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LEASES AS CONTRACTS FOR CONSTRUCTION

DBA/DBRA

Coverage and Compliance Principles

This section provides basic information regarding major aspects of compliance with the Davis-Bacon labor standards and CWHSSA overtime requirements. It addresses frequently asked questions such as:

- ◇ Who are the “laborers and mechanics” to whom the Davis-Bacon prevailing wage requirements apply?
- ◇ What is the “site of the work” where workers are covered by Davis-Bacon prevailing wage requirements?
- ◇ How are truck drivers affected by the “site of the work” limit on Davis-Bacon coverage?
- ◇ When can apprentices or trainees work on a Davis-Bacon project at less than the wages listed in the Davis-Bacon wage determination?
- ◇ Can helper classifications be used on Davis-Bacon covered projects?
- ◇ What happens if there is a dispute over how a worker should be classified?
- ◇ Does the Davis-Bacon prevailing wage include fringe benefits?
- ◇ How can a contractor’s fringe benefit costs count towards Davis-Bacon prevailing wages?
- ◇ How do you compute fringe benefit costs as an hourly rate that can count towards fulfilling your prevailing wage obligation?

LABORERS AND MECHANICS

Definition 29 C.F.R. § 5.2(m).

- ◇ The term “**laborer or mechanic**” includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial duties.

Laborers and mechanics include:

- ◇◇ Apprentices
- ◇◇ Trainees
- ◇◇ Helpers

For overtime coverage under CWHSSA, also:

- ◇◇ Guards and watchmen

Note: Although guards and watchmen are not considered laborers or mechanics under DBA/DBRA, they are covered by CWHSSA by virtue of its express statutory language.

- ◇ The term laborer or mechanic does not include workers whose duties are primarily administrative, executive, or clerical, rather than manual.
- ◇ Categories of workers normally considered not to be laborers or mechanics when, in the course of their duties, they perform no manual or physical work on the construction project are:
 - ◇◇ Architects and engineers
 - ◇◇ Timekeepers
 - ◇◇ Inspectors

Coverage of laborers and mechanics

- ◇ The DBA requires the payment of the applicable prevailing wage rates to all laborers and mechanics “regardless of any contractual relationship which may be alleged to exist.”
- ◇ Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the exemption criteria of 29 C.F.R. Part 541, are laborers and mechanics for the time so spent. The working foreman is due the applicable rate listed in the contract wage determination for the hours spent as a laborer or mechanic.
- ◇ Persons “employed in a bona fide executive, administrative, or professional capacity” as defined in 29 C.F.R. Part 541 are deemed not to be laborers or mechanics.
- ◇ Business Owners: An individual who owns at least a bona fide 20 percent equity interest in the business and is actively engaged in its management is considered a bona fide executive, and is not a laborer or mechanic under the Davis-Bacon definition of the term “laborer or mechanic.” *See* 29 C.F.R. § 5.2(m) and 29 C.F.R. § 541.101-102.

SITE OF THE WORK

Definition 29 C.F.R. § 5.2(1).

- ◇ **5.2(1)(1)** – “Site of the work” is 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.

For example:

- ◇◇ If a small office building is being erected, the “site of the work” will normally include no more than the building itself and its grounds.
- ◇◇ In the case of larger projects, such as airports, highways, or dams, the “site of the work” is necessarily more extensive and may include the whole area in which the construction activity will take place.
- ◇◇ Where a very large segment of a dam is constructed up-river and floated downstream to be affixed onto a support structure, the secondary construction site would be within the meaning of “site of the work” for Davis-Bacon purposes if it was established for and dedicated to the dam construction project.
- ◇ **5.2(1)(2)** - Except as provided in paragraph 5.2(1)(3), batch plants, borrow pits, job headquarters, tool yards, etc., are part of the “site,” provided they are dedicated exclusively, or nearly so, to the contract or project, and are adjacent or virtually adjacent to the site of the work as defined in paragraph 5.2(1)(1).
- ◇ **5.2(1)(3)** - Not included in the “site of work” are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular federal or federally assisted project.

Also excluded from the “site of the work” are fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph 5.2(1)(1), even where such operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

- ◇ CWHSSA has no site of work limitation. An employee performing part of the contract work under a construction contract at the job site who then continues contract work at a shop or other facility located elsewhere is subject to CWHSSA overtime pay for all the hours worked at both locations and travel time between them. (Different wage rates might be paid, as the Davis-Bacon prevailing wage requirements would apply only to activities performed on “the site of the work.”)

- ◇ Contracting agencies should consult the WHD when confronted with “site of the work” issues.

TRUCK DRIVERS

Definition 29 C.F.R. § 5.2(j).

- ◇ The terms “**construction, prosecution, completion, or repair**” mean all types of work done on a particular building or work at the site (including work at a facility deemed part of the “site of the work”) by laborers and mechanics of a construction contractor or construction subcontractor, including without limitation:
 - ◇◇ Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site.
 - ◇◇ Painting and decorating.
 - ◇◇ The manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work.
 - ◇◇ Transportation between the “site of the work” (within the meaning of 29 C.F.R. § 5.2(1)) and a facility which is dedicated to the construction of the building or work and deemed a part of the “site of the work” (within the meaning of 29 C.F.R. § 5.2(1)).

