Schwabe

Schwabe's Summary: Final Rule on Davis-Bacon Act Regulations

What These Changes Mean for Federal Contractors

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On August 23, 2023, the United States Department of Labor ("DOL") issued a final rule updating regulations issued under the Davis-Bacon Act. This is the DOL's first comprehensive update to the Davis-Bacon Act regulations in forty years, and understanding and applying these new regulations will be critical to contractors engaged in federal construction projects.

The Davis-Bacon Act, enacted in 1931, requires the payment of locally prevailing wages and fringe benefits on Federal contracts for construction. The Davis-Bacon Act applies to workers on federal contracts that are both in excess of $2,000 and for the construction, alteration, or repair of public buildings or public works. The basic goal of the Davis-Bacon Act is to establish minimum wages and benefits for workers on federal construction projects, with those minimum wages and benefits based on the prevailing rates in the area where the project is being built.

Over the past seventy years, Congress has extended to the Davis-Bacon Act to other federal construction projects, including those funded by grants, loans, loan guarantees, insurance, and other methods. There are now over seventy different statutes and laws to which the DOL's Davis-Bacon Act regulations apply.

Primary Changes

The primary changes that may be relevant to contractors are:

- Revisions to the definition of the "site of the work" to expand the definition of "secondary locations," where prevailing wages must be paid, to include locations that are either established specifically for a Davis-Bacon Act project *or* are dedicated exclusively, or nearly so, to the Davis-Bacon Act project for a specific period of time (i.e. weeks, months or more). The prior version of the regulation only applied Davis-Bacon Act labor rules to secondary sites that were established specifically for a Davis-Bacon Act project.

- Revises the definition of "material supplier," including adopting three criteria for determining if an employer is a "material supplier" and therefore not subject to Davis-Bacon Act requirements:

    - The material supplier's work on the contract must be limited to the supply of materials, articles, supplies, or equipment, which may include

pickup in addition to, but not exclusive of, delivery, and which may also include activities incidental to such delivery and/or pickup, such as delivery, drop off, and waiting time;

- The material supplier's facility or facilities being used for the contract either must have been established before opening of bids or, if it was established after bid opening, may not be dedicated exclusively, or nearly so, to the performance of a covered contract; and

- The material supplier's facility manufacturing the materials, articles, supplies, or equipment may not be located on the primary or secondary construction site.

- Limits the material supplier exemption to employers whose sole contractual responsibility is material supply and eliminated the 20% de minimis threshold that previously was used to determine when material suppliers' drivers are subject to Davis-Bacon Act prevailing wage rates. Instead, the DOL will use a fact specific inquiry to determine whether a material supplier's driver is entitled to Davis-Bacon Act wages, including aggregating short periods of time that may be considered de minimis in isolation, but not when combined with other periods of de minimis work.

- Authorizes the DOL to require contractors to pay back wages to workers on Davis-Bacon Act contracts even when the contracting agency failed to include a Davis-Bacon Act contract clause or wage determination in the contract. In recognition of the hardship this could impose on contractors, the DOL is also adopting regulations requiring the contracting agency to reimburse contractors for back wages they have to pay to their employees due to the contracting agency's failure to include a Davis-Bacon Act contract clause or wage determination in the contract.

- Defines the term "prime contractor" to include controlling shareholders, joint venture members, and anyone who has been delegated responsibility for overseeing all or substantially all of the construction anticipated by the prime contract. This definition rises the potential that owners could be held liable for violations of the Davis-Bacon Act requirements by the prime contractor. The DOL explained:

> The term "prime contractor" means any person or entity that enters into a contract with an agency. For the purposes of the labor standards provisions of any of the laws referenced by § 5.1, the term prime contractor also includes the controlling shareholders or members of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, and any contractor (*e.g.*, a general contractor) that has been delegated the responsibility for overseeing all or substantially all of the construction anticipated by the prime contract. For the purposes of the provisions in §§ 5.5 and 5.9, any such related entities holding different prime contracts are considered to be the same prime contractor.

- Makes upper tier subcontractors liable for failures by lower tier subcontractors to pay prevailing wages required by the Davis-Bacon Act. The DOL explained that this change:

> "is intended to place liability not only on the lower-tier subcontractor that is directly employing the worker who did not receive required wages, but also on the upper-tier subcontractors that may have disregarded their obligations to be responsible for compliance." This responsibility requires upper-tier subcontractors to pay back wages on behalf of their lower-tier subcontractors and subjects upper-tier subcontractors to debarment in appropriate circumstances (*i.e.*, where the lower-tier subcontractor's violation reflects a disregard of obligations by the upper-tier subcontractor to workers of their subcontractors).

- Codifies the requirement to engage in "annualization" of fringe benefit contributions, which effectively prohibits contractors from using fringe benefit plan contributions attributable to work on private projects to meet their prevailing wage obligation for Davis-Bacon Act projects.

- Adopts the Davis-Bacon Act statutory debarment standard—*disregard of obligations to employees or subcontractors*—for all debarment cases, and eliminates the regulatory "aggravated or willful" debarment standard.

The following is a more detailed summary of the revisions to the Davis-Bacon Act regulations.

DETAILED SUMMARY

INCORPORATION OF WAGE DETERMINATIONS INTO CONTRACTS

The DOL revised its regulations to address when wage determinations are incorporated into a contract and, if a wage determination is wrongly omitted, to require the contractor to provide back pay to affected workers and the contracting agency to reimburse the contractor for having to do so.

Adding Wage Determinations Prior to Contract Award

In 29 C.F.R. § 1.6(e), the DOL adopted language clarifying that that if, prior to contract award (or, as appropriate, prior to the start of construction), the Administrator provides written notice that the bidding documents or solicitation included the wrong wage determination or schedule, or that an included wage determination was withdrawn by the DOL as a result of an ARB decision, the wage determination may not be used for the contract, regardless of whether bid opening (or initial endorsement or the signing of a housing assistance payments contract) has occurred.

In 29 C.F.R. § 1.6(g), the DOL adopted several additional clarifying revisions. For instance, it clarified that if Federal funding or assistance is not approved prior to contract award (or the beginning of construction where there is no contract award), the applicable wage determination must be incorporated retroactive to the date of the contract award or the beginning of construction. The revisions also clarify that the *head* of the applicable Federal agency—not simply, as previously

written, the "agency"—must request waiver of the requirement that a wage determination provided under such circumstances be retroactive to the date of the contract award or the beginning of construction.

The DOL also deleted language indicating that a wage determination must be "requested," explaining that such language appears to contemplate a project wage determination, which in most situations will not be necessary as a general wage determination will apply.

Incorporating the Most Recent Wage Determinations into Certain Ongoing Contracts

The DOL revised 29 C.F.R. § 1.6(a) to affirmatively state that a wage determination is generally applicable for the duration of a contract once incorporated:

> 29 C.F.R. § 1.6(a)(1): Once a wage determination is incorporated into a contract (or once construction has started when there is no contract award), the wage determination generally applies for the duration of the contract or project, except as specified in this section.

The DOL also added new language, 29 C.F.R. § 1.6(c)(2)(iii), explaining two situations in which a new wage determination will be added to an existing contract:

> the most recent version of any applicable wage determination(s) must be incorporated when a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order or to require the contractor to perform work for an additional time period not originally obligated, including where an agency exercises an option provision to unilaterally extend the term of a contract.

The DOL explained that this change is consistent with the DOL's "guidance, case law, and historical practice, under which such modifications are considered new contracts." The new wage determination would have to be incorporated as of the date of the change or, where applicable, the date the agency exercises its option to extend the contract's term. The requirement to add a new wage determination would not apply where the contractor is simply given additional time to complete its original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental.

The DOL also addressed the use of schedule contracts, BPAs, and IDIQ contracts, i.e. contracts involve a contractor agreeing to perform construction as the need arises over an extended time period, with the quantity and timing of the construction not known when the contract is awarded. For these types of contracts, contracting agencies must incorporate the most up-to-date applicable wage determination(s) annually on each anniversary date of a contract award or, where there is no contract, on each anniversary date of the start of construction, or another similar anniversary date where the agency has sought and received prior approval from the DOL for the alternative date.

