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Some Big Changes May be in Store for the Davis-Bacon Act

The Davis-Bacon Act (DBA) has played a major role in the construction industry for over 90 years. Passed in 1931, it has been described by the Supreme Court as a "minimum wage law designed for the benefit of construction workers." The DBA generally requires payment of locally prevailing wages under direct federal contracts and for covered contractors and their subcontractors. The employer's obligation can be met by paying the applicable prevailing wage entirely as cash wages or by a combination of cash wages and employer-provided, bona fide fringe benefits—including pension and health benefits.

In its original form, the DBA required employers to use a three-step process to determine the appropriate prevailing wage to pay their employees. This three-step process consisted of the following.

- Employers had to first determine whether a majority of workers (more than 50 percent) who were working in the same trade in the same area were receiving the same wage rate. If this occurred, that wage rate would be deemed the prevailing wage.
- If a prevailing wage could not be determined under the first step, then the employer had to determine whether the same wage rate was being paid to at least 30 percent of the workers (known as the "30 percent rule"). If the employer found evidence of this, then that wage rate would become the prevailing wage.
- If the employer could not determine a prevailing wage rate under the second step, then the employer would need to determine the "weighted average rate" for workers in that area.

Over the years, the 30 percent rule caused growing concern in the industry. In some situations, this rule allowed employers to disregard the wages of 70 percent of the workers when determining the prevailing wage. There was also concern that this rule may have been contributing to higher inflation and to the overuse of collectively bargained wage rates. Because of these concerns, the Department of Labor (DOL) eliminated the 30 percent rule from the prevailing wage determination process in 1982. As a result, more employers began using the weighted average rate to determine the prevailing wage.

Now, 40 years after the 30 percent rule was eliminated, the DOL has become concerned that too many employers may be relying on the weighted average rate to determine the prevailing wage rate. Because the weighted average rate does not represent a true wage rate received by most of the workers, the DOL does not consider this to be an accurate prevailing wage rate. It should be used only as a last resort. To help address this, and other concerns, the DOL has issued proposed regulations that represent the most comprehensive changes to the DBA since 1982.

Overview of Proposed Changes

As proposed, the regulations would amend the DBA rules to update wage rate determinations, update the prevailing wage system, modify definitions, strengthen anti-retaliation provisions, and enhance enforcement. The regulations would also modernize communication procedures by using email addresses and websites to contact the DOL or to access information.

- **Prevailing Wage Rate Determinations:** To address the overuse of weighted average rates, the proposed regulations would re-introduce the 30 percent rule to determine prevailing wages. As previously mentioned, the two-step process requires the use of either the wage rate effective for a majority of the workforce or the weighted average rate. The 30 percent rule would require employers to use the wage rate effective for at least 30 percent of workers before they could use the weighted average rate.
- **Prevailing Wage System:** To help increase workers' wages, the proposed regulations would change procedures to ensure quicker updates to the prevailing wage rate as actual wages increase. In particular, the rule would adopt state and local wage determinations; reduce the need for conformances, which add or identify wage rates and fringe benefit rates for certain employee classifications; and modify the mechanism to update noncollectively bargained prevailing wages.
- **Modified Definitions:** The proposed regulations would expand the term "building or work" to include work that does not involve construction, such as installation. The term "Employee" would be expanded to include any individual that works at the site and that is indirectly paid, regardless of whether the worker is covered by the contract or required wage rates. This definition would include those outside the common-law employee/employer relationship.
- **Anti-Retaliation and Enforcement:** The proposed regulations would effectuate certain contractual provisions omitted by operation of law to expedite enforcement efforts and to ensure timely payment of back wages. In addition, the rule would include new anti-retaliation provisions in contracts to permit employees to raise concerns related to payment practices. Finally, the rule would clarify and strengthen cross-withholding procedures to permit a government agency to withhold payment to a contractor or a controlled entity that fails to comply with the prevailing wage requirements.

Retirement Provisions

- **Rate of Contribution or Cost for Fringe Benefits:** The proposed regulations would require contractors to annualize (i.e., determine the hourly rate of contribution that is creditable towards a contractor's prevailing wage obligation) all fringe benefit contributions, including for "defined contribution pension plans (DCPPs)" to determine the hourly equivalent for which they can take a credit against the fringe benefit obligation. An exception to the annualization requirement would apply if
    - the benefit provided is not continuous in nature,
    - the benefit does not compensate both private and public work, and
    - the plan provides for immediate participation and essentially immediate vesting.

  The DOL takes the position that DCPPs are "not continuous in nature" because "the benefits are not available until a worker's retirement." The DOL is maintaining its existing position that "a plan will generally be considered to have essentially immediate vesting if the benefits vest after a worker works 500 or fewer hours."

  To receive the exception, "contractors and other interested parties" (i.e., plan administrators, contractors, or their representatives) must submit a written exception request to the DOL's Wage and Hour Division Administrator through the DOL's Division of Government Contracts Enforcement.

  The proposed regulations would provide a grace period for existing fringe benefit plans, including DCPPs that have immediate participation and immediate vesting, with an existing annualization exception. These plans may continue to rely on their existing exception until the earlier of 1) requesting and receiving an exception under the new regulation, or 2) 18 months from the regulation's effective date.

Health and Welfare Provisions

- **Funded and Unfunded Plans:** There are two types of fringe benefit plans that employers may use to meet the prevailing wage requirement: funded and unfunded plans. Under a funded fringe benefit plan, employers make regular irrevocable contributions (at least quarterly) to a third-party trustee or issuer. This can be

accomplished without prior DOL approval. Examples of funded fringe benefit plans include pension plans, insured health plans, or life insurance plans.

With an unfunded fringe benefit plan, an employer may pay for certain benefits out of its general assets (in lieu of making payments to a third-party trustee or issuer). Examples include health reimbursement arrangements, health flexible spending accounts, or vacation plans). The proposed regulations would require the DOL to verify a plan's compliance with the DBA in order to be approved as an unfunded fringe benefit plan. Employers would need to submit a written approval request to the DOL before they could offer the plan to employees. Employers may be required to establish separate accounts to meet the plan's funding obligations.

For both funded and unfunded plans, the proposed regulations would also require an employer to pay any amount that an employee has been underpaid (including earnings) to an employee. In addition, employers would need to notify employees of the fringe benefits being paid and would need to ensure that the plans are properly funded.

- **Plan Administration Costs:** The proposed regulations would allow employers with unfunded fringe benefit plans to include plan administration costs in the prevailing wage rate calculation. Additional guidance is needed to address whether any limitations apply.

Next Steps

The DOL had asked those in the construction industry—and any other interested parties—to submit comments on the proposed regulations by May 17, 2022. The public responded by submitting nearly *41,000* comments. As a result, it may take some time for the DOL to review the comments and to incorporate any suggestions into the final regulations.

Employers working under federal construction contracts should become familiar with the proposed regulations and how they could affect their day-to-day operations. Ascensus will continue to follow any new guidance as it is released. Visit ascensus.com for the latest developments.