Coverage of truck drivers

- ◇ Truck drivers **are covered** by Davis-Bacon in the following circumstances:
 - ◇◇ Drivers of a contractor or subcontractor for time spent working on the site of the work.
 - ◇◇ Drivers of a contractor or subcontractor for time spent loading and/or unloading materials and supplies on the site of the work, if such time is not *de minimis*. (Note: information provided regarding “material suppliers” may also be relevant.)
 - ◇◇ Truck drivers transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site.
 - ◇◇ Truck drivers transporting portion(s) of the building or work between a site established specifically for the performance of the contract or project where a significant portion of such building or work is constructed and the

physical place(s) where the building or work called for in the contract(s) will remain.

- ◇ Truck drivers are **not covered** in the following instances:
 - ◇◇ Material delivery truck drivers while off “the site of the work.”
 - ◇◇ Drivers of a contractor or subcontractor traveling between a Davis-Bacon job and a commercial supply facility while they are off the “site of the work.”
 - ◇◇ Truck drivers whose time spent on the site of the work is *de minimis*, such as only a few minutes at a time merely to pick up or drop off materials or supplies. (See further information in the discussion below concerning “material suppliers.”)
- ◇ DOL has an **enforcement position** with respect to bona fide owner-operators of trucks who own and drive their own trucks. Certified payrolls including the names of such owner-operators do not need to show the hours worked or rates paid, only the notation “owner-operator”. This position does not apply to owner-operators of other equipment such as bulldozers, backhoes, cranes, welding machines, etc. (WHD does not view rental of a truck as equivalent to ownership.)
- ◇ Overtime pay requirements under CWHSSA apply to truck drivers employed by contractors and subcontractors regardless of whether the hours worked on the contract are on or off the site of the work.

Material suppliers

- ◇ The manufacture and delivery to the work site of supply items such as sand, gravel, and ready-mixed concrete, when accomplished by bona fide material suppliers, are activities not covered by DBA/DBRA requirements. (This would be so even though the materials are delivered directly into a contractor’s mixing facilities at the work site.)
- ◇ Bona fide material suppliers whose only contractual obligations for on-site work are to deliver materials and/or pick up materials are not considered contractors under the DBA/DBRA. Thus, their employees are not subject to the Davis-Bacon labor standards.
- ◇ However, if a material supplier, manufacturer, or carrier undertakes to perform a part of a construction contract as a subcontractor, its laborers and mechanics

employed at the site of the work would be subject to Davis-Bacon labor standards in the same manner as those employed by any other contractor or subcontractor.

- ◇◇ Laborers and mechanics employed by a material supplier who are required to perform more than an incidental amount of construction work in any workweek at the site of the work would be covered by the Davis-Bacon labor standards and due the applicable wage rate for the classification of work performed. For enforcement purposes, if such an employee spends more than 20% of his/her time in a workweek engaged in such activities on the site, he/she is Davis-Bacon covered for all time spent on the site during that workweek.

APPRENTICES AND TRAINEES

Definition (29 C.F.R. § 5.2(n)).

- ◇ *Apprentice* means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration [ETA], Office of Apprenticeship Training, Employer and Labor Services [OA], or with a State Apprenticeship Agency recognized by the ... [ETA/OA], or (ii) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the ..., [OA] or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice;
- ◇ *Trainee* means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, ... [ETA], as meeting its standards for on-the-job training programs and which has been so certified by ... [ETA].

Coverage of apprentices and trainees

- ◇ Apprentices and trainees are laborers and mechanics but are not listed on Davis-Bacon wage determinations. Apprentices and trainees are permitted to work on DBA/DBRA covered projects only under very controlled circumstances, as follows.
- ◇ Apprentices and trainees may be used on DBA/DBRA covered projects and paid less than the specified journeyman rate for the work performed if:
 1. The apprentice or trainee is **individually registered** in an **approved** apprenticeship or training program.
 - ◇◇ The **apprenticeship program** has been approved by the ETA/OA or by a state apprenticeship agency recognized by the ETA/OA.
 - ◇◇ The registration requirements do not apply to apprentices and trainees employed on highway construction projects funded by the **Federal-Aid Highway Act** and enrolled in programs certified by the U.S. Department of Transportation.

2. Apprentices/trainees must each be paid the percentage (%) specified in the approved apprenticeship or trainee program for their level of progression calculated as a percent of the basic hourly rate required by the applicable wage determination for the applicable classification.
3. The contractor is limited in the number of apprentices/trainees permitted on the DBA/DBRA job site based on the **allowable ratio** of apprentices/trainees to journeymen specified in the approved program. (Note: In view of the apprenticeship regulations at 29 C.F.R. Part 29, as revised in 2008, any questions concerning portability of the wages and ratio provisions on DBA/DBRA covered projects in light of 29 C.F.R. 29.13(b)(7) may require careful consideration by WHD).
 - ◇◇ Compliance with the applicable ratio is determined on a daily, not weekly basis.
 - ◇◇ The use of “fraction thereof” in computing apprenticeship ratios is not permitted unless specified in the approved apprenticeship program.
4. **Fringe benefits** should be paid to apprentices/trainees in accordance with the provisions of the apprenticeship/trainee program. If the program is silent on the payment of fringes, the apprentices/trainees are to receive the full amount of the fringe benefits stipulated on the applicable wage decision (for the craft in which an individual apprentice/trainee is employed) unless it is determined that a different practice prevails for such apprentices/trainees.
5. When the contractor has exceeded the allowable ratio of apprentices/trainees in a classification, only the individuals who were employed before the applicable ratio was exceeded may be paid below the wage determination rate(s) for the work performed. Individuals whose employment on the site exceeds the allowable ratio must be paid the full wage determination rate for the classification of work performed.

HELPERS

Definition 29 C.F.R. 5.2(n)(4).