The new regulation states:

> 29 C.F.R. § 1.6(c)(2)(iii): If a revised wage determination is issued after contract award (or after the beginning of construction where there is no contract award), it

is not effective with respect to that project, except under the following circumstances:

(A) Where a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order, or to require the contractor to perform work for an additional time period not originally obligated, including where an option to extend the term of a contract is exercised, the contracting agency must include the most recent revision of any wage determination(s) at the time the contract is changed or the option is exercised. This does not apply where the contractor is simply given additional time to complete its original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental.

(B) Some contracts call for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project. Examples of such contracts include, but are not limited to, indefinite-delivery-indefinite-quantity construction contracts to perform any necessary repairs to a Federal facility over a period of time; long-term operations-and-maintenance contracts that may include construction, alteration, and/or repair work covered by Davis-Bacon labor standards; or schedule contracts or blanket purchase agreements in which a contractor agrees to provide certain construction work at agreed-upon prices to Federal agencies. These types of contracts often involve a general commitment to perform necessary construction as the need arises, but do not necessarily specify the exact construction to be performed. For the types of contracts described here, the contracting agency must incorporate into the contract the most recent revision(s) of any applicable wage determination(s) on each anniversary date of the contract's award (or each anniversary date of the beginning of construction when there is no award) unless the agency has sought and received prior written approval from the Department for an alternative process. The Department may grant such an exception when it is necessary and proper in the public interest or to prevent injustice and undue hardship. Such revised wage determination(s) will apply to any construction work that begins or is obligated under such a contract during the 12 months following that anniversary date until such construction work is completed, even if the completion of that work extends beyond the twelve-month period. Where such contracts have task orders, purchase orders, or other similar contract instruments awarded under the master contract, the master contract must specify that the applicable updated wage determination must be included in such task orders, purchase orders, or other similar contract instrument, and the ordering agency must so incorporate the applicable updated wage determinations into their orders. Once the applicable updated wage determination revision has been incorporated into such task orders, purchase orders, or other similar contract instruments, that wage determination revision remains applicable for the duration of such order, unless the order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work, when the wage determination must be updated as set forth in paragraph (c)(2)(iii)(A) of this section, or the order itself includes the exercise of options. Where such orders do include the exercise of options, updated applicable wage determination revision, as

> incorporated into the master contract must be included when an option is exercised on such an order.

Periodic Adjustments to Update Prevailing Wage Rates

The DOL added a provision to 29 CFR 1.6(c)(1) that expressly provides a mechanism to regularly update certain non-collectively bargained prevailing wage rates.

As context for that revision, the DOL explained:

> Based on the data that it receives through its prevailing wage survey program, Wage and Hour Department (WHD) generally publishes two types of prevailing wage rates in the Davis-Bacon wage determinations that it issues: (1) modal rates, which under the current regulations must be paid to a majority of workers in a particular classification, and (2) weighted average rates, which under the current regulations are published whenever the wage data received by WHD reflects that no single wage rate was paid to a majority of workers in the classification. *See* 29 CFR 1.2(a)(1).
>
> Under the current regulations, modal wage rates often reflect collectively bargained wage rates. When a CBA rate prevails on a general wage determination, WHD updates that prevailing wage rate based on periodic wage and fringe benefit increases in the CBA. Manual of Operations at 74–75; *see also Mistick Constr.*, ARB No. 04–051, 2006 WL 861357, at *7 n.4.
>
> However, when the prevailing wage is set through the weighted average method based on non-collectively bargained rates or a mix of collectively bargained rates and non-collectively bargained rates, or when a non-collectively bargained rate prevails, such wage rates (currently designated as "SU" rates) on general wage determinations are not updated between surveys and therefore can become out-of-date.

The revision to 29 CFR 1.6(c)(1) expands the DOL's current practice of updating collectively bargained prevailing wage rates between surveys to include updating non-collectively bargained prevailing wage rates. Such periodic updates will better protect workers' wages and reflect construction industry compensation in communities where federally funded construction is occurring. Additionally, "[r]egularly increasing non-collectively bargained prevailing wage rates that are more than 3 years old [is] consistent with the Davis-Bacon Act's purpose of protecting local wage standards by updating significantly out-of-date non-collectively bargained prevailing wage rates that have fallen behind currently prevailing local rates."

The revisions also expressly permit adjustments to non-collectively bargained prevailing rates on general wage determinations based on BLS ECI data or its successor data.

> The DOL stated its belief that ECI data is appropriate for these rate adjustments because the ECI tracks both wages and fringe benefits and may be used as a proxy for changes in construction compensation over time. Therefore, the Department proposed to use a compensation growth rate based on the change in the ECI total compensation index for construction, extraction, farming, fishing, and forestry occupations to adjust non-collectively bargained prevailing wage rates (both base hourly and fringe benefit rates) published in 2001 or after.

Because updating non-collectively bargained prevailing wage rates will be resource-intensive, the DOL does not anticipate making all initial adjustments to such rates that are 3 or more years old simultaneously, but instead expects that such adjustments will be made over a period of time (though as quickly as is reasonably possible). Due to the effort involved, the process of adjusting non-collectively bargained rates that are three or more years old is unlikely to begin until approximately 6–12 months after a final rule implementing the proposal becomes effective.

Post-Award Determinations That a Wage Determination Has Been Wrongly Omitted From a Contract

The DOL made revisions to 29 C.F.R. 1.6(f), 5.5, and 5.6 to address what happens if a contracting agencies wrongly fails to include a Davis-Bacon Act contract clause or wage determination in a contract. The DOL's goal was to provide a regulatory mechanism for the DOL, or workers, to obtain wages required by the Davis-Bacon Act where an agency failed to include the contract clauses or wage determinations required by the Davis-Bacon Act.

The changes are;

> 29 C.F.R. § 5.5(e): Added language to provide that the labor standards contract clauses and appropriate wage determinations will be effective "by operation of law" in circumstances where they have been wrongly omitted from a covered contract:
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> > 29 C.F.R. § 5.5(e) *Incorporation by operation of law*. The contract clauses set forth in this section (or their equivalent under the Federal Acquisition Regulation), along with the correct wage determinations, will be considered to be a part of every prime contract required by the applicable statutes referenced by § 5.1 to include such clauses, and will be effective by operation of law, whether or not they are included or incorporated by reference into such contract, unless the Administrator grants a variance, tolerance, or exemption from the application of this paragraph. Where the clauses and applicable wage determinations are effective by operation of law under this paragraph, the prime contractor must be compensated for any resulting increase in wages in accordance with applicable law.
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> Under this new regulation, erroneously omitted contract clauses and appropriate wage determinations will be enforceable retroactive to the beginning of the contract or construction. This means that the DOL can enforce prevailing wage requirements on

contractors whose contracts should have, but did not, include applicable wage determination.

Contracting agencies will be required to compensate contractors for any increases in wages resulting from a post-award incorporation of a contract clause or wage determination by operation of law. Contracting agencies can also seek a variance, tolerance, or exemption from application of the regulations.

Notably, this "operation of law" provision will only apply to prime contractors, not subcontractors. The DOL explained that:

> the Davis-Bacon regulations and case law provide that the prime contractor is responsible for the payment of applicable wages on all subcontracts. If the prime contract contains the labor standards as a matter of law, then the prime contractor is required to ensure that all employees on the contract—including subcontractors' employees—receive all applicable prevailing wages. Accordingly, as the Department explained in the NPRM, extending the operation-of-law provision itself to subcontracts is not necessary to enforce the Congressional mandate that all covered workers under the contract are paid the applicable prevailing wages.

This new regulation will also only apply to new contracts executed after the effective date of the regulations. It will not apply to construction contracts in place prior to that effective date:

> Once the operation-of-law provision at § 5.5(e) is effective and applicable to a contract, it will require the incorporation as a matter of law of any omitted contract clauses and wage determinations that would have been appropriate and necessary to include in the contract at the time the contract was entered into. Because § 5.5(e) will generally only apply to contracts newly entered into after the applicability date, the Department would not interpret § 5.5(e) to require the contract clause provisions as amended in this final rule to be incorporated by operation of law to replace the contract clauses that have already been physically incorporated into contracts entered into before the applicability date. Similarly, § 5.5(e) would not incorporate the contract clauses into any contract from which the clauses have been wrongly omitted, unless that contract has been entered into after the effective date of the final rule. For any contracts entered into prior to the effective date of the final rule that are missing required contract clauses or wage determinations, the Department will seek to address any omissions solely through the modification provisions in the existing regulation at § 1.6(f).

