

THE DAVIS-BACON ACT—
A Summary Guide

**FINISHING CONTRACTORS
ASSOCIATION**

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I. THE DAVIS-BACON ACT.

The Davis-Bacon Act and its companion acts require all contractors and subcontractors performing work on federal or District of Columbia construction contracts or federally assisted contracts in excess of \$2,000 to pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits for corresponding classes of laborers and mechanics employed on similar projects in the area. The prevailing wage rates and fringe benefits are determined by the Secretary of Labor for inclusion in covered contracts.

In addition to the Davis-Bacon Act itself, Congress added Davis-Bacon prevailing wage provisions to approximately 60 laws under which federal agencies assist construction projects through grants, loans, loan guarantees, and insurance (e.g., the Federal-Aid Highway Acts, the Housing and Community Development Act of 1974, and the Federal Water Pollution Control Act). Generally, the application of prevailing wage requirements to projects receiving federal assistance under any particular “related” Act depends on the provisions of that law.

The U.S. Department of Labor (“DOL”) has oversight responsibilities to assure coordination of administration and consistency of enforcement of the labor standards provisions of the Davis-Bacon Act. Under this authority, DOL has issued regulations establishing standards and procedures for the administration and enforcement of the Davis-Bacon labor standards provisions. Federal contracting agencies have day-to-day responsibility for administration and enforcement of the Davis-Bacon labor standards provisions in covered contracts for which they are responsible or to which they provide federal assistance under laws they administer.

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (“ARRA”), Pub. L. No. 111-5, into law. Division A of ARRA appropriates substantial funding for construction, alteration, and repair of Federal buildings and for infrastructure projects, including roads, bridges, public transit, water systems, and housing. In accordance with existing Davis-Bacon Act requirements, federal agencies directly contracting for construction work using ARRA funds must ensure that bid solicitations and resulting covered contracts contain Davis-Bacon labor standards and wage determinations in accordance with the Federal Acquisition Regulations (FAR). *See* 48 C.F.R. § 22.4.

II. STATUTORY AND REGULATORY FRAMEWORK.

The Davis-Bacon Act, together with the Contract Work Hours and Safety Standards Act and the Copeland Anti-Kickback Act, prescribe the labor standards for laborers and mechanics performing work on public construction projects pursuant to a federal contract.

A. COVERAGE.

1. CONTRACTS COVERED.

The Davis-Bacon Act covers government contracts between the United States or the District of Columbia and a contractor for laborers and mechanics on public construction projects

for which the advertised specifications are for an amount in excess of \$2,000. The contract must be for the construction, alteration, or repair of public buildings or public works, and the work must be performed by mechanics or laborers. The prevailing wage standards of the Davis-Bacon Act also apply to subcontracts that meet these requirements. 40 U.S.C. § 3142; 29 C.F.R. § 5.2(h).

The public buildings or public works covered under the Davis-Bacon Act must be those owned by the United States or the District of Columbia and located within their geographical limits, or those constructed, completed, or repaired by a federal agency or with federal funds regardless of whether the agency has title to them. In addition, the terms public buildings and public works include

buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping.

Manufactured or furnished materials, articles, supplies, and equipment (whether or not a government agency acquires title to the items or owns the materials from which they are manufactured or furnished) are not buildings or works, unless the manufacturing or furnishing is conducted in connection with and at the site of a public building or public work, or under specified Davis-Bacon-related acts. 29 C.F.R. § 5.2(i)-(k).

According to the DOL, covered contract work, generally referred to as construction, alteration, or repair, includes the following:

- Painting and decorating
- Altering, remodeling, or installation on the site of the work of items fabricated off site
- Manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work
- Transportation between the actual construction location and a facility that is dedicated to the construction and deemed a part of the site of the work (Otherwise, the transportation of materials or supplies to or from the public building or work by employees of the construction contractor or a construction subcontractor is not construction.)

Examples of the type of work that constitutes construction, alteration, or repair include:

- Laying carpet and installing draperies during reconstruction of a public building

- Preparatory clean-up work like window washing or paint scraping, as long as it is performed before the contractors have finished the construction work
- Demolition work in preparation for further construction activity (but not demolition work not followed by construction activity)
- Landscaping performed in connection with construction (but not landscaping work alone, i.e., landscaping work not incidental to any construction work, which would be covered under the Service Contract Act, not the Davis-Bacon Act)

29 CFR § 5.2(i), (j), (l); Wage and Hour Field Operations Handbook Pt. 15d. In contrast, (Compare the site-of-work requirements discussed in Q11:38.)

2. CONTRACTORS COVERED.

The Davis-Bacon Act applies to contractors and subcontractors performing work under a covered contract. For purposes of the Davis-Bacon Act, state and local governments are not contractors under statutes providing federal loans, grants, or other assistance if the construction is performed by the governmental entity's own employees; however, state and local recipients of federal aid must pay laborers and mechanics pursuant to the Davis-Bacon labor standards if the applicable statute so provides. 29 C.F.R. § 5.2.