- ◇ A distinct classification of “helper” will be issued in Davis-Bacon wage determinations only where all of the following conditions are met:
 - ◇◇ The duties of the helper are clearly defined and distinct from those of 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.

A “helper” classification will be added to wage determinations pursuant to the Davis-Bacon contract clause at § 5.5(a)(1)(ii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

Note: Helpers may be employed on a DBA/DBRA covered construction project only if the helper classification is listed in the Davis-Bacon wage determination in the contract or the classification is added with approval by DOL. Helper classes are issued or approved only where they are within the scope of the definition stated above.

AREA PRACTICE – PROPER CLASSIFICATION OF WORKERS

- ◇ To determine proper classifications for workers employed on a Davis-Bacon covered project, it may be necessary to examine **local area practice**.
- ◇◇ There are no nationwide standard classification definitions under the DBA. (This differs from the SCA, as SCA classifications are defined in the *SCA Directory of Classifications*.)

Note: The Dictionary of Occupational Titles, published by the Department’s Employment and Training Administration, cannot be relied on for making Davis-Bacon determinations regarding proper employee classification.
- ◇◇ The Wage Appeals Board ruled in *Fry Brothers Corp.*, WAB Case No. 76-6 (June 14, 1977) that the proper classification of work performed by laborers and mechanics is that classification used by firms whose wage rates were found to be prevailing in the area and incorporated in the applicable Davis-Bacon wage determination.
- ◇◇ Questions concerning the proper classification of laborers and mechanics are resolved in accordance with prevailing local area practice. An “area practice survey” may be conducted by the WHD or by the contracting agency to determine the proper classification(s) of work.
- ◇ For advice regarding proper classification of workers and for guidance on the need to conduct an area practice survey to determine proper classification of laborers and mechanics on DBA/DBRA covered projects, consultation with the WHD Regional Government Contracts Enforcement Coordinator is appropriate.

Basic Principles for Conducting Surveys to Determine Prevailing Local Area Practice

- ◇ In accord with *Fry Brothers Corp.*, information to be considered in the area practice survey is from firms in the sector (union or non-union) whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination for each classification listed in the wage determination.
- ◇◇ If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are non-union rates, the dispute will be resolved by examining the practice(s) of non-union contractors in classifying workers who have been performing the duties in question in the area.

- ◇◇ If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are union rates, the dispute will be resolved by examining the practice(s) of union contractors in classifying workers who have been performing the duties in question in the area.

- ◇◇ If a combination of union and non-union rates are listed in the wage determination for the classifications that may have performed the work in the area, the dispute will be resolved based on the combined information from:
 - ◇◇◇ union contractors for the classification(s) for which union rate(s) are listed,

 - and

 - ◇◇◇ non-union contractors for the classification(s) for which non-union rate(s) are listed.

- ◇ Proper classification of the laborers or mechanics performing the work in question will be resolved by examining the classification practice(s) of contractors who performed the work in question:
 - ◇◇ On similar construction projects (building construction, residential construction, highway construction, heavy construction),

 - ◇◇ In progress in the same area (normally the same county),

 - ◇◇ During the year preceding the wage determination lock-in date for the contract in question (as discussed below; *see* 29 C.F.R. § 1.6(c)).
 - ◇◇◇ In the case of contracts entered into pursuant to competitive bidding procedures (sealed bid procurement, as contrasted with contracting by negotiation), the year prior to bid opening;

 - ◇◇◇ The year prior to contract award in the case of contracts entered into pursuant to contracting by negotiation (such as contracts arrived at through requests for proposals (RFPs) or similar contracting methods);

 - ◇◇◇ In the case of projects assisted under the National Housing Act, the year prior to beginning of construction or the date the mortgage was initially endorsed, whichever occurred first; or,

- ◇◇◇ In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, the year prior to beginning of construction or the date the agreement to enter a housing assistance payments contract was executed, whichever was first.
- ◇ The extent of the information required for making area practice determinations will depend on the facts in each case. For example:
 - ◇◇ If, in gathering preliminary data, all of the parties agree as to the proper classification, the area practice is thus established (i.e., a **“limited”** area practice survey).
 - ◇◇ However, if all parties do not agree (i.e., jurisdictional dispute between two unions, or management does not agree with the union, or where non-union rate(s) in the wage determination may apply and the practice among non-union contractors in the area varies), it will be necessary to determine by a **“full”** area practice survey which classification actually performed the work in question.
- ◇ More detailed information on procedures involved in conducting an area practice survey to resolve enforcement issues regarding the proper classification of workers employed on DBA/DBRA covered contracts is available in Chapter 15 of the WHD Field Operations Handbook (FOH) (Chapter 15 of the FOH is available at http://www.dol.gov/whd/FOH/FOH_Ch15.pdf).

FRINGE BENEFITS

Definition 29 U.S.C. § 3141(2); 29 C.F.R. §§ 5.2(p) and 5.23.

- ◇ Under the Davis-Bacon Act, the terms “wages,” “scale of wages,” “wage rates,” and “prevailing wages” include:
 - ◇◇ The basic hourly rate of pay,
 - ◇◇ Any contribution irrevocably made by a contractor or subcontractor to a trustee or third party pursuant to a bona fide fringe benefit fund, plan or program, and
 - ◇◇ The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated to the employees in writing.