29 C.F.R. § 5.5(d): Clarified that that the clauses and wage determinations are equally effective if they are incorporated by reference.

> 29 C.F.R. § 5.5(d) *Incorporation of contract clauses and wage determinations by reference*. Although agencies are required to insert the contract clauses set forth in this section, along with appropriate wage determinations, in full into covered contracts, and contractors and subcontractors are required to insert them in any lower-tier subcontracts, the incorporation by reference of the required contract clauses and appropriate wage determinations will be given the same force and effect as if they were inserted in full text.

29 C.F.R. § 1.6(f)(1): Added new language clarifying that the contracting agency can incorporate the correct wage determination post-award "upon its own initiative," as oppose to having to wait for a request from the DOL, as well as clarifying that the requirements apply equally to projects carried out with Federal financial assistance as they do to Davis-Bacon Act projects.

> 29 C.F.R. § 1.6(f) *Post-award determinations and procedures*. (1) If a contract subject to the labor standards provisions of the laws referenced by § 5.1 of this subtitle is entered into without the correct wage determination(s), the agency must, upon the request of the Administrator or upon its own initiative, incorporate the correct wage determination into the contract or require its incorporation. Where the agency is not entering directly into such a contract but instead is providing Federal financial assistance, the agency must ensure that the recipient or sub-recipient of the Federal assistance similarly incorporates the correct wage determination(s) into its contracts.

29 C.F.R. § 1.6(f)(3): Added language consistent with the changes to 29 C.F.R. § 5.5(e), including that contractors must be compensated for any increases in wages resulting from incorporation of a missing wage determination and that:

- the agency must suspend further payments or guarantees if the recipient refuses to incorporate the specified wage determination and promptly refer the dispute to the Administrator for further proceedings; and

- before termination of a contract, the agency must withhold or cross-withhold sufficient funds to remedy any back wage liability or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism.

The new language is:

> 29 C.F.R. § 1.6(f)(3): Under any of the circumstances described in paragraphs (f)(1) and (2) of this section, the agency must either terminate and resolicit the contract with the correct wage determination or incorporate the correct wage determination into the contract (or ensure it is so incorporated) through supplemental agreement, change order, or any other authority that may be needed. The method of incorporation of the correct

> wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable law. Additionally, the following requirements apply:
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> (i) Unless the Administrator directs otherwise, the incorporation of the correct wage determination(s) must be retroactive to the date of contract award or start of construction if there is no award.
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> (ii) If incorporation occurs as the result of a request from the Administrator, the incorporation must take place within 30 days of the date of that request, unless the agency has obtained an extension from the Administrator.
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> (iii) Before the agency requires incorporation upon its own initiative, it must provide notice to the Administrator of the proposed action.
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> (iv) The contractor must be compensated for any increases in wages resulting from incorporation of a missing wage determination.
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> (v) If a recipient or sub-recipient of Federal assistance under any of the applicable laws referenced by § 5.1 of this subtitle refuses to incorporate the wage determination as required, the agency must make no further payment, advance, grant, loan, or guarantee of funds in connection with the contract until the recipient incorporates the required wage determination into its contract, and must promptly refer the dispute to the Administrator for further proceedings under § 5.13 of this subtitle.
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> (vi) Before terminating a contract pursuant to this section, the agency must withhold or cross-withhold sufficient funds to remedy any back-wage liability resulting from the failure to incorporate the correct wage determination or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism.

29 C.F.R. § 5.6(a)(1) Added a procedure for determining that the required contract clauses were wrongly omitted from a contract. The DOL also added language stating that, in the event the clauses were wrongly omitted the applicable agency must incorporate the clauses or require their incorporation into any contract that is either awarded by the agency or receives funding assistance from the agency. The DOL also revised 29 C.F.R. § 5.6(a)(1) to reflect the changes to 29 C.F.R. § 1.6(f). The DOL explained that:

> The proposed changes clarify that the requirement to incorporate the Davis-Bacon labor standards clauses is an ongoing responsibility that does not end upon contract award, and the changes expressly state the Department's longstanding practice of requiring the relevant agency to retroactively incorporate, or ensure retroactive incorporation of, the required clauses in such circumstances. As discussed above, such clarification is warranted because agencies occasionally have expressed confusion about—and even questioned whether they possess—the authority to incorporate, or ensure

> the incorporation of, the required contract clauses after a contract has been awarded or construction has started.
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> The proposed changes similarly make clear that while agencies must retroactively incorporate the required clauses upon the request of the Administrator, agencies also have the authority to make such changes on their own initiative when they discover that an error has been made. The proposed changes also eliminate any confusion of the recipients of Federal funding as to the extent of the Federal funding agency's authority to require such retroactive incorporation in federally funded contracts subject to the Davis-Bacon labor standards. Finally, the proposed changes do not alter the provisions of 29 CFR 1.6(g), including its provisos.

The new language is:

> 29 C.F.R. § 5.6(a) *Agency responsibilities*. (1)(i) The Federal agency has the initial responsibility to ascertain whether the clauses required by § 5.5 and the appropriate wage determination(s) have been incorporated into the contracts subject to the labor standards provisions of the laws referenced by § 5.1. Additionally, a Federal agency that provides Federal financial assistance that is subject to the labor standards provisions of the Act must promulgate the necessary regulations or procedures to require the recipient or sub-recipient of the Federal assistance to insert in its contracts the provisions of § 5.5. No payment, advance, grant, loan, or guarantee of funds will be approved by the Federal agency unless it ensures that the clauses required by § 5.5 and the appropriate wage determination(s) are incorporated into such contracts. Furthermore, no payment, advance, grant, loan, or guarantee of funds will be approved by the Federal agency after the beginning of construction unless there is on file with the Federal agency a certification by the contractor that the contractor and its subcontractors have complied with the provisions of § 5.5, or unless there is on file with the Federal agency, a certification by the contractor that there is a substantial dispute with respect to the required provisions.
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> (ii) If a contract subject to the labor standards provisions of the applicable statutes referenced by § 5.1 is entered into without the incorporation of the clauses required by § 5.5, the agency must, upon the request of the Administrator or upon its own initiative, either terminate and resolicit the contract with the required contract clauses, or incorporate the required clauses into the contract (or ensure they are so incorporated) through supplemental agreement, change order, or any and all authority that may be needed. Where an agency has not entered directly into such a contract but instead has provided Federal financial assistance, the agency must ensure that the recipient or sub-recipient of the Federal assistance similarly incorporates the clauses required into its contracts. The method of incorporation of the correct wage determination, and adjustment in contract

price, where appropriate, should be in accordance with applicable law. Additionally, the following requirements apply:

> (A) Unless the Administrator directs otherwise, the incorporation of the clauses required by § 5.5 must be retroactive to the date of contract award or start of construction if there is no award.
>
> (B) If this incorporation occurs as the result of a request from the Administrator, the incorporation must take place within 30 days of the date of that request, unless the agency has obtained an extension from the Administrator.
>
> (C) The contractor must be compensated for any increases in wages resulting from incorporation of a missing contract clause.
>
> (D) If the recipient refuses to incorporate the clauses as required, the agency must make no further payment, advance, grant, loan, or guarantee of funds in connection with the contract until the recipient incorporates the required clauses into its contract, and must promptly refer the dispute to the Administrator for further proceedings under § 5.13.
>
> (E) Before terminating a contract pursuant to this section, the agency must withhold or cross-withhold sufficient funds to remedy any back wage liability resulting from the failure to incorporate the correct wage determination or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism.
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> (F) Notwithstanding the requirement to incorporate the contract clauses and correct wage determination within 30 days, the contract clauses and correct wage determination will be effective by operation of law, retroactive to the beginning of construction, in accordance with § 5.5(e).

SUBCONTRACTOR FLOW-DOWN REQUIREMENTS

The DOL made revisions to 29 C.F.R. § 5.5(a)(6) and (b)(4). Currently, those clauses contain explicit contractual requirements for prime contractors and upper-tier subcontractors to flow down the required contract clauses into their contracts with lower-tier subcontractors. The revisions to 29 C.F.R. § 5.5(a)(6) clarify that the flow-down requirement also requires the inclusion in such subcontracts of the appropriate wage determination(s):

> The contractor or subcontractor must insert in any subcontracts the clauses contained in paragraphs (a)(1) through (11) of this section, along with the applicable wage determination(s) and such other clauses or contract modifications as the [write in the name of the

> Federal agency] may by appropriate instructions require, and a clause requiring the subcontractors to include these clauses and wage determination(s) in any lower tier subcontracts. The prime contractor is responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in this section. In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier subcontractors, and may be subject to debarment, as appropriate.

See also revisions to § 5.6(b)(4).

As noted in our discussion of the changes to 29 C.F.R. § 5.2, the DOL is codifying a definition of "prime contractor" in 29 C.F.R. § 5.2 to include controlling shareholders or members, joint venturers or partners, and any contractor (*e.g.*, a general contractor) that has been delegated all or substantially all of the construction anticipated by the prime contract. Those entities, having notice of the definitions, these regulations, and the contract clauses, would therefore also be "responsible" under 29 C.F.R. § 5.5(a)(6) and (b)(4) for the same violations as the legal entity that signed the prime contract.

The revised rules include new language underscoring that being "responsible for . . . compliance" means the prime contractor has the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of the contract clauses. Because such liability for prime contractors is contractual, it represents strict liability and does not require that the prime contractor knew of or should have known of the subcontractors' violations. The new language also provides more explicit notice (in 29 C.F.R. § 5.5(a)(6) and (b)(4) themselves) that a prime contractor may be debarred where there are violations on the contract (including violations perpetrated by a subcontractor) and the prime contractor has failed to take responsibility for compliance.

Additionally, the DOL sought to eliminate confusion regarding the responsibility and liability of upper-tier subcontractors by adding language stating that "any subcontractor[ ] responsible" for the violations is also liable for back wages and potentially subject to debarment. The DOL explains that this "language is intended to place liability not only on the lower-tier subcontractor that is directly employing the worker who did not receive required wages, but also on the upper-tier subcontractors that may have disregarded their obligations to be responsible for compliance." This responsibility requires upper-tier subcontractors to pay back wages on behalf of their lower-tier subcontractors and subjects upper-tier subcontractors to debarment in appropriate circumstances (*i.e.*, where the lower-tier subcontractor's violation reflects a disregard of obligations by the upper-tier subcontractor to workers of their subcontractors).

PAYMENT OF MINIMUM WAGES, INCLUDING FRINGE BENEFITS, TO COVERED WORKERS ENGAGED IN CONSTRUCTION ACTIVITY COVERED BY THE DAVIS-BACON

The regulations at 29 C.F.R. Part 5 address the rules regarding payment of minimum wages, including fringe benefits, to covered workers engaged in construction activity covered by the Davis-Bacon Act, as well as enforcement of these rules. The DOL adopted new definitions, and changed others, in ways that will expand the applicability of the Davis-Bacon Act, as well provide some additional clarity and requirements regarding payment of fringe benefits.

Definition Revisions

Addition of a Definition of "Type of Construction"

The Davis-Bacon Act applies to construction projects, and the DOL revised 29 C.F.R. § 1.2 to include a definition of "Type of construction (or construction type)" that:

> means the general category of construction, as established by the Administrator, for the publication of general wage determinations. Types of construction may include, but are not limited to, building, residential, heavy, and highway. As used in this part, the terms "type of construction" and "construction type" are synonymous and interchangeable.

The intent was to clarify that the terms "type of construction" and "construction type," when used in the regulations, are synonymous and interchangeable.

Revisions to the Definition of Agency, Agency Head, Contracting Officer, Secretary, and Davis-Bacon Labor Standards.

The DOL made non-substantive revisions to certain definitions in 29 C.F.R. § 5.2, including clarifying that references to agencies, agency head, and contracting officer to clarify that some state agencies and officials have responsibility for enforcing Davis-Bacon Act rules.

Inclusion of Energy Infrastructure and Related Activities in the Definition of "Building or Work"

The DOL revised the definition of "building or work" in 29 C.F.R. § 5.2 to include solar panels, wind turbines, broadband installation, and installation of electric car chargers to the non-exclusive list of construction activities encompassed by the definition. The DOL explained that:

> These proposed additions to the definition were clarifications intended to reflect the significance of energy infrastructure and related projects to modern-day construction activities subject to the Davis-Bacon and Related Acts, as well as to illustrate the types of energy-infrastructure and related activities that are encompassed by the definition of "building or work."

The DOL also added language to the definitions of "building or work" and "public building or public work" to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement.

The new definition of "building or work" reads:

> 29 C.F.R. § 5.2, *Building or work*. The term "building or work" generally includes construction activities of all types, as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The term includes, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, **solar panels, wind turbines, broadband installation, installation of electric car chargers**, 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. **The term "building or work" also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work**.
>
> 29 C.F.R. § 5.2, *Public building or public work*. The term "public building or public work" includes a building or work, the construction, prosecution, completion, or repair of which, as defined in this section, 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. The construction, prosecution, completion, or repair of a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work, may still be considered a public building or work, even where the entire building or work is not owned, leased by, or to be used by a Federal agency, as long as the construction, prosecution, completion, or repair of that portion of the building or work, or the installation (where appropriate) of equipment or components into that building or work, is carried on by authority of or with funds of a Federal agency to serve the interest of the general public.

The DOL explained that:

> to further make plain that "building or work" includes not only construction activity involving an entire building, structure, or improvement, but also construction activity involving a portion of a building, structure, or improvement, or the installation of equipment or components into a building, structure, or improvement, the Department proposed to add a sentence to this definition stating that "[t]he term building or work also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work." The Department also proposed to include additional language in the definition of "public building or public work" to clarify that a "public building" or "public work" includes the construction, prosecution, completion, or repair of a portion of a building or work that is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public, even where construction of the entire building or work does not fit within this definition.

The DOL also explained that this revision does not eliminate the requirement that the Federal government enter into a contract for construction in order for the regulations to apply:

> The proposed changes to the definition of a public building or work, adopted in this final rule, do not eliminate the requirement that the Federal Government enter into a contract for construction for the DBA to be applicable. As reflected not only in the *CityCenterDC* decision but also in the statute itself, coverage under the DBA applies to "every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works." 40 U.S.C. 3142(a). The requirement that the Federal Government enter into a contract for construction and the requirement that such a contract for construction must be for a public building or public work are two distinct requirements, both of which must be satisfied for the DBA to apply to a contract. The changes to the definitions of "building or work" and "public building or public work" described here simply provide that the construction of a portion of a building or work may still be considered a public building or work, even where the entire building or work is not owned, leased by, or to be used by a Federal agency. These revisions do not eliminate or affect the separate requirement under the DBA that the Federal government enter into a "contract . . . for construction."

Revision to the Definition of "Construction, Prosecution, Completion, or Repair"

The final rule also adds a new sub-definition to the term "construction, prosecution, completion, or repair" in 29 C.F.R. § 5.2, to clarify when demolition and similar activities are covered by the Davis-Bacon Act. The new clause reads:

> (2) These terms [construction, prosecution, completion, or repair] include, without limitation (except as specified in this definition):
>
> …
>
> (v) Demolition and/or removal, under any of the following circumstances:
>
> (A) Where the demolition and/or removal activities themselves constitute construction, alteration, and/or repair of an existing building or work. Examples of such activities include the removal of asbestos, paint, components, systems, or parts from a facility that will not be demolished; as well as contracts for hazardous waste removal, land recycling, or reclamation that involve substantial earth moving, removal of contaminated soil, re-contouring surfaces, and/or habitat restoration.
>
> (B) Where subsequent construction covered in whole or in part by the labor standards in this part is contemplated at the site of the demolition or removal, either as part of the same contract or as part of a future contract. In determining whether covered construction is contemplated within the meaning of this provision, relevant factors include, but are not limited to, the existence of engineering or architectural plans or surveys of the site; the allocation of, or an

> application for, Federal funds; contract negotiations or bid solicitations; the stated intent of the relevant government officials; and the disposition of the site after demolition.
>
> (C) Where otherwise required by statute.

The DOL explained that:

> First, demolition and removal activities are covered by Davis-Bacon labor standards when such activities in and of themselves constitute construction, alteration, or repair of a public building or work…. Second, the Department has consistently maintained that if future construction that will be subject to the Davis-Bacon labor standards is contemplated at the location where the demolition occurs—either because the demolition is part of a contract for such construction or because such construction is contemplated as part of a future contract, then the demolition of the previously existing structure is considered part of the construction of the subsequent building or work and therefore within the scope of the Davis-Bacon labor standards.

The determination of whether demolition performed in anticipation of a future construction project is a "fact-specific question." The DOL stated, as an example, that:

> Davis-Bacon coverage may apply, for example, to the removal and disposal of contaminated soil in preparation for construction of a building, or the demolition of a parking lot to prepare the site for a future public park. In contrast, Davis-Bacon likely would not apply to the demolition of an abandoned, dilapidated, or condemned building to eliminate it as a public hazard, to reduce likelihood of squatters or trespassers, or to make the land more desirable for sale to private parties for purely private construction.

Expansion of the Definition of "Contract"

The DOL expanded the definition of "contract" in 29 C.F.R. § 5.2 to conform to the definition to the manner in which the term "contract" is defined in other DOL regulations applying to Federal contracting statutes and Executive Orders. The new definition is:

> 29 C.F.R. § 5.2, *Contract*. The term "contract" means any prime contract which is subject wholly or in part to the labor standards provisions of any of the laws referenced by § 5.1 and any subcontract of any tier thereunder, let under the prime contract. With the exception of work performed under a development statute, the terms contract and subcontract do not include agreements with employers that meet the definition of a material supplier under this section.

The DOL explained that:

> While the Department has not included a list in the regulatory text of all of the various types of agreements that may be considered to be "contracts" under the definition, it continues to interpret the DBRA as applying broadly to any contract

> that fits within the common law definition, as well as to contracts-implied-in-law where the parties intended to enter into such a contract, as long as the contract satisfies the other statutory and regulatory elements of coverage.

Addition of a Definition of Contractor

"Contractor" is not defined in the existing version of § 5.2. The DOL adopted the following definition of "contractor" in the revised regulations:

> The term "contractor" means any individual or other legal entity that enters into or is awarded a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced by § 5.1, including any prime contract or subcontract of any tier under a covered prime contract. In addition, the term contractor includes any surety that is completing performance for a defaulted contractor pursuant to a performance bond. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers or joint employers for purposes of the labor standards provisions of any of the laws referenced by § 5.1. A State or local government is not regarded as a contractor or subcontractor under statutes providing loans, grants, or other Federal assistance in situations where construction is performed by its own employees. However, under development statutes or other statutes requiring payment of prevailing wages to all laborers and mechanics employed on the assisted project, such as the U.S. Housing Act of 1937, State and local recipients of Federal-aid must pay these workers according to Davis-Bacon labor standards. The term "contractor" does not include an entity that is a material supplier, except if the entity is performing work under a development statute.

Addition of a Definition of Prime Contractor

The DOL also adopted a definition at 29 C.F.R. § 5.2 for the term "prime contractor." The DOL explained that it adopted a broad definition in order to "prioritize the appropriate allocation of responsibility for contract compliance and enhance the effectiveness of the withholding remedy" and clarify that the label an entity gives itself is not controlling. The definition is:

> The term "prime contractor" means any person or entity that enters into a contract with an agency. For the purposes of the labor standards provisions of any of the laws referenced by § 5.1, the term prime contractor also includes the controlling shareholders or members of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, and any contractor (*e.g.*, a general contractor) that has been delegated the responsibility for overseeing all or substantially all of the construction anticipated by the prime contract. For the purposes of the provisions in §§ 5.5 and 5.9, any such related entities holding

> different prime contracts are considered to be the same prime contractor.

Addition of a Definition of Subcontractor

The DOL adopted the following definition for the term "subcontractor" at 29 C.F.R. § 5.2:

> The term "subcontractor" means any contractor that agrees to perform or be responsible for the performance of any part of a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced in § 5.1. The term subcontractor includes subcontractors of any tier.

Originally, the DOL proposed that the "subcontractor" definition "did not include laborers or mechanics for whom a prevailing wage must be paid." After considering public comment, however, the DOL abandoned that language, determining that it was likely to cause confusion. Instead, the DOL explains that "an individual can both be referred to as a 'subcontractor' who contracts for a portion of the work on the prime contract and also be a laborer who must be paid a prevailing wage by the prime contractor or upper-tier subcontractor that has brought them onto the project."

Revisions to the Definition of Apprentice and Helper

The DOL amended the current regulatory definition in 29 C.F.R. § 5.2(n) of "apprentice, trainee, and helper" to remove references to trainees. A trainee is currently defined as a person registered and receiving on-the-job training in a construction occupation under a program approved and certified in advance by the Employment and Training Administration (ETA) as meeting its standards for on-the-job training programs. Because ETA no longer reviews or approves on-the-job training programs, the DOL concluded that a definition is unnecessary.

The DOL also modified the definition of "apprentice and helper" to reflect the current name of the office designated by the Secretary of Labor, within the Department, to register apprenticeship programs.

Revisions to the Definition of Laborer or Mechanic

The DOL amended the regulatory definition of "laborer or mechanic" to remove the reference to trainees and to replace the term "foremen" with the gender-neutral term "foreperson."

Clarification Regarding the Rules that Apply to Survey Crews

Because the DOL frequently receives questions about the application of the definition of "laborer or mechanic"—and thus the application of the Davis-Bacon labor standards—to members of survey crews, it provided non-substantive revisions to clarify the circumstances under which survey crew members should be considered laborers or mechanics. The DOL describes those circumstances:

> The Department has historically recognized that members of survey crews who perform primarily physical and/or manual work while employed by contractors or subcontractors on a DBA or Related Acts covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers or mechanics subject to the Davis-Bacon labor standards. Whether or not a specific survey crew member is covered by these standards is a question of fact, which takes into account the actual duties performed and whether these duties are "manual or physical in nature" including the "use of tools or . . . work of a trade."
>
> When considering whether a survey crew member performs primarily physical and/or manual duties, it is appropriate to consider the relative importance of the worker's different duties, including (but not solely) the time spent performing these duties. Thus, survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics (provided that they do not meet the tests for exemption as professional, executive, or administrative employees under part 541). If their work meets other required criteria (*i.e.*, it is performed on the site of the work, where required, and immediately prior to or during construction in direct support of construction crews), it would be covered by the Davis-Bacon labor standards.

Revision to the Definition of "Site of the Work"

For contracts subject to the Davis-Bacon Act, the prevailing wage and other labor requirements will generally apply to all "mechanics and laborers employed directly on the site of the work." The current regulations include in the definition of "site of the work" both the physical location where the building or work will remain *and* secondary locations, defined as "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."

The DOL revised the definition of "site of the work" to expand what will be considered a "secondary location" to include:

> locations where a significant portion of a building or work is constructed for specific use in the designated building or work, the site must be either established specifically for the performance of the covered contract or project or dedicated exclusively, or nearly so, to the covered contract or project.

The new definition of "site of the work" is:

> 29 C.F.R. § 5.2, *Site of the work*. The term "site of the work" is defined as follows:
>
> (1) "Site of the work" includes all of the following:

(i) The primary construction site(s), defined as the physical place or places where the building or work called for in the contract will remain.

(ii) Any secondary construction site(s), defined as any other site(s) where a significant portion of the building or work is constructed, provided that such construction is for specific use in that building or work and does not simply reflect the manufacture or construction of a product made available to the general public, and provided further that the site is either established specifically for the performance of the contract or project, or is dedicated exclusively, or nearly so, to the performance of the contract or project for a specific period of time. A "significant portion" of a building or work means one or more entire portion(s) or module(s) of the building or work, such as a completed room or structure, with minimal construction work remaining other than the installation and/or final assembly of the portions or modules at the place where the building or work will remain. A "significant portion" does not include materials or prefabricated component parts such as prefabricated housing components. A "specific period of time" means a period of weeks, months, or more, and does not include circumstances where a site at which multiple projects are in progress is shifted exclusively or nearly so to a single project for a few hours or days in order to meet a deadline.

(iii) Any adjacent or virtually adjacent dedicated support sites, defined as:

(A) Job headquarters, tool yards, batch plants, borrow pits, and similar facilities of a contractor or subcontractor that are dedicated exclusively, or nearly so, to performance of the contract or project, and adjacent or virtually adjacent to either a primary construction site or a secondary construction site, and

(B) Locations adjacent or virtually adjacent to a primary construction site at which workers perform activities associated with directing vehicular or pedestrian traffic around or away from the primary construction site.

(2) With the exception of locations that are on, or that themselves constitute, primary or secondary construction sites as defined in paragraphs (1)(i) and (ii) of this definition, site of the work does not include:

(i) 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 contract or project; or

(ii) Fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a material supplier, which are established by a material supplier for the project before opening of bids and not on the primary

> construction site or a secondary construction site, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

The DOL will make separate wage determinations for secondary sites, and not automatically apply the wage determination applicable to the primary construction site:

> The Department agrees that the appropriate geographic area for the application of prevailing wages to secondary construction sites is the location of the secondary construction site, not the location of the primary worksite. The purpose of the Davis-Bacon labor standards is to ensure that laborers and mechanics are paid wages that prevail where they work; thus, it would not be appropriate to apply wage rates from a different area when there is sufficient wage data in the area in which they work. A contract involving both a primary and secondary construction site should include wage determinations for both areas.
>
> Instead, the Department is revising this component of the regulation to reflect a more incremental expansion of coverage of secondary construction sites where significant portions of public works are constructed for specific use in a particular building or work. Specifically, whereas the current regulation includes such sites only if they are established specifically for a DBRA-covered project or contract, the revised regulation also includes any sites that are dedicated exclusively or nearly so to the performance of a single DBRA-covered project or contract— *i.e.*, sites that for a specific period of time are dedicated entirely, or nearly entirely, to the construction of one or more "significant portions" of a particular public building or work. The final rule further explains that a "specific period of time" in this context means a period of weeks, months, or more, and does not include circumstances where a site at which multiple projects are in progress is shifted exclusively or nearly so to a single project for a few hours or days in order to meet a deadline.

The DOL also addressed application of the "site of the work" to flaggers, adding new language to clarify that workers engaged in traffic control and related activities adjacent or virtually adjacent to the primary construction site are working on the site of the work. The DOL did explain that this revision is not intended to apply Davis-Bacon labor standards to delivery drivers who only deliver materials or supplies to the project, and do not provide flagging or construction services:

> The Department acknowledges the distinction between flaggers and workers of traffic service companies. As described in section c ("Clarification of `material supplier' distinction"), the final rule codifies the distinction between contractors and subcontractors and material suppliers. Under the final rule, if a traffic service company's only contractual responsibility is to deliver equipment and to perform activities incidental to such delivery, such as loading and unloading, then assuming it meets the other enumerated criteria, it is considered a material supplier and its workers therefore are not subject to the Davis-Bacon labor standards unless the work is performed under a statute that applies to all work performed by laborers and mechanics in the development of a project. On the other hand, if the company's

> workers are engaged in construction work on the site that is not incidental to delivery, such as acting as flaggers, the company would be considered a subcontractor, and therefore, as discussed below, *see infra* section d ("Coverage of time for truck drivers"), its workers would be covered for any time spent in non-delivery-related construction work, as well as any onsite time essential or incidental to delivery that is not *de minimis.*

Revision to the Definition of Material Suppliers

As noted in the discussion of the DOL's guidance regarding flaggers, the DOL also added language to 29 C.F.R. § 5.2 to "clarify the distinction between subcontractors and "material suppliers" and to make explicit that employees of material suppliers are not covered by the Davis-Bacon Act and most of the Related Acts." The final rule adds new definitions of "contractor" and "subcontractor" and identified criteria that would determine if an employer is a material supplier not subject to Davis-Bacon labor requirements or a contractor that is subject to those requirements.

The criteria are:

- an employer's obligations for work on a contract must be limited to the supply of materials, articles, supplies, or equipment, which may include pickup in addition to, but not exclusive of, delivery, and which may also include activities incidental to such delivery and/or pickup, such as delivery, drop off, and waiting time;

- the employer's facility or facilities being used for material supply of the contract either must have been established before opening of bids or, if it was established after bid opening, may not be dedicated exclusively, or nearly so, to the performance of a covered contract; and

- a material supplier's facility manufacturing the materials, articles, supplies, or equipment may not be located on the primary or secondary construction site.

The revised regulations eliminates the current provision that if a supplier's worker spends less than 20 percent of their workweek engaged in on-delivery construction work, then they are not subject to the Davis-Bacon labor rules. DOL explained that it did not view this change as a significant change from current practice:

> The Department emphasizes that contrary to commenters' concerns, the only aspect of the "material supplier" definition in the final rule that arguably reflects a change from current practice is that the definition in the final rule strictly limits applicability of the exemption to companies whose only contractual responsibilities are material supply or activities incidental to material supply. It therefore excludes from the exemption companies that also perform any other onsite construction, alteration, or repair; such companies are instead deemed contractors or subcontractors even if they also engage in material supply. This principle is consistent with numerous statements in the Department's current guidance….

> While the Department recognizes that many stakeholders are familiar with the 20-percent threshold, it believes that eliminating the 20-percent threshold for purposes of the material supplier/subcontractor distinction is appropriate for a number of reasons. First, the Department believes that by creating a bright-line rule that ties this determination to a company's obligations under a contract, rather than the amount of time its workers spend onsite engaged in particular activities in a given workweek, this change will reduce uncertainty about coverage and assist both bidders and agencies in predicting labor costs before bidding. Second, as noted in the proposed rule, the Department has observed that under its current guidance, there is considerable confusion regarding the 20-percent threshold and its application…. In contrast, the clarity in the final rule will facilitate compliance and is more consistent with both the language and purpose of the Davis- Bacon labor standards, as it ensures that all laborers and mechanics performing any non-delivery construction work on the site of the work will receive prevailing wages for such work.

The DOL also explained that the "material supplier exemption" is applied in the context of the "site of the work" requirement:

> under the final rule, a worker employed by an employer meeting the criteria for the material supplier exemption is not employed by a contractor or subcontractor, and therefore is not entitled to prevailing wages and fringe benefits under the Davis-Bacon labor standards at all even for time spent on the site of the work. In contrast, workers employed by contractors or subcontractors are entitled to Davis-Bacon wages, but only for time spent on the site of the work. Thus, for example, if a company establishes a facility near, but not on, the site of the work for the exclusive or nearly-exclusive purpose of furnishing materials to a particular project, even though the company is considered a subcontractor rather than a material supplier, its workers are only subject to the Davis-Bacon labor standards for time they spend on the site of the work as defined in this final rule.

The new definition of material supplier is:

> 29 C.F.R. § 5.2, *Material Supplier*. The term "material supplier" is defined as follows:
>
> (1) A material supplier is an entity meeting all of the following criteria:
>
> > (i) Its only obligations for work on the contract or project are the delivery of materials, articles, supplies, or equipment, which may include pickup of the same in addition to, but not exclusive of, delivery, and which may also include activities incidental to such delivery and pickup, such as loading, unloading, or waiting for materials to be loaded or unloaded; and
> >
> > (ii) Its facility or facilities that manufactures the materials, articles, supplies, or equipment used for the contract or project:

> (A) Is not located on, or does not itself constitute, the project or contract's primary construction site or secondary construction site as defined in this section; and
>
> (B) Either was established before opening of bids on the contract or project, or is not dedicated exclusively, or nearly so, to the performance of the contract or project.
>
> (2) If an entity, in addition to being engaged in the activities specified in paragraph (1)(i) of this definition, also engages in other construction, prosecution, completion, or repair work at the site of the work, it is not a material supplier.