3. EMPLOYEES COVERED.

Under the Davis-Bacon Act, laborers and mechanics include workers who perform manual or physical labor, and exclude workers whose duties are primarily administrative, executive, or clerical. Under the Davis-Bacon Act, the terms include apprentices and trainees working pursuant to a certified program, and helpers, except apprentices and trainees employed on federal-aid highway projects subject to 23 U.S.C. § 113. Any employee performing the duties of a laborer or mechanic covered under the Davis-Bacon Act is an employee regardless of any contractual relationship alleged to exist. 40 U.S.C. §§ 3142, 3701; 29 C.F.R. §§ 5.2(m), (o), 5.5(a), 5.16, 5.17.

A distinct classification of helper will be issued in Davis-Bacon wage determinations only where the duties of the helper are clearly defined and distinct from any other classification on the wage determination, the use of such helpers is an established prevailing practice in the area, and the helper is not employed as a trainee in an informal training program. 29 C.F.R. § 5.2(n)(4).

A further limitation of the Davis-Bacon Act is that it applies only to mechanics and laborers who perform construction directly on the site of work. The DOL has an expansive definition of the site of work. Site of the work is generally defined as

the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is

constructed, provided that such site is established specifically for the performance of the contract or project.

29 C.F.R. § 5.2(l). The site of the work includes nearby fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, and other similar facilities, that are exclusively or nearly so dedicated to performance of the contract; however, it excludes such facilities to the extent they belong to a commercial supplier or materialman located off the project site and are established by a supplier of materials for the project before the opening of bids, even though they may be exclusively dedicated to the performance of a contract. 40 U.S.C. § 3142.

Some courts take issue with these expansive site-of-work regulations and reject the DOL's interpretation, maintaining that the statutory language clearly states that the labor standards apply to "mechanics and laborers employed directly on the site of the work." See 40 U.S.C. § 3142; see also LP Cavett Co. v United States Dep't of Labor, 101 F.3d 1111 (6th Cir. 1996) (following decisions from the District of Columbia Circuit, the Sixth Circuit held that truck drivers hauling asphalt from a temporary batch point to a federally assisted highway construction project three miles away from the site of work were not performing directly on the site of work and therefore were not covered by the prevailing wage standards of the Davis-Bacon Act); Building & Constr. Trades Dep't v. United States Dep't of Labor Wage Appeals Bd., 932 F.2d 985 (D.C. Cir. 1991) (holding that truck drivers who deliver materials to a federally funded construction project are akin to materialmen or commercial suppliers and are therefore excluded from the requirements of the Davis-Bacon Act).

B. REQUIREMENTS.

1. MINIMUM WAGE = PREVAILING WAGE.

Covered employees must be paid a prevailing wage determined by the Secretary of Labor. The prevailing wage is based on the wages and benefits paid to corresponding classes of laborers and mechanics performing contract work on a particular project similar to work performed in the city, town, village, or other civil subdivision of the state in which the work is to be performed.

If a laborer or mechanic performs work in more than one classification, the employee may be paid at the rate specified for each classification if the employer's payroll records separate the time spent in each classification. Apprentices and trainees performing contract work pursuant to a registered program may be paid at a wage specified in the program; however, apprentices and trainees must be paid the prevailing wage rate if they are not properly registered in a program or they are employed in excess of the ratio permitted by the program. 40 U.S.C. § 3142; 29 C.F.R. § 5.5(a).

2. "HOURS WORKED".

Because the Davis-Bacon Act is covered under the Portal to Portal Act, hours worked are determined under the Davis-Bacon Act in the same manner as under the FLSA. 29 U.S.C. § 251.

The FLSA does not define the term “work,” but it defines “employ” to mean “to suffer or permit to work.” 29 U.S.C. § 203(g). The Supreme Court has defined the terms “work” and “workweek” broadly.

In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), the Court defined “work” as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” *Id.* at 598. In *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), the Court clarified that “exertion” was not necessary for an activity to constitute “work.”

Federal regulations provide that a “workday” includes the following:

[T]he period between the commencement and completion on the same workday of an employee’s principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout that period.

29 C.F.R. § 790.6. Thus, any time that is spent for the benefit of an employer, with the employer’s knowledge, and that is considered a “principal activity” of the employee is considered to be hours worked and is therefore compensable. *See* 29 C.F.R. §§ 785.7, 785.9, 785.11.

a. The Portal-to-Portal Act.

The Portal-to-Portal Act of 1947, 29 U.S.C. § 251 *et seq.*, creates a limited exception to the FLSA’s general rule that an employer must compensate its employees for all hours worked. Section 4(a) of the Portal Act relieves an employer of responsibility for compensating employees for:

- (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
- (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. . . .

29 U.S.C. § 254(a).

Activities performed before and after the regular work shift are compensable, however, if they are an “integral” part of the employees’ principal activities and are not specifically excluded by Section 4(a)(1). *See* 29 C.F.R. § 785.9. Like “work,” “principal activity” is not defined by the statute; nonetheless, courts have characterized an activity as “principal activity” under the FLSA if they are performed as part of the regular work of the employees and are in the ordinary course of business. *Dunlop v. City Elec.*, 527 F.2d 394, 401 (5th Cir. 1976).

b. Section 3(o) of the FLSA.

