and Hour Division (WHD) notes that the changes are necessary because, since 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."[4] Below is a survey of some of the changes that are included in the recent DBRA update.

DETERMINING THE PREVAILING WAGE

WHD's most significant change to the regulations relates to how the DOL is permitted to determine the prevailing wage in a given area. Since 1983, the wage rate has been determined through a two-step process: The WHD first would determine if there was a single wage rate paid to over 50% of workers in a specific classification. If there was not a single wage rate paid to over 50% of workers, then the DOL would use the average of all wage rates paid to workers in that classification.[5] The new rule inserts an intermediate step: If there is not a single wage rate paid to over 50% of workers in a given area, the DOL must now determine the prevailing wage based on "the wage paid to the greatest number [of workers in the classification], *provided* that such greatest number constitutes at least 30 percent of those employed."[6] Only if there is no single wage rate paid to 30% of workers can the DOL then base the prevailing wage on the average of all wages paid.

The DOL claims that this updated methodology, known as the "three step process," is closer to Congress's intent that DBA wages should be the "prevailing" wage actually paid to workers.[7] The DOL noted that "[a]n average rate does not reflect a true rate which is actually being paid by any group of contractors in the community being

surveyed. Instead, it represents an artificial rate which we create ourselves, and which does not reflect that which a predominant amount of workers are paid."[8] The DOL further argues that using averages for issuing wage determinations can artificially lower wage rates by allowing "a single low-wage contractor in the area to depress wage rates on Federal contracts below the higher rate that may be generally more prevalent in the community."[9] Currently, 63% of DBA wage rates were determined using averages, and the DOL claims this new change will reduce that to 31%.[10]

OTHER CHANGES

The DBRA update also amends 29 C.F.R. § 1.3 to give the WHD Administrator authority to adopt state or local government wage determinations as the DBRA prevailing wage in that area. The goal is to save federal resources by avoiding duplicative and costly wage surveys.

The revised regulations also made changes to 29 C.F.R. § 1.6(c), which now requires that wage determinations be updated during the life of certain long-term or modified contracts. Wage determinations generally still apply for the life of the contract; under the new regulations, however, if a contract is modified to include additional construction beyond the scope of the original work order or requires the contractor to perform work for an additional time period, then the most recent prevailing wages must be incorporated into the contract. Further, contracts that require construction over a period of time and that are not tied to any one project, such as an IDIQ, schedule, or similar long-term contracts, must incorporate the most recent prevailing wages into the contract annually.

According to 29 C.F.R. § 1.2, the "area" for the purpose of a wage determination can be the "city, town, village, county or other civil subdivision of the state in which the work is to be performed"; however, it is normally set at the county level.[11] Changes to 29 C.F.R. § 1.7 have expanded this definition, allowing the WHD to determine multi-county wage determinations for projects that span multiple counties by combining wage rate data from all counties in which work will be performed.

The new regulations also clarify which workers are covered under the DBRA. Specifically, 29 C.F.R. § 5.2 clarifies that workers whose location of work is adjacent to the construction site, such as flaggers,[12] are covered under the DBRA; however, truck drivers must only be paid the prevailing wage for on-site driving time, provided that their time on-site is not "*de minimis*."

Additionally, the DOL's update makes changes to 29 C.F.R. § 5.5(a)(3) to clarify the recordkeeping obligations of contractors and subcontractors subject to DBA. For three years after all work on the prime contract has been completed, employers must maintain basic records (including employee information such as Social Security number, last known address, work performed, wages paid, etc.) as well as certified payroll records.

It is important that federal contractors performing under, or submitting bids for construction projects covered by the DBRA are familiar with the extensive changes to the regulations. A detailed side-by-side comparison of the new regulations and the previous regulations is available here.

SUGGESTIONS FOR CONTRACTOR OR GRANT RECIPIENT CONSIDERATION

1. Contractors and grant recipients subject to DBRA should read and familiarize themselves with the new DOL regulations.
2. Contractors and grant recipients should understand the implications of how DOL has changed how the "prevailing wage" is determined in a given area and prepare to factor in higher wage costs into their current federal contracts and future federal construction contract bids. Likewise, contractors should monitor their contracts to determine which ones will require annual updates to wage determinations under the revised DOL regulations.
3. Contractors and grant recipients should reassess which of their workers are considered to work on-site or adjacent to on-site to ensure that all employees covered by DBRA are receiving the prevailing wage

Please contact the authors or your Winston & Strawn relationship attorney if you have any questions or need further information.

[1] The Davis Bacon Act passed in 1931, was meant to "ensure that Government construction and federally assisted construction would not be conducted at the expense of depressing local wage standards." *See* Determination of Wage Rates Under the Davis-Bacon & Serv. Cont. Acts, 5 Op. O.L.C. 174, 176 (1981) (citation and internal quotation marks omitted). The Act achieves this by tasking the Secretary of Labor with determining the local prevailing wage paid to corresponding workers employed on similar projects in the area and using that number as the basis for determining the minimum pay due to workers under federal construction contracts.

[2] Congress later incorporated DBA prevailing wage requirements into numerous statutes under which Federal agencies provide assistance to construction projects through grants, loans, loan guarantees, insurance, and other methods.

[3] Updating the Davis-Bacon and Related Acts Regulations, 88 Fed. Reg. 57,526 (Aug. 23, 2023), https://www.federalregister.gov/d/2023-17221/p-10.

[4] *Frequently Asked Questions: Updating the Davis-Bacon and Related Acts Regulation Final Rule*, U.S. Department of Labor, Wage and Hour Division, https://www.dol.gov/agencies/whd/government-contracts/construction/rulemaking-davis-bacon/faqs.

[5] *See DBRA Comparison Chart*, U.S. Department of Labor, https://www.dol.gov/agencies/whd/government-contracts/construction/rulemaking-davis-bacon/dba-comparison-charts.

[6] 29 C.F.R. § 1.2 "Prevailing wage," https://www.ecfr.gov/current/title-29/part-1#p-1.2(Prevailing%20wage).

[7] 88 Fed. Reg. 57,533 (Aug. 23, 2023), https://www.federalregister.gov/d/2023-17221/p-96.

[8] *Id.* at 57,532, *https*://www.federalregister.gov/d/2023-17221/p-82 (internal quotations excluded).

[9] *Id.* at 57,533, https://www.federalregister.gov/d/2023-17221/p-97.

[10] *Id.*

[11] *Id.* at § 1.7(a), https://www.ecfr.gov/current/title-29/section-1.7.

[12] "Flaggers" are workers who "perform activities associated with directing vehicular or pedestrian traffic around or away from the primary construction site." 29 C.F.R. § 5.2(1)(iii)(B).

6 Min Read

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