Clarification Regarding the Rules Governing Truck Drivers

Under current Davis-Bacon regulations, different rules apply depending on whether truck drivers are employed by material suppliers or contractors or subcontractors. There is also some uncertainty regarding application of these different rules. To address this uncertainty, the DOL revised the regulations to, as discussed above,

> codify a definition of "material supplier" in a manner that would reduce ambiguity regarding the subcontractor/material supplier distinction by restricting the material supplier exemption to employers whose sole contractual responsibility is material supply and, in so doing, eliminate the subregulatory 20-percent threshold pertaining to material suppliers' drivers who engage in onsite construction work.

In addition to those changes, the DOL revised the definition of "construction, prosecution, completion, or repair" in 29 C.F.R. § 5.2 to clarify which truck drivers are covered by the Davis-Bacon Act labor requirements. The DOL revised that definition to include "covered transportation," and thus truck drivers, in five different circumstances:

> (A) Transportation that takes place entirely within a location meeting the definition of "site of the work";
>
> (B) Transportation of one or more "significant portion(s)" of the building or work between a "secondary construction site" as defined in this section and a "primary construction site";
>
> (C) Transportation between an "adjacent or virtually adjacent dedicated support site" and a "primary construction site" or "secondary construction site";
>
> (D) "Onsite activities essential or incidental to offsite transportation," defined as activities conducted by a truck driver or truck driver's assistant on the site of the work that are essential or incidental to the transportation of materials or supplies to or from the site of the work, such as loading, unloading, or waiting for materials to be loaded or unloaded, but only where the driver or driver's assistant's time spent on the site of the work is not *de minimis*; and

> (E) Any transportation and related activities, whether on or off the site of the work, by laborers and mechanics employed in the construction or development of the project under a development statute.

In regards to whether a driver's time spent on the site of the work is "de minimis," and thus not subject to the Davis-Bacon Act labor rules, the DOL did not define what would constitute "de minimis" time. Instead, the DOL intends to review this issue on a case-by-case basis:

> However, whereas the proposed rule sought to borrow language from the Department's regulatory definition of *de minimis* under the FLSA, *see*29 CFR 785.47, the final rule is not defining *de minimis* in the regulation for several reasons. First, the Department did not propose a definition for the term in the NPRM. Second, the Department's historical practice has been to evaluate *de minimis* under the DBRA on a case-by-case basis…. To the extent warranted, the Department will consider whether to further elaborate on the definition of *de minimis* in subregulatory guidance.

While the DOL did not define "de minimis," its notice of final rulemaking did identify two general principles that would apply. The first principle is that guidance and precedent under the Fair Labor Standards Act regarding what constitutes "de minimis" time does not apply or govern:

> First, the *de minimis* standard under the DBRA is independent of the *de minimis* standard under the FLSA…. The DBRA's *de minimis* principle…informs the different inquiry of whether a worker is "employed directly on the site of the work." Thus, the Department has generally held that it excludes periods of "a few minutes" onsite just to drop off materials, even though such time generally is considered hours worked under the FLSA.

The second principle is that, in certain cases, the DOL will aggregate short periods of time that may be considered de minimis in isolation, but not when combined with other de minimis periods of activity:

> Second, the Department intends that under circumstances where workers spend a significant portion of their day or week onsite, short periods of time that in isolation might be considered *de minimis* may be aggregated. For example, in its recent decision in *ET Simonds*, the ARB concluded that it was reasonable for the Administrator to aggregate such periods throughout a workday where the record showed that workers spent a total of 15 minutes per hour on the website. Thus, the Department's position is that the total amount of time a driver spends on the site of the work during a typical day or workweek—not just the amount of time that each delivery takes—is relevant to a determination of whether the onsite time is *de minimis*.

Rate of Contribution or Cost for Fringe Benefits

Contributions made to a fringe benefit plan for Davis-Bacon Act projects generally may not be used to fund the plan for periods of private work. Therefore, when a contractor's workers perform

work on both Davis-Bacon Act projects and projects that are not subject to Davis-Bacon Act requirements (referred to as "private" work or projects) in a particular year or other shorter time period, the contractor typically must convert its total annual contributions to the fringe benefit plan to an hourly cash equivalent by dividing the cost of the fringe benefit by the total number of hours worked (Davis-Bacon Act projects and private work) to determine the amount creditable towards meeting its obligation to pay the prevailing wage under the Davis-Bacon Act. This principle, referred to as "annualization," effectively prohibits contractors from using fringe benefit plan contributions attributable to work on private projects to meet their prevailing wage obligation for Davis-Bacon Act projects.

The DOL added 29 C.F.R. § 5.25 (c) to codify the principle of annualization and to clarify when exceptions to annualization may apply:

> Except as provided in this section, contractors must "annualize" all contributions to fringe benefit plans (or the reasonably anticipated costs of an unfunded benefit plan) to determine the hourly equivalent for which they may take credit against their fringe benefit obligation. The "annualization" principle reflects that DBRA credit for contributions made to bona fide fringe benefit plans (or the reasonably anticipated costs of an unfunded benefit plan) is allowed based on the effective rate of contributions or costs incurred for total hours worked during the year (or a shorter time period) by a laborer or mechanic.
>
> (1) *Method of computation.* To annualize the cost of providing a fringe benefit, a contractor must divide the total cost of the fringe benefit contribution (or the reasonably anticipated costs of an unfunded benefit plan) by the total number of hours worked on both private (non-DBRA) work and work covered by the Davis-Bacon Act and/or Davis-Bacon Related Acts (DBRA-covered work) during the time period to which the cost is attributable to determine the rate of contribution per hour. If the amount of contribution varies per worker, credit must be determined separately for the amount contributed on behalf of each worker.
>
> (2) *Exception requests.* Contractors, plans, and other interested parties may request an exception from the annualization requirement by submitting a request to the WHD Administrator. A request for an exception may be granted only if each of the requirements of paragraph (c)(3) of this section is satisfied. Contributions to defined contribution pension plans (DCPPs) are excepted from the annualization requirement, and exception requests therefore are not required in connection with DCPPs, provided that each of the requirements of paragraph (c)(3) is satisfied and the DCPP provides for immediate participation and essentially immediate vesting (*i.e.*, the benefit vests within the first 500 hours worked). Requests must be submitted in writing to the Division of Government Contracts

> Enforcement by email to *DBAannualization@dol.gov* or by mail to Director, Division of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Ave. NW, Room S–3502, Washington, DC 20210.
>
> (3) *Exception requirements.* Contributions to a bona fide fringe benefit plan (or the reasonably anticipated costs of an unfunded benefit plan) are excepted from the annualization requirement if all of the following criteria are satisfied:
>
> > (i) The benefit provided is not continuous in nature. A benefit is not continuous in nature when it is not available to a participant without penalty throughout the year or other time period to which the cost of the benefit is attributable; and
> >
> > (ii) The benefit does not compensate both private work and DBRA-covered work. A benefit does not compensate both private and DBRA-covered work if any benefits attributable to periods of private work are wholly paid for by compensation for private work.

Unfunded Plans

An "unfunded plan" is a plan:

> in which the contractor does not make irrevocable contributions to a trustee or third person pursuant to a fund, plan, or program, but instead provides fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, and receives fringe benefit credit for the rate of costs which may be reasonably anticipated in providing benefits under such a commitment.

The DOL added language to 29 C.F.R. § 5.28(b), (c) and (d) explicitly stating that unfunded benefit plans or programs must be approved by the Secretary in order to qualify as bona fide fringe benefits. The revised regulations do not specify the documentation that must be submitted with a request for DOL approval of an unfunded plan, but only states that contractors should submit sufficient information so as to permit the DOL to determine if the unfunded plan can "withstand a test of actuarial soundness."

The revised 29 C.F.R. § 5.28 states:

> (a) The costs to a contractor or subcontractor which may be reasonably anticipated in providing benefits of the types described in the Act, pursuant to an enforceable commitment to carry out a financially responsible plan or program, are considered fringe benefits within the meaning of the Act (see 40 U.S.C. 3141(2)(B)(ii)). The legislative history suggests that these provisions were intended to permit the

consideration of fringe benefits meeting these requirements, among others, and which are provided from the general assets of a contractor or subcontractor. (Report of the House Committee on Education and Labor, H. Rep. No. 308, 88th Cong., 1st Sess., p. 4; see also S. Rep. No. 963, p. 6.)

(b) Such a benefit plan or program, commonly referred to as an unfunded plan, may not constitute a fringe benefit within the meaning of the Act unless:

(1) It could be reasonably anticipated to provide the benefits described in the Act;

(2) It represents a commitment that can be legally enforced;

(3) It is carried out under a financially responsible plan or program;

(4) The plan or program providing the benefits has been communicated in writing to the laborers and mechanics affected; and

(5) The contractor or subcontractor requests and receives approval of the plan or program from the Secretary, as described in paragraph (c) of this section.

(c) To receive approval of an unfunded plan or program, a contractor or subcontractor must demonstrate in its request to the Secretary that the unfunded plan or program, and the benefits provided under such plan or program, are "bona fide," meet the requirements set forth in paragraphs (b)(1) through (4) of this section, and are otherwise consistent with the Act. The request must include sufficient documentation to enable the Secretary to evaluate these criteria. Contractors and subcontractors may request approval of an unfunded plan or program by submitting a written request in one of the following manners:

(1) By mail to the United States Department of Labor, Wage and Hour Division, Director, Division of Government Contracts Enforcement, 200 Constitution Ave. NW, Room S–3502, Washington, DC 20210;

(2) By email to unfunded@dol.gov (or its successor email address); or

(3) By any other means as directed by the Administrator.

(d) Unfunded plans or programs may not be used as a means of avoiding the Act's requirements. The words "reasonably anticipated" require that any unfunded plan or program be able to withstand a test of actuarial soundness. Moreover, as in the case of other fringe benefits payable under the Act, an unfunded plan or program must be "bona fide" and not a mere simulation or sham for avoiding compliance with the Act. To prevent these provisions from being used to avoid compliance with the Act, the Secretary may direct a contractor or subcontractor to set aside in an account assets which, under sound actuarial principles, will be sufficient to meet

> future obligations under the plan. Such an account must be preserved for the purpose intended. (S. Rep. No. 963, p. 6.)

The DOL did, in its notice of final rulemaking, explain that while the DOL's approval of an unfunded plan is based on the "totality of the circumstances," the type of information the DOL will be seeking from contractors will:

> typically include identification of the benefit(s) to be provided; an explanation of the funding/contribution formula; an explanation of the financial analysis methodology used to estimate the costs of the plan or program benefits and how the contractor has budgeted for those costs; a specification of how frequently the contractor either sets aside funds in accordance with the cost calculations to meet claims as they arise, or otherwise budgets, allocates, or tracks such funds to ensure that they will be available to meet claims; an explanation of whether employer contribution amounts are different for Davis-Bacon and non-prevailing wage work; identification of the administrator of the plan or program and the source of the funds the administrator uses to pay the benefits provided by the plan or program; specification of the ERISA status of the plan or program; and an explanation of how the plan or program is communicated to laborers or mechanics.

Specific Fringe Benefits

While 29 C.F.R. § 5.29(a) provides that the defrayment of the costs of apprenticeship programs is a recognized fringe benefit that Congress considered common in the construction industry, the current regulations do not address when a contractor may take credit for such contributions or how to properly credit such contributions against a contractor's fringe benefit obligations.

Accordingly, the DOL has adopted a new paragraph (g) to address the circumstances under which a contractor may take a fringe benefit credit for the costs of an apprenticeship program.

The DOL also adopted a minor technical revision to paragraph (e) to include a citation to 29 C.F.R. § 5.28, which provides additional guidance on unfunded plans.

Administrative Expenses of a Contractor or Subcontractor

The DOL also added a new 29 C.F.R. § 5.33 to codify existing WHD policy under which a contractor or subcontractor may not take Davis-Bacon credit for its own administrative expenses incurred in connection with fringe benefit plans. That policy is consistent with the DOL's regulations under the Service Contract Act (SCA) and with case law under the Davis-Bacon Act, under which such costs are viewed as "part of [an employer's] general overhead expenses of doing business and should not serve to decrease the direct benefit going to the employee." *Collinson Constr. Co.*, WAB No. 76–09, 1977 WL 24826, at *2.

The revised 29 C.F.R. § 5.33 delineates which costs are "creditable" and which costs are "noncreditable," and explains that questions regarding whether a particular cost or expense is creditable towards a contractor's prevailing wage obligations should be referred to the Administrator for resolution prior to any such credit being claimed.

Clarification to Fringe Benefit Contributions to Plans Managed by a Trustee or Third Party

The DOL made non-substantive changes to the 29 C.F.R. § 5.26, which address the requirements that apply to any fringe benefit contributions made to a trustee or to a third person pursuant to a fund, plan, or program. While the changes are not substantive, the DOL did, in response to one comment, state:

> The Department nonetheless recognizes that, as these commenters noted, the current regulation only includes trustees, not non-trustee "third persons," when referring to applicable fiduciary responsibilities, whereas the proposed rule included both. Given the commenters' concerns that this could be construed as a substantive change, the Department modifies the language in the final rule to state instead that "a trustee must adhere to any fiduciary responsibilities applicable under law." The Department notes, however, that whether the recipient of fringe benefit contributions is a trustee or a third person, to the extent that the party is deemed a fiduciary under applicable law, **if the party is found to have materially violated its fiduciary responsibilities with respect to the fringe benefit contributions, it is likely that such contributions will not be creditable under the DBRA**. The final rule makes this change and otherwise adopts the language as proposed.

This commentary by the DOL raises the possibility that fiduciary breaches by trustees (or third parties) managing a fringe benefit program may impact contractors by making their contributions not creditable for fringe benefit purposes.

RECORDKEEPING REQUIREMENTS

The DOL amended several of 29 C.F.R § 5.5's recordkeeping regulations in an effort to "enhance Davis-Bacon compliance and enforcement by clarifying and supplementing existing recordkeeping requirements."

> 29 C.F.R. § 5.5(a)(3)(i): Revised to clarify the records that employers must keep, that they must keep the records for three years after all work on the prime contract is completed, and that the records must include last known worker telephone numbers and email addresses.
>
> > 29 C.F.R. § 5.5(a)(3)(ii) *Basic record requirements* —
> >
> > (A) *Length of record retention.* All regular payrolls and other basic records must be maintained by the contractor and any subcontractor during the course of the work and preserved for all laborers and mechanics working at the site of the work (or otherwise working in construction or development of the project under a development statute) for a period of at least 3 years after all the work on the prime contract is completed.
> >
> > (B) *Information required.* Such records must contain the name; Social Security number; last known address, telephone number, and email address of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of

the types described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid.

(C) *Additional records relating to fringe benefits.* Whenever the Secretary of Labor has found under paragraph (a)(1)(v) of this section that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act, the contractor must maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

(D) *Additional records relating to apprenticeship.* Contractors with apprentices working under approved programs must maintain written evidence of the registration of apprenticeship programs, the registration of the apprentices, and the ratios and wage rates prescribed in the applicable programs.

29 C.F.R. § 5.5(a)(3)(ii): Revised to expressly apply the regulation's recordkeeping requirements to all entities that might be responsible for maintaining the payrolls a contractor is required to submit weekly when a Federal agency is not a party to the contract, to clarify that compliance actions may be accomplished by various means, not solely by an investigation or audit of compliance, to expressly permit electronic submission of payroll records, provided that an alternative is afforded to those contractors who cannot submit electronically, and to provide that for a contractor's signature on certified payroll to be valid, the contractor's signature must either be an original handwritten signature or a legally valid electronic signature.

29 C.F.R. § 5.5(a)(3)(ii) *Certified payroll requirements*—

(A) *Frequency and method of submission.* The contractor or subcontractor must submit weekly, for each week in which any DBA- or Related Acts-covered work is performed, certified 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 certified payrolls to the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records, for transmission to the [write in name of agency]. The prime contractor is responsible for the