Enacted in 1949, section 3(o) of the FLSA was intended to close a “loophole” in the Portal-to-Portal Act by excluding from the definition of “hours worked” time spent “changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.”

Thus, to claim an exemption from compensable time for certain activity under section 3(o), a defendant must show that (1) the activity constitutes “changing clothes” and (2) the activity was excluded from working time “by custom or practice” under a valid CBA. For employers, this is important because the time is noncompensable even where the changing or washing is required by the nature of the job, except where special conditions exist.

c. De Minimis Time.

In *Anderson v. Mt. Clemens Pottery Co.*, 238 U.S. 680 (1946), the Supreme Court described the *de minimis* principal as follows:

We do not, of course, preclude the application of a *de minimis* rule where the minimum walking time is such as to be negligible. The workweek contemplated by § 7(a) [of the FLSA] must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the [FLSA]. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

Id. at 692. Federal regulations provide that the *de minimis* exception “applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities.” 29 C.F.R. § 785.47.

In determining whether time worked is *de minimis*, courts have weighed the following factors:

- (1) The aggregate amount of compensable work;
- (2) The regularity of additional work; and
- (3) The amount of daily time spend on the additional work.

See Lindow v. United States, 738 F.2d 1057, 1060 (9th Cir. 1984) (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956)); *see also* 29 C.F.R. § 790.8(a). Courts have been clear, however, that time is not *de minimis* where it is practical for an employer to record it. *See, e.g., Mireles v Frio Foods*, 899 F.2d 1407 (5th Cir. 1990).

3. CONTRACT PROVISIONS.

Covered contracts must contain the several and various stipulations that incorporate the requirements under the Davis-Bacon Act. The required stipulations are set forth in 29 C.F.R. § 5.5 and include the following:

- (1) Wages shall be paid without condition, deduction, or rebate and regardless of any contractual relationship said to exist between the contractors, subcontractors, or covered employees;
- (2) Wages shall be paid not less often than once a week; and
- (3) The scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the work site.

29 C.F.R. § 5.5. Failure to include the required stipulations in a covered contract results in denial of approval of the contract, or of payments (unless the contractor has a certification on file) by the contracting federal agency. 40 U.S.C. §§ 3142(c), 3143(a); 29 C.F.R. §§ 5.5, 5.6.

4. FRINGE BENEFITS.

Employees covered under the Davis-Bacon Act must be provided the prevailing benefits in the locality, the levels of which are set by the Secretary of Labor. The benefits contemplated by the Davis-Bacon Act are the same as those under the Service Contract Act. They include medical or hospital care, pensions, unemployment compensation, life insurance, disability or sick pay, accident insurance, vacation and holiday pay, and the costs of apprenticeships or like programs, as well as any other bona fide fringe benefits not required by federal, state, or local law, or the cash equivalent.

The Secretary of Labor must make a separate determination of the rate of contribution or cost for fringe benefits, ordinarily set at an hourly rate. Bona fide fringe benefits are those “common in the construction industry and which are established under a usual fund, plan, or program.” Unconventional fringe benefits must be approved specifically by the Secretary of Labor under 29 C.F.R. § 5.5(a)(1)(iv). 40 U.S.C. § 3142; 29 C.F.R. §§ 5.5(a), 5.25, 5.29, 5.30.

Under the Davis-Bacon Act payments made by a covered employer for fringe benefits are considered part of the prevailing wage, as long as the benefits are paid pursuant to the following methods of contribution:

- (1) By payments or contributions irrevocably made to a trust or to a third person pursuant to a fund, plan, or program (funded plans);
- (2) By setting aside or allocating the costs the contractor reasonably anticipates it will incur in providing fringe benefits to employees pursuant to an enforceable,

financially sound plan communicated in writing to the employees (unfunded plans);

- (3) By making cash payments to the employees.

Cash payments may be made in combination with the other two methods of contribution so long as the contractor does not pay below the prevailing wage obligations.

Apprentices and trainees performing contract work pursuant to a registered program must be paid fringe benefits as specified in a registered apprentice or trainee program. If these benefits are not specified, the apprentices and trainees generally must be paid the fringe benefits listed in the wage determination, unless the Wage and Hour Administrator determines that a different practice prevails in the locality of the construction project for that particular apprentice or trainee classification. Wage and Hour Field Operations Handbook §§ 15e01(g), 15e02.

5. OVERTIME.

The Davis-Bacon Act does not have its own overtime provision. The act provides, however, that for employees who are entitled to be paid overtime under other federal laws, the basic rate of pay under the applicable wage determination serves as the regular rate for purposes of computing overtime. 40 U.S.C. § 3142(e); 29 C.F.R. § 5.32.

There is an issue whether fringe benefits should be included in the regular rate when calculating overtime due an employee. The regulations state that when the overtime provisions of the FLSA, the Contract Work Hours and Safety Standards Act, or the Public Contracts Act apply concurrently with the Davis-Bacon Act or Davis-Bacon-related acts, amounts paid by a contractor or subcontractor for fringe benefits are excluded from the regular rate for purposes of calculating overtime pay to the extent provided under the applicable statute. 29 C.F.R. §§ 5.32, 778.6. Because the prevailing wage under the Davis-Bacon Act includes the basic hourly rate of pay and the cash fringe benefit payments, however, two courts have affirmed the interpretation of the Wage Appeals Board, and have required employers to include as part of the regular rate cash payments for fringe benefits. *Holloway Constr. v. Wage Appeals Bd.*, 825 F.2d 1072 (6th Cir. 1987); *G & C Enters., Inc. v. Wage Appeals Bd.*, 619 F. Supp. 1430 (D.N.J. 1995), *aff'd mem.* 782 F.2d 1028 (3d Cir. 1985). An employee's contributions for fringe benefits must be included in the basic or regular rate. 40 U.S.C. § 3142(e).

6. RECORDKEEPING.

The following records must be retained by the contractor for the duration of the contract and for three years thereafter:

- (1) **Payroll and basic information.** The records must contain the name, address, Social Security number, classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents), daily and weekly number of hours worked, deductions made, and actual wages paid.

- (2) **Unfunded plan contributions.** If a contractor makes contributions to an unfunded plan as part of the prevailing wage rate, it must keep records that show that the commitment to provide such benefits is enforceable and that the plan or program is financially responsible and has been communicated in writing to the laborers or mechanics affected, and records that show the costs anticipated or the actual cost incurred in providing such benefits.
- (3) **Apprentices and trainees.** Contractors employing apprentices or trainees under approved programs must maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the programs.

29 C.F.R. § 5.5(a)(3)(i). There are also weekly payroll reporting requirements that accompany the minimum wage requirements of the Davis-Bacon Act. 29 C.F.R. § 5.5(a)(3)(ii).

Required records must be available for inspection by DOL representatives. Failure to maintain or produce the required records may result in the contracting federal agency, after notice to the contractor, suspending further payment on the contract. Such a failure may also be grounds for debarment. 29 C.F.R. § 5.5(a)(3)(iii).

C. ENFORCEMENT AND PENALTIES.

The DOL is generally charged with enforcement of the Davis-Bacon Act, which includes investigating and prosecuting violations, adopting rules and regulations necessary for the enforcement of the Act, and issuing wage determinations. The Comptroller General of the United States is authorized to make direct wage payments to laborers and mechanics from any withheld payments under the contract. 40 U.S.C. §§ 3142, 3144, 3145; 29 C.F.R. § 5.6.

In the event of violation of the Davis-Bacon Act, the contracting agency may withhold payments or advances under the contract to pay laborers or mechanics. The government may also terminate the contractor's or subcontractor's right to proceed with work and hold it liable for excess costs incurred in completing the contract work in the event of underpayment. It is an affirmative defense to alleged violations if an employer relied in good faith on administrative rulings under the Davis-Bacon Act. Absent such a defense, payments may be withheld from the contractor to cover the underpayment due covered employees, among other penalties available to the contracting agency. 29 U.S.C. § 260; 40 U.S.C. §§ 3142, 3143; 29 C.F.R. §§ 5.8, 5.9, 5.13.

Actions for unpaid minimum wages or overtime pay, or liquidated damages, must be brought no later than two years from the date the action accrued, or no later than three years from the date the action accrued if the violation was willful. Under the Davis-Bacon Act, covered employees have a right of action or intervention against the contractor or its surety for wages to the extent the payments withheld are insufficient. The Davis-Bacon Act does not expressly provide employees a private right of action to enforce the act, although in some circumstances courts may find an implied right of action. 29 U.S.C. § 255; 40 U.S.C. § 3144(a).

The Davis-Bacon Act contains a blacklisting provision similar to that of the Service Contract Act for contractors that have acted with the intent to “disregard their obligations” under the act. In addition to being blacklisted, if a contractor fails to produce the records required to be kept under the Davis-Bacon Act to the DOL on request, the contracting federal agency may suspend any further payment, advance, or guarantee of funds. 40 U.S.C. § 3144(b); 29 C.F.R. § 5.5(a)(3)(iii). The procedures for resolving disputes under Davis-Bacon-related Acts are covered in 29 C.F.R. § 5.11 and are beyond the scope of this chapter. The procedures and requirements for debarment proceedings are covered in 29 C.F.R. § 5.12.

III. CALCULATING THE PREVAILING WAGE.

A “wage determination” is the listing of wage rates and fringe benefit rates for each classification of laborers and mechanics which the Administrator of the WHD has determined to be prevailing in a given area for a particular type of construction. For the purposes of Davis-Bacon wage determinations, construction is grouped into four major types:

- **Commercial Building.** The construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies.
- **Highway Construction.** Includes the construction of roads, streets, highways and other similar projects.
- **Residential Construction.** Involves the construction of single family houses or apartment buildings of no more than four stories.
- **Heavy Construction.** A catch-all grouping that includes projects not properly classified under the other three types of construction .

The WHJD issues two types of wage determinations: general determinations, also known as area determinations, and project determinations. General wage determinations reflect those rates determined by the Division to be prevailing in a specific geographic area for the type of construction described. General wage decisions and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the Federal Register, or on the date written notice is received by the agency, whichever is earlier. Project wage determinations are issued at the specific request of a contracting agency; each is applicable to the named project only; and expires 180 calendar days from the date of issuance unless an extension of the expiration date is requested by the agency and approved by the Wage and Hour Division. If such a determination is not used in the period of its effectiveness, it is void.

Calculating the prevailing wage under the Davis-Bacon Act is a four-step process: (1) planning and scheduling of surveys, (2) conducting the surveys, (3) clarifying and analyzing the respondents’ data and (4) issuing the wage determinations. Problems that contribute to inaccurate

prevailing wage estimates begin early in the process and continue throughout all four steps.¹ Current wage determinations are available online at <http://www.gpo.gov/davisbacon/>.

A. P L A N N I N G A N D S C H E D U L I N G T H E S U R V E Y S .

Planning begins in the third quarter of each fiscal year when the WHD distributes the Regional Survey Planning Report (RSPR), supplied by the F.W. Dodge Division of McGraw-Hill Information Systems, to their regional offices. The RSPR is comprised of data that shows detailed information regarding active construction projects as well as data from federal agencies about upcoming construction projects. The data show the quantity and value of construction projects by geographical area, type of construction, the percentage of the project that is federally financed, the date of the most recent survey in a county and the current wage determination. Using the RSPR, regional offices, in collaboration with the national office, then determine the county and types of construction to be included in that year's survey.

Due to the vast number of prevailing wages to be determined across the entire country (more than 3,000 counties, well over 100 job categories and four project classifications) and the limited resources faced by the WHD, it is not possible to survey each county each year. Therefore, the office must annually identify specific areas that are most in need of revision by referring back to the RSPR. According to the WHD general requirements, areas should be surveyed every three years. Areas in need of a survey are identified based upon the following criteria: (1) the volume of federally funded construction projects in the area, (2) the age of the last survey completed, and (3) requests or complaints about the existing prevailing wage estimate.²

B. C O N D U C T I N G S U R V E Y S .

Once survey schedules are approved, regional offices begin to compile lists of potential survey participants. Analysts from Construction Resources Analysis (CRA) at the University of Tennessee provide regional offices with files of projects that are appropriate for the survey. The CRA identifies projects by applying a model to the F.W. Dodge data that pinpoints projects within the parameters specified by the regional offices. The files include the location, type and cost of construction as well as contact information for the primary contractor and subcontractors, if available, that were active during the given time period specified. The time period can be three months or longer and is based on the number of projects that are active; the time period is expanded if there are not enough active projects for the survey.

¹ United States General Accounting Office, "Davis-Bacon Act Process Changes Could Address Vulnerability to Use of Inaccurate Data in Setting Prevailing Wage Rates," (June 1996): available at <http://www.gao.gov/cgi-bin/getrpt?T-HEHS-96-166>.

² United States General Accounting Office, "Davis-Bacon Act Process Changes Could Raise Confidence that Wage Rates are Based on Accurate Data"; (May 1996); available from <http://www.gao.gov/archive/1996/he96130.pdf>.

1. POPULATION SURVEYED.

The WD-10 survey form is sent to contractors and subcontractors along with a letter requesting information on any other applicable projects. The WD-10 is now available online at <http://www.dol.gov/whd/programs/dbra/wd-10.htm>. Letters announcing the survey and a copy of the WD-10 form are also sent to members of Congress, contractor trade associations and building trade unions to inform them of the survey and solicit their information as well. Contractors who do not respond to the initial request are sent a second WD-10 form. Those who do not respond to the second inquiry are contacted by telephone.

2. SURVEY FORMAT.

The WD-10 survey form includes questions about the contractor, subcontractor, project, type of construction and hourly wage and fringe benefits paid to workers in specific classifications. The survey is designed to place a heavy burden on survey participants, and hence can lead to a small and unrepresentative response rate.

WD-10 survey is further complicated by its fringe benefits recording requirements. The survey requires employers to report hourly wages and hourly fringe benefits, yet fringe benefits are rarely quoted, reported or paid on an hourly basis. While firms typically calculate wage rates on an hourly basis, they have little need for, or experience in, calculating hourly fringe benefit rates unless they have previous experience with federally funded projects. Moreover, the survey requests employers to break out the hourly fringe benefits into different components, such as “pension,” “vacation and holiday,” etc., making the task even more burdensome.

C. CLARIFYING AND ANALYZING THE RESPONDENTS’ WAGE DATA.

As completed surveys arrive at the WHD, analysts review them for missing information, ambiguities and inconsistencies. Analysts attempt to clarify any questions or problems through telephone conversations with the submitting contractor. Analysts then enter data from complete WD-10s into a computer which generates a WD-22a or Project Wage Summary for each project included in the data.

D. DETERMINING THE PREVAILING WAGE.

The survey response rate is calculated prior to the survey cutoff date to determine if the sample of wage data collected is adequate. This allows survey analysts additional time to follow up if the response rate is low. The DOL considers the surveys an inadequate representation of the area if the survey response rate is less than 25%, or if less than half of the wage classifications are represented.

If the survey response rate is determined to be inadequate, analysts will take further steps to increase the robustness of the sample through follow up telephone calls encouraging contractors to submit their wage data. If, after a second attempt to increase the sample, the response rate is still insufficient, federal construction wage data will be included. If there is still a

lack of data, analysts will combine private wage data from a nearby county to the current sample of wage data.

E. ISSUING THE PREVAILING WAGE.

The designation of the federal prevailing wage depends on the data included in the survey responses. If, according to the survey data, a majority of workers in a single job category receive the same wage to the penny, that wage is designated as the prevailing wage. However, if no single wage rate comprises a majority among a job classification, the average wage is calculated from the data and becomes the prevailing wage rate.

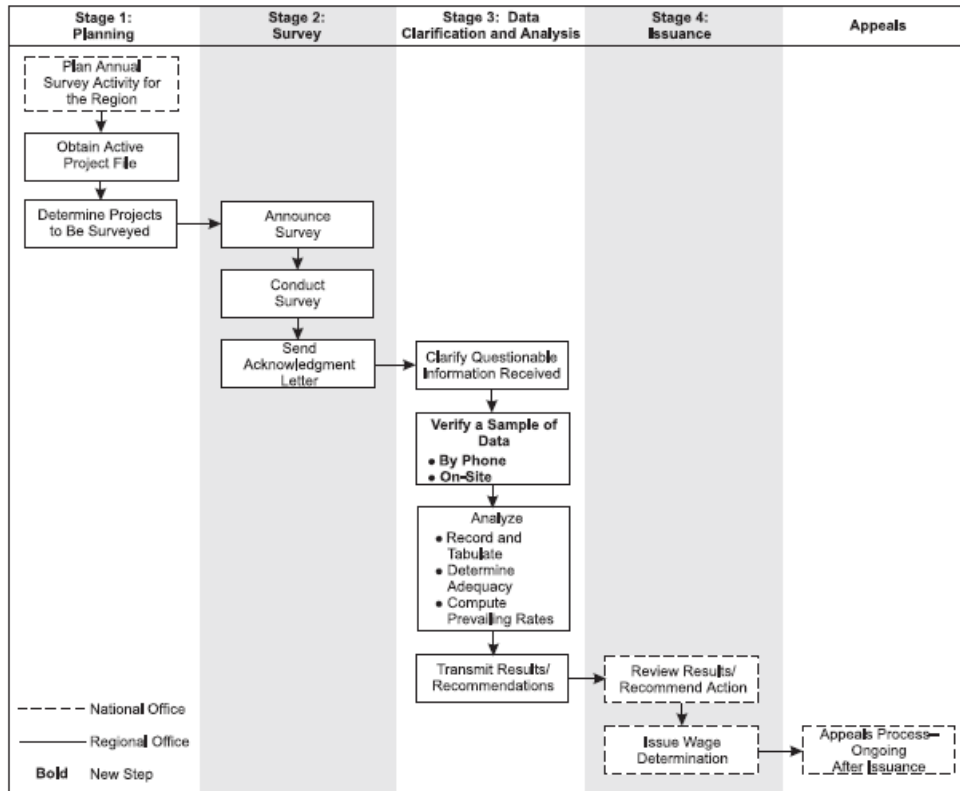
The use of a majority wage as the prevailing wage allows one or several large entities to determine the prevailing wage, especially in light of the potential low response threshold. A few large firms paying exactly the same wage for a specific job category could provide enough responses to meet the 25% threshold. The wage paid by these firms would be designated the prevailing wage if the wage comprised the majority of workers in the survey responses. Thus, as few as 12.5% (50% of 25%) of the contractors contacted to complete the survey could determine the prevailing wage to be paid by all contractors for federal projects.³

F. APPEALS.

An interested party may seek review and reconsideration of Labor's final wage determinations. The national office and the regional offices accept protests and inquiries relating to wage determinations at any time after a wage determination has been issued. The national office refers all the complaints it receives to the relevant regional offices for resolution.

Those who are not satisfied with the decision of the regional office may write to the national office to request a ruling by Labor's WHD Administrator. If the revision of a wage rate has been sought and denied by a ruling of Labor's WHD Administrator, an interested party has 30 days to appeal to the Administrative Review Board for review of the wage determination.

³ General Accounting Office "Davis-Bacon Act, Labor Now Verifies Wage Data, But Verification Process Needs Improvement"; (January 1999); available from <http://www.gao.gov/archive/1999/he99021.pdf>.



IV. ENFORCING THE PREVAILING WAGE.

The DOL has oversight responsibilities to assure coordination of administration and consistency of enforcement of the labor standards provisions of the Davis Bacon and Related Acts. However, private plaintiffs have administrative, and in some cases, judicial remedies. In fact, even non-employees, including unions, may bring *qui tam* claims on behalf of the government.

A. FEDERAL AND STATE AGENCY ENFORCEMENT.

The DOL is responsible for enforcing the Davis-Bacon Act. Under the Davis-Bacon Act, the DOL may investigate and prosecute violations for unpaid wages and overtime, adopt rules and regulations necessary for the enforcement those statutes, and issue wage determinations.

For violations of the Davis-Bacon Act, the Comptroller General of the United States is authorized to withhold payments due under the funding contract for violations of either Act and make direct wage payments to laborers and mechanics from contract payments that have been withheld. *See* 40 U.S.C. §§ 3142, 3144, 3145; 29 C.F.R. § 5.6.

Decisions of the DOL are appealable to the Administrative Review Board, but assessments made against a contractor are appealable to the head of the contracting agency, and then to the courts. *See* 40 U.S.C. §§ 3702, 3703, 3706.

The contracting agency and the DOL are responsible for carefully examining a contractor’s or subcontractor’s weekly payroll reports for thoroughness, consistency with previously submitted payrolls, and accuracy of special deductions, work hours and pay rates according to job classifications and the wage determination rate. The contracting agency and DOL are authorized to conduct job-site inspections, during which an inspector considers several factors in determining compliance, including general observations of the job-site and information obtained from employee interviews. The inspector also confirms that the required wage rate notices are posted.

Thirty-one states currently have “Mini Davis-Bacon Acts,” prevailing wage laws that were modeled after the federal Davis-Bacon Act. *See* Table. Generally under mini Davis-Bacon Acts, the state’s Department of Labor is charged with enforcement of the prevailing wage requirements for programs and projects receiving state and local government funding. Mini Davis-Bacon Acts also typically have administrative enforcement schemes similar to that of the DOL’s enforcement of the federal Davis-Bacon Act.

State	Date Enacted	State	Date Enacted
Alaska	1931	Nebraska	1923
Arkansas	1955	Nevada	1937
California	1931	New Jersey	1913
Connecticut	1935	New Mexico	1937
Delaware	1962	New York	1897
District of Columbia	1931	Ohio	1931
Hawaii	1955	Oregon	1965
Illinois	1931	Pennsylvania	1961
Indiana	1935	Rhode Island	1961
Kentucky	1982	Tennessee	1953
Maine	1933	Texas	1933
Maryland	1945	Vermont	2007
Massachusetts	1914	Washington	1945
Michigan	1965	West Virginia	1933
Minnesota	1973	Wisconsin	1931
Missouri	1957	Wyoming	1967
Montana	1931		

B. PRIVATE RIGHT OF ACTION.

The vast majority of federal courts have held that an employee does *not* have a private right of action against his or her employer for failure to pay prevailing wages because such relief would be inconsistent with the enforcement procedures explicitly provided by the Davis-Bacon Act. *See, e.g., Grochowski v. Phoenix Const.*, 318 F.3d 80 (2d Cir. 2003) (holding that the Davis-Bacon Act does not provide employees with a private right of action for unpaid wages); *Weber v. Heat Control Co.*, 728 F.2d 599 (3d Cir. 1984) (same); *U.S. for Benefit and on Behalf*

of *Glynn v. Capeletti Bros., Inc.*, 621 F.2d 1309 (5th Cir. 1980) (same); *Mosley v. Starr Elec. Co.*, 542 F. Supp. 1032 (E.D. Tenn. 1981) (same); *Operating Engineers Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671 (9th Cir. 1998) (same).

Instead, the employee must seek an administrative remedy by alerting the DOL of the violation and/or seek contractual relief in state court. *See, e.g., District Lodge No. 166, Intl Ass 'n of Machinists & Aerospace Workers v. TWA Servs., Inc.*, 731 F.2d 711 (11th Cir. 1984) (holding that if the Secretary of Labor issues a wage determination after the contract has begun, employees cannot bring suit against the contractor to recover the difference between wages actually paid and those that would have been due in the interim had the agency issued the wage determination earlier), *cert. denied*, 469 U.S. 1209 (1985).

For example, in *Araujo v. Tiano's Constr. Corp.*, 10 N.Y.3d 592 (N.Y. June 5, 2008), a case arising New York law, workers on federally-funded public housing projects that were contracted for by the New York City Housing Authority brought separate actions against the contractors and their sureties, alleging state law causes of action for breach of contract based on the contractors' alleged failure to pay the prevailing-wage rates required by the U.S. Housing Act, which is a Davis-Bacon Related Act. The New York Court of Appeals, held that the workers could pursue their state causes of action

Courts also have held that an employee has a right, albeit through his or her union, to alert the DOL to the fact that a contractor's payroll practices are not in compliance with the Davis-Bacon Act. *E.M. Gilbert Eng'g Corp. v. United States*, 82 Ct. Cl. 616 (1936).

State courts have been somewhat inconsistent in deciding whether or not a private cause of action exists under the state's "Mini Davis-Bacon Act," with courts in some states finding that a private cause of action exists under the state's prevailing wage law. For instance, while Alaska has found a private cause of action, *see, Dayhoff v Temsco Helicopters, Inc.*, 848 P.2d 1367 (Alaska 1993), courts in other states have found that a private rights of action does not exist under state law, *see, e.g., International Bhd. of Elec. Workers, Local Union No. 58 v McNulty*, 543 N.W.2d 25 (1995); or that an employee has a private right of action only after the employee has exhausted the administrative process for enforcement of the state's prevailing wage law. *See, e.g., Wunsch v. Esposito Bldg. Specialty, Inc.*, 852 N.Y.S.2d 199 (App. Div. 2d Dep't 2008).

C. PRIVATE SUIT ALTERNATIVE—QUI TAM ACTIONS.

An alternative means of enforcing the requirements of the Davis-Bacon Act is an action pursuant to the False Claims Act. 31 U.S.C. §§ 3729-3733). The False Claims Act lists seven specific acts that may provide a basis for liability, including where a person "knowingly presents, or causes to be presented, to an officer or employee of the United States Government... a false fraudulent claim for payment or approval. 31 U.S.C. § 3729(a)(1).

Liability includes a civil penalty between \$5,000 and \$10,000, plus three times the amount of damages sustained by the government because of that person's act. A federal contractor or subcontractor who makes a false certification on the weekly payroll statement (e.g., that it has paid applicable prevailing wages as required by the Davis-Bacon Act or has not taken

a rebate or made an impermissible deduction from wages) comes within the liability purview of that provision. *See, e.g., United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co.*, 183 F.3d 1088 (9th Cir. 1999).

The False Claims Act creates incentives for “whistleblowers” to combat fraud on the government by allowing someone with knowledge of fraud on the federal government, to sue on behalf of the government to recover civil penalties and potential treble damages. *See* 31 U.S.C. §§ 3729-33. Such actions are called *qui tam* claims. The individual, or “relator,” files a complaint under seal in the appropriate federal district court together with a written statement disclosing the material evidence and information the individual has regarding the fraud. The appropriate government agency investigates the complaint, and determines whether to join the lawsuit, decline to intervene, move to dismiss or attempt to settle the matter.

The relator may receive between 15% and 25% of the proceeds if the government decides to intervene. If the government declines, however, the relator may investigate his or her own claim and, if successful, collect between 25% and 30% of the proceeds, as well as reimbursement for attorney’s fees and costs. 31 U.S.C. § 3730(d). The relator’s share may be reduced at the court’s discretion if it is determined the relator was involved in the wrongdoing.

Thus, for example, an individual employee or a union could file a *qui tam* action under the FCA based on the allegation that a contractor on a public works contract submitted a false weekly payroll statement.

V. PRACTICAL GUIDANCE.

A. TRAPS FOR THE UNWARY.

- √ **Wrong Wage Schedule.** Using the wrong wage schedule (i.e., building, heavy, highway or residential) can cause the contractor to fail to pay the prevailing wage.
- √ **Misclassification of Workers.** Because the same worker may perform multiple duties, a contractor should require each employee to sign off weekly on the number of hours performed at each craft.
- √ **Apprentices.** Apprentices must be enrolled, registered and attend a DOL-approved training program. Furthermore, ratios may apply as to the number of apprentices to Journeymen.
- √ **Travel Time.** Prevailing wages apply to “site of work” only. Thus, contractors are not required to pay for travel time from an employee's home to a covered project or for the delivery of materials to a covered site. 29 C.F.R. § 5.2. However, if employees meet at the place of work then travel to the site, a contractor may be subject to the payment of prevailing wages.

B. THE DAVIS-BACON ACT CHECKLIST.

- √ **Application of Davis-Bacon.** Determine whether the Davis-Bacon applies to your project.
- √ **Application of “Mini” Davis-Bacon.** Determine whether the your state has a “Mini Davis-Bacon Act,” which can be more stringent than the federal version.
- √ **Use Proper Wage Determination.** Ensure you have the correct prevailing wage determination for the classifications of employees on a specific project before you submit a bid and execute the contract. Current wage determinations are available at <http://www.gpo.gov/davisbacon/>.
- √ **Use Proper Classification.** Properly define the classifications of employees necessary for the public works project.
- √ **Distinguish Travel Time from “Site of Work” Time.** Determine what work areas necessary for the project will be considered a “site of work” mandating the payment of prevailing wages for work performed within that work area.
- √ **Train Payroll Staff.** Train your managers and payroll staff to properly determine what work will be subject to the payment of prevailing wages, and ensure that appropriate employees on the appropriate projects are properly reporting and being paid for overtime hours.
- √ **Subcontractors.** Ensure subcontractors are complying. Include contract language that permits the termination of a subcontract and indemnification should a subcontractor incorrectly pay employees.
- √ **Proper Posters.** Ensure the appropriate federal posters (and if applicable, state posters) related to prevailing wage requirements are posted within appropriate areas of the worksite or relevant work location. The current poster is located at <http://www.dol.gov/whd/regs/compliance/posters/fedprojc.pdf>
- √ **Conduct Audits.** Conduct periodic audits of your subcontractors’ certified payroll statements to ensure thorough compliance with reporting obligations.
- √ **Identify and Disclose Potential Violations.** Identify potential violations; determine whether “credible evidence” shows that a violation occurred; and make a timely disclosure to the government agency’s inspector general.