In practice

- ◇ The Davis-Bacon “prevailing wage” is made up of two interchangeable components – a basic hourly rate and fringe benefits found prevailing in an area and published in a Davis-Bacon wage determination. Along with the basic hourly rate listed on the wage determination, a fringe benefit amount is listed for any classification for which fringe benefits have been found prevailing. The sum of both the basic hourly rate and any fringe benefits listed comprise the Davis-Bacon “prevailing wage” requirement for a given classification. If no fringe benefits are found prevailing and listed for a given classification, the basic hourly rate itself is the “prevailing wage” requirement for that classification.
- ◇ The regulations at 29 C.F.R. § 3.10, issued under the Copeland Act, and applicable to wage payments on projects subject to Davis-Bacon prevailing wage requirements, specify the allowable “methods of payment” as follows:

§ 3.10 Methods of payment of wages.

The payment of wages shall be by cash, negotiable instruments payable on demand, or the additional forms of compensation for which deductions are permissible under this part. No other methods of payment shall be recognized on work subject to the Copeland Act.

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

**DBA/DBRA COMPLIANCE
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- ◇◇ Generally the “cash” portion of the prevailing wage, as discussed below, is the worker’s paycheck (which may be paid by electronic transmission of the wages to a worker’s account, if the worker authorizes such direct deposit).
- ◇ A contractor’s prevailing wage obligation may be met by any combination of cash wages and creditable “bona fide” fringe benefits provided for a covered worker:
 - ◇◇ The total, including any fringe benefits listed for the classification, may be paid entirely as cash wages;
 - ◇◇ Payments made or costs incurred by the contractor for “bona fide” fringe benefits may be creditable towards fulfilling the requirement; or
 - ◇◇ A combination of cash wages paid and “bona fide” fringe benefits may be used together to meet the total required prevailing wage.
- ◇ Davis-Bacon fringe benefits must be paid for all hours worked – both straight time and overtime hours.
- ◇ Each classification on a Davis-Bacon wage determination stands alone and each laborer and mechanic is due the full prevailing wage (including fringe benefits, if listed) for all hours of work in a classification.

Example:

A Davis-Bacon wage determination requires:

Basic hourly rate	\$14.00
Fringe benefit	<u>1.00</u>
Total prevailing rate	\$15.00

Here are some examples of how a contractor can comply:

1. \$15.00 in cash wages;
2. \$14.00 plus \$1.00 in pension contributions or other “bona fide” fringe benefits; or
3. \$12.00 plus \$3.00 in pension contributions or any combination of “bona fide” fringe benefits. (In this case, to compute the minimum overtime rate under CWHSSA, half the basic rate listed, i.e., \$7.00 must be added to the full \$15.00 straight time DBA prevailing wage. Thus, the CWHSSA overtime pay rate would be \$22.00 per hour.)

Note: Under DBA/DBRA monetary wages paid in excess of the basic hourly rate may be used as an offset or credit to satisfy fringe benefit obligations, and vice versa.

Application to all hours worked

- ◇ Under Davis-Bacon, fringe benefits must be paid for **all** hours worked, including overtime hours. However, the fringe benefit amounts listed in the applicable wage determination may be excluded from the half-time premium due as overtime compensation.

For example:

An employee worked 44 hours as an electrician. The wage determination rate was \$16.00 (basic hourly rate) plus \$2.50 in fringe benefits. The electrician would be due:

$$\begin{array}{rcl}
 44 \text{ hours} \times \$18.50 & = & \$814.00 - \text{(straight time pay)} \\
 4 \text{ hours} \times \frac{1}{2} \text{ of } \$16.00 & = & \underline{32.00} - \text{(overtime pay)} \\
 & & \$846.00
 \end{array}$$

Crediting fringe benefit contributions to meet DBA/DBRA requirements

- ◇ The Davis-Bacon Act and 29 C.F.R. § 5.23 list fringe benefits to be considered.

Examples:

Life insurance

Health insurance

Pension

Vacation

Holidays

Sick leave

Supplemental Unemployment Benefits

- ◇ The use of a truck is not a fringe benefit; a Thanksgiving turkey or Christmas bonus is not a fringe benefit. (See *Cody-Zeigler, Inc.*, WAB Case No. 89-19 (April 30, 1991).)

- ◇ No credit may be taken for a benefit required by federal, state or local law, such as:

- Workers compensation

- Unemployment compensation

- Social security contributions

Funded fringe benefit plans 29 C.F.R. §§ 5.26-5.27.

- ◇ The contractor's fringe benefit contributions made irrevocably to a trustee or third party pursuant to a bona fide fringe benefit fund, plan or program can be credited towards meeting the prevailing wage requirement without prior DOL approval. For example:
 - ◇◇ Contractor pays a third party provider for health insurance monthly premiums.
 - ◇◇ Contractor makes quarterly contributions to retirement plan trust.
- ◇ The amount of contributions for fringe benefits must be paid **irrevocably** to the trustee or third party.
- ◇ Contributions to fringe benefit plans must be made regularly, not less often than **quarterly**. (This requirement is specified in the standard Davis-Bacon contract clauses at 29 C.F.R. § 5.5(a)(1)(i).) Annual contributions into a fringe benefit plan fund do not meet this requirement.
- ◇ The contractor must make payments or incur costs in the amount specified by the applicable wage decision **with respect to each individual laborer or mechanic**. Thus, the amount contributed for each employee must be determined separately, and credit taken accordingly towards the prevailing wage requirement for each individual. (It is not permissible to take credit based on the average premium paid or average contribution made per employee.)
- ◇ Credit may not be taken for fringe benefit contributions made on behalf of employees who are not eligible to participate in the plan (e.g., those excluded due to age or part-time employment).
 - ◇◇ Some plans provide that contributions and allocations under the plan will only be made on behalf of participants who are employed on the last day of the plan year. No credit is permitted for such participants for whom no contribution is made or

for contributions made for employees whose accounts receive no allocation solely because they are not employed on the last day of the plan year.

- ◇◇ On the other hand, it is not required that all employees participating in a fringe benefit plan be entitled to receive benefits from the plan at all times. For example, an employee who is eligible to participate in an insurance plan may be prohibited from receiving benefits from the plan during a 30-day waiting period. Contributions made on behalf of these employees would be creditable against the contractor's fringe benefit obligations.
- ◇ A pension plan that meets the Employee Retirement Income Security Act (ERISA) requirements may be considered "bona fide" for DBA/DBRA purposes. In accordance with 29 C.F.R. § 5.26, the fringe benefit plan trustees must assume the usual fiduciary responsibilities imposed on trustees by applicable law. A contractor may be a pension plan trustee.
- ◇ Some pension plans contain "vesting" requirements. Where an employer contributes to the plan, employees may be required to complete a certain length of service before they have a nonforfeitable right to benefits based on the employer's contributions to the plan. Thus, an employee who leaves employment before completing the specified length of service may forfeit all or part of the accrued benefit.
 - ◇◇ Such forfeitures are permitted, provided the plan is a bona fide plan that meets applicable requirements under ERISA, including minimum vesting requirements.
 - ◇◇ Forfeited Davis-Bacon contributions may not revert to the employer, but should be distributed among the remaining plan participants.
- ◇ Credit for profit sharing or other discretionary employer contributions that fund pension benefit plans can be given if certain conditions are met:
 - ◇◇ DOL requires contractors to contribute irrevocably to an escrow account not less often than quarterly, during the period of the Davis-Bacon covered work, an amount sufficient to meet any claimed fringe benefit credit towards meeting the Davis-Bacon prevailing wage obligation (based on expected profit sharing pension plan contributions) on behalf of each employee participating in the plan.
 - ◇◇ Upon the annual determination of profits, monies placed in escrow are transferred to the pension trust fund and used as an offset against the contractor's obligation to the laborers and mechanics under the profit sharing plan.

- ◇◇ Allowable Davis-Bacon credit is limited to the contributions made which cover that portion of the total hours worked by the covered workers during the year which is attributable to work covered by Davis-Bacon labor standards.
- ◇◇ Any shortfall in profits which results in actual payments to the pension plan being less than the rate at which the contractor claimed Davis-Bacon credit throughout the year would have to be made up by the contractor when the account is settled at year end by paying the difference (shortfall) in cash directly to the covered workers or by making additional contributions to the pension fund in an amount to cover the shortfall.
 - ◇◇◇ A contractor cannot be given credit for more than the actual costs of, or payments made into, the pension plan trust fund.

Unfunded plans 29 C.F.R. § 5.28.

- ◇ A fringe benefit plan or program which the contractor funds from the company's general assets (rather than by payments to a trustee or third party) is referred to as an unfunded plan. A contractor's reasonably anticipated costs in providing bona fide fringe benefits under such a plan may be creditable towards meeting the Davis-Bacon prevailing wage obligations if certain requirements are met. Unfunded fringe benefit plans generally include:
 - ◇◇ Holiday plans
 - ◇◇ Vacation plans
 - ◇◇ Sick pay plans
- ◇ No type of fringe benefit is eligible for consideration as an unfunded plan unless it meets the following criteria:
 1. It can be reasonably anticipated to provide benefits described in the Davis-Bacon Act;
 2. It represents a commitment that can be legally enforced;
 3. It is carried out under a financially responsible plan or program; and
 4. The plan or program has been communicated in writing to the laborers and mechanics affected.

- ◇ To ensure that such plans are not used to avoid compliance with the Act, the DOL directs the contractor to set aside, in an account, no less often than quarterly, sufficient assets to meet the future obligations of the plan.

Annualization

- ◇ Annualization is a computation strategy used to determine the hourly rate of contribution that is creditable towards a contractor's prevailing wage obligation on DBA/DBRA covered projects.
 - ◇◇ This principle is important because the amount of credit a contractor may claim as an offset against the prevailing wage obligation can be as significant in determining Davis-Bacon compliance as whether a particular fringe benefit plan is a bona fide fringe benefit plan under the DBA.
 - ◇◇ Annualization is particularly important for computing the fringe benefit credit when a contractor employs workers on both DBA/DBRA covered projects and projects not subject to DBA/DBRA coverage and makes contributions to fund fringe benefit plan(s) during the year.
- ◇ Background and rationale
 - ◇◇ When the 1964 DBA amendments added fringe benefits as a component of DBA "prevailing wages," the fringe benefit plans that were prevalent were collectively bargained fringe benefit plans that called for the same rate of contribution for all hours worked by laborers and mechanics employed on both DBA/DBRA covered projects and other (non-covered) construction.
 - ◇◇ The annualization principle was originally applied in the 1970's in the context of health insurance plans.
 - ◇◇◇ A contractor sought to receive Davis-Bacon credit for the entire annual cost of purchasing health insurance for its employees who worked on both government and private work.
 - ◇◇◇ DOL took the position, in opinion letters, that the cost of the health insurance was appropriately apportioned among all hours worked by the employees, and that therefore the hourly Davis-Bacon credit would be derived by dividing the total annual cost of the health insurance by the total number of hours worked by employees on both Davis-Bacon and private work during the year.

- ◇◇ This principle was later applied to other fringe benefit plans as well, such as apprenticeship and training plans, vacation plans, and most pension plans under which contractors sought to receive Davis-Bacon credit for the entire cost of the plans.
- ◇ Applying annualization to compute the allowable Davis-Bacon fringe benefit credit:
 - ◇◇ Davis-Bacon credit for contributions made to fringe benefit plans are allowed based on the effective annual rate of contributions worked during the year by an employee.
 - ◇◇ In practice, annualization limits the Davis-Bacon credit to an amount equal to the hourly cost of the fringe benefit averaged over all hours an individual laborer or mechanic works during a year (both Davis-Bacon and non-Davis-Bacon hours).
 - ◇◇ To compute the contractor's allowable hourly credit towards meeting the prevailing wage obligation for a covered laborer or mechanic on a DBA/DBRA project, the total annual cost of the fringe benefit must be divided by the total number of hours the individual works in a year (including work on both covered and non-covered work).
- ◇ Effect of annualization
 - ◇◇ Application of the annualization principle to computing the fringe benefit credit for an individual's hours worked on DBA/DBRA covered projects ensures that a contractor does not fund a fringe benefit plan that provides benefits/coverage to the individual for all hours he/she works with wages earned solely on Davis-Bacon covered projects.
 - ◇◇ Thus, it prevents using the Davis-Bacon work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and compensation for all the employee's work (e.g. for a benefit that is in effect during both Davis-Bacon covered and non-covered work).
 - ◇◇ Application of the annualization principle thus restricts employers from using a variety of temporary nontraditional plans as a means to avoid increasing workers' cash wages to meet prevailing wage requirements while performing Davis-Bacon covered work.
 - ◇◇ Thus, the annualization principle encourages traditional fringe benefit plans that provide meaningful and continuous benefits to covered workers.

- ◇ Exception from the annualization requirement
 - ◇◇ For contributions made to defined contribution pension plans which provide for immediate participation and immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), a contractor may take Davis-Bacon credit at the hourly rate specified by the plan, regardless of whether the contractor makes contributions to the plan when working on non-Davis-Bacon projects.
 - ◇◇◇ Under such plans, contributions are irrevocably made by the contractor, most, if not all, of the workers will become fully vested in the plan, and the higher contributions made during Davis-Bacon work result in an increase in the value of the individual employee's account.
 - ◇◇◇ Pursuant to this exception, the contractor may take credit for the full amount of contributions made to such a plan during periods of DBA/DBRA covered work without annualizing the credit claimed (even if the contractor makes no contributions to the plan during periods of non-Davis-Bacon work).
 - ◇◇◇ The amount of contributions to such plans should be in conformance with any limitations imposed by the Internal Revenue Code and ERISA.
- ◇ The two examples below illustrate the application of annualization.
 - ◇◇ Example 1 – Computing the DBA fringe benefit credit for a pension plan with a 5-year vesting schedule:
 - ◇◇◇ For all defined benefit pension plans and for defined contribution pension plans which do not provide for immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), Davis-Bacon credit for contributions made to the plan is allowed based on the effective annual rate of contributions for all hours worked during the year. In other words, if a contractor wishes to receive \$2.00 per hour credit for pension plan contributions, the contractor must contribute at this same rate for all hours worked during the year (or otherwise make regular contributions at least quarterly, that would result in a \$2 average contribution to the plan based on all hours worked in the year). If this is not done, the credit for DBA/DBRA purposes would have to be revised accordingly.

◇◇ Example 2

- ◇◇◇ Assume that a firm's contributions for the pension benefit were computed to be \$2,000.00 a year for a particular employee. If that employee worked 1,500 hours of the year on a DBA/DBRA covered project and 500 hours of the year on private non-Davis-Bacon jobs, \$1.00 per hour ($\$2,000 \div 2,000$ hours) would be creditable towards meeting the firm's obligation to pay the prevailing wage on the covered project. This method for determining the allowable Davis-Bacon credit for fringe benefit payments illustrates that employers are normally prohibited from using contributions made for covered work to fund the plan for periods of non-covered work.

Computing hourly fringe benefit equivalents for contributions made weekly, monthly, quarterly, etc. to claim credit towards fulfilling the prevailing wage requirement

- ◇ In determining cash equivalent credit for fringe benefit payments, the period of time to be used is the period covered by the contribution. If contributions are made weekly, cash equivalents should be computed weekly. If contributions are made quarterly, cash equivalents should be computed quarterly, etc.
- ◇◇ For example, if an employer contributes to a hospitalization plan on a monthly basis, the contribution made by the employer on behalf of an employee should be divided by the total hours worked (DB covered and non-covered) each month by the employee to determine the hourly cash equivalent the employer is entitled to count as credit towards the prevailing wage obligation for that employee.

Example: An employee works 160 hours a month as an electrician and the applicable wage determination rate is \$16.00 (basic hourly rate) plus \$2.50 in fringe benefits.

Where the employer provides the electrician with medical insurance in the amount of \$200 per month, the employer would divide the total monthly cost of the benefit by 160 hours to arrive at the allowable fringe benefit credit.

$$\$200 \text{ divided by } 160 \text{ hours} = \$1.25 \text{ per hour.}$$

If the employee in this example receives no other "bona fide" fringe benefits, then for each hour worked on a covered contract the individual is due \$16.00 (basic hourly rate) plus \$1.25 paid as cash wages (the difference between the \$2.50 per hour fringe benefit required under the applicable wage determination and the credit allowed for the provision of medical insurance.) Thus,

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Basic hourly rate	\$16.00
Medical insurance benefit	1.25
<u>Additional cash wages due</u>	<u>1.25</u>
Total paid per hour	\$18.50 (\$17.25+\$1.25)

- ◇◇ On occasion, a contractor or subcontractor may offset the annual cost of a particular fringe benefit by converting such costs to an hourly cash equivalent.
 - ◇◇◇ Since construction workers often do not work a full year (2,080 hours), where the contractor makes annual payments in advance to cover the coming year and actual hours worked will not be determinable until the close of that year, the total hours worked by the DB-covered laborers, mechanics and apprentices, if any, for the preceding calendar year (or plan year), will be considered as representative of a normal work year for purposes of the above formula. To illustrate, assume that the annual cost of a pension program is \$15,000. The total actual working hours (Davis-Bacon and hours worked not subject to federal Davis-Bacon requirements) are 15,000. Thus $\$15,000 / 15,000 \text{ hours} = \1.00 per hour cash equivalent.
 - ◇◇◇ Similarly, where the contractor pays monthly health insurance premiums in advance on a lump sum basis, the total actual hours worked in the previous month or in the same month in the previous year may be used to determine (i.e., estimate) the hourly equivalent credit per employee during the current month. Any representative period may be utilized in such cases, provided that the period selected is reasonable.
 - ◇◇◇ Where the cost incurred included contributions for employees other than covered laborers, mechanics, and apprentices, the hours of such non-covered employees must be included in the computation of the hourly cash equivalent or the contributions for such employees must be eliminated prior to determining the cash equivalent for covered employees.
- ◇ In computing cash equivalents, it should be kept in mind that under certain kinds of fringe benefit plans the rate of contribution for employees may vary. For example, under a hospitalization plan the employer often contributes at different rates for single and family plan members. In such situations, an employer cannot take an across the board average equivalent for all employees; rather, the cash equivalent can only be credited based on the rate of contributions for each individual employee.

CERTIFIED PAYROLLS & USE OF ELECTRONIC SIGNATURES

Copeland Act provision and implementing regulations

- ◇ The Copeland Act language requires DOL regulations to “include a provision that each contractor and subcontractor each week must furnish a statement on the wages paid each employee during the prior week.” 40 U.S.C. § 3145.
 - ◇◇ This requirement is implemented by DOL regulations at 29 C.F.R. Part 3 and Davis-Bacon contract clauses in 29 C.F.R. Part 5:
 - ◇◇◇ Davis-Bacon contract clause provisions at 29 C.F.R. § 5.5(a)(3) address “*Payrolls and basic records.*” Also, 29 C.F.R. §§ 5.5(a)(5) and (8) incorporate the requirements of 29 C.F.R. Part 3 and rulings and interpretations under 29 C.F.R. Part 3 in DBA/DBRA covered contracts. (These provisions are reiterated in the FAR 48 C.F.R. §§ 52.222-8, 52.222-10 and 52.222-13, respectively.)
 - ◇◇◇ Provisions at 29 C.F.R. § 3.3 address “Weekly statement with respect to payment of wages” and § 3.4 addresses “Submission of weekly statements and the preservation and inspection of weekly payroll records.”
- ◇ Regarding the weekly statement with respect to payment of wages, section 3.3(b) requires that:

Each contractor or subcontractor engaged in the construction, prosecution, completion, or repair of any public building or public work, or building or work financed in whole or in part by loans or grants from the United States, shall furnish each week a statement with respect to the wages paid each of its employees engaged on work covered by this part 3 and part 5 of this title during the preceding weekly payroll period. This statement shall be executed by the contractor or subcontractor or by an authorized officer or employee of the contractor or subcontractor who supervises the payment of wages, and shall be on the back of Form WH 347, “Payroll (For Contractors Optional Use)” or on any form with identical wording.
- ◇ Section 3.4(a) further requires that:

Each weekly statement required under § 3.3 shall be delivered by the contractor or subcontractor, within seven days after the regular payment date of the payroll

period, to a representative of a Federal or State agency in charge at the site of the building or work, or, if there is no representative of a Federal or State agency at the site of the building or work, the statement shall be mailed by the contractor or subcontractor, within such time, to a Federal or State agency contracting for or financing the building or work [Emphasis added.]

Payrolls and the “Statement of Compliance”

- ◇ In the administration and enforcement of Davis-Bacon labor standards references are generally made to “certified payrolls.” However, it is important to note that in the standard Davis-Bacon contract clauses established by 29 C.F.R. Part 5, section 5.5, there are two separate requirements that relate to the submittal of the “certified payrolls.”
 - ◇◇ Subsection 5.5(a)(3)(ii)(A) requires the weekly submittal of “a copy of all payrolls.” Specifically, it states that:

The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the (write in name of appropriate federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the [agency]” (emphasis added).

The word “agency” in the preceding sentence refers to the federal agency.
 - ◇◇◇ Thus, on federal contracts to which the Davis-Bacon Act applies, the prime contractor is responsible for submittal of all weekly payrolls to the federal agency.
 - ◇◇◇ On federally assisted projects to which Davis-Bacon requirements apply under a Davis-Bacon “related Act,” the prime contractor generally submits the weekly payrolls to a state or local government agency (or an applicant or sponsor responsible to such an agency) for transmission to the federal agency responsible for the federal program under which federal assistance is provided.
- ◇ Apart from and in addition to the requirement stated in subsection 5.5(a)(3)(ii)(A), subsection 5.5(a)(3)(ii)(B) stipulates a separate, albeit closely related, requirement that each weekly payroll submitted be accompanied by a “Statement of Compliance.”

- ◇ The provisions at 29 C.F.R. §§ 5.5(a)(3)(ii)(B) and (C) require that:
 - (B) Each payroll submitted shall be accompanied by a “Statement of Compliance,” signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following: (1) That the payroll for the payroll period contains the information required to be provided ..., the appropriate information is being maintained ..., and that such information is correct and complete; (2) That each laborer or mechanic ... has been paid the full weekly wages earned, ... ; and (3) That each laborer or mechanic has been paid not less than the applicable wages ... as specified in the applicable wage determination incorporated into the contract.
 - (C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the “Statement of Compliance” required by paragraph (a)(3)(ii)(B) of this section. [See page 2 at <http://www.dol.gov/whd/forms/wh347.pdf>.]
- ◇ The “Statement of Compliance,” which is required to be attached to each copy of a contractor’s weekly payroll for a covered project, pursuant to 29 C.F.R. § 5.5(a)(3)(ii)(B), requires a signature “by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract.”
 - ◇◇ The signature on each weekly “Statement of Compliance” attached to the weekly payroll may be either an original handwritten or an electronic signature.
- ◇ Thus, the payroll certification provision established by 29 C.F.R. § 5.5(a)(3)(ii)(B) continues to require that the properly signed “Statement of Compliance” be submitted or transmitted to the appropriate federal agency.
- ◇ Photocopies or “pdf” copies of the “Statement of Compliance,” faxed “Statements of Compliance,” or an electronically scanned “Statement of Compliance” e-mailed to an agency do not satisfy the requirement that a “Statement of Compliance” be “signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract.”
 - ◇◇ This fact is particularly important in the context of 29 C.F.R. § 5.5(a)(3)(ii)(D) which emphasizes the fact that: “The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.”

Electronic submittal of payrolls with the related “Statement of Compliance”

- ◇ In 2004, WHD issued an advisory letter to the U.S. Army Corps of Engineers and the Federal Highway Administration advising that the submission of electronic signatures satisfied requirements of the Copeland Act and its regulations.
- ◇ A contracting agency or prime contractor may permit or require contractors to submit the weekly payrolls, each with the accompanying “Statement of Compliance” through an electronic system. Individual contracting agencies determine any such electronic submission options because contractors submit the information directly to each contracting agency, not to the DOL.
 - ◇◇ The use of electronic signatures to satisfy requirements of the Copeland Act and its regulations by the use of an “agency approved limited access Web-based portal” should include the legally valid electronic signature of the “contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract.” (*See 73 FR 77510.*)
 - ◇◇ Web-based certified payroll compliance solutions exist and some agencies and contractors have set up systems to comply electronically.
- ◇ Under pertinent provisions of the Copeland Act and the Government Paperwork Elimination Act (Pub. L. 105-277, Stat 2681, codified at 44 U.S.C. § 3504, note), WHD affirms that the use of electronic signatures is sufficient for compliance purposes under the Copeland Act.
 - ◇◇ WHD encourages all government agencies to permit contractors to submit certified payrolls electronically or through allowing access to appropriate agency approved limited access Web-based portals providing the required information and certification.
 - ◇◇ Web-based systems for the submission of electronic submission of certified payrolls often include compliance monitoring tools and can improve efficiency in the review of data reported, as well as reducing recordkeeping burdens and storage expenses.

LEASES AS CONTRACTS FOR CONSTRUCTION

AAM No. 176 – Basic DBA Principles

- ◇ AAM No. 176 provides guidance concerning the “Application of the Davis-Bacon Act to Buildings and Works Constructed and/or Altered for Lease by the Federal Government”
- ◇ AAM No. 176 initiates its discussion concerning leases that may be contracts covered by DBA by noting that:
 - ◇◇ The DBA applies to federal and District of Columbia contracts in excess of \$2,000 for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work; and
 - ◇◇ The terms “public building” and “public work” are defined in 29 C.F.R. § 5.2(k) to include “every building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.”

AAM No. 176 Notice to Contracting Agencies on DBA Applicability to Lease/Construction Contracts

- ◇ On June 22, 1994, the WHD Administrator issued AAM No. 176 to advise the federal contracting agencies that in view of the Crown Point case and a May 23, 1994 Department of Justice/Office of Legal Counsel (DOJ/OLC) memorandum, DBA can apply to certain federal lease contracts that also call for construction of a public work or building. As stated in AAM No. 176:

DBA application to any lease contract can be determined only by reviewing the specific facts of the particular contract.

... [and]

Accordingly, any lease calling for the construction, alteration, and/or repair, of a public building or public work must be analyzed under specified criteria to determine whether it is necessary to include DBA requirements in the lease.

- ◇ AAM No. 176 reiterates the DOJ/OLC guidance by quoting from the 1994 memorandum:
 - [F]actors to be considered in determining whether a lease/construction contract calls for construction of a public building or public work may include:
 - [◇◇] length of the lease,
 - [◇◇] the extent of government involvement in the construction project [such as whether the building is being built to Government requirements and whether the Government has the right to inspect the progress of the work],
 - [◇◇] the extent to which the building will be used for private rather than public purposes,
 - [◇◇] the extent to which the costs of the construction will be fully paid for by the lease payments, and
 - [◇◇] whether the contract is written as a lease solely to avoid application of the DBA.
- ◇ AAM No. 176 concludes by advising agencies if there are any questions concerning the applicability of DBA coverage in a lease/construction situation, please contact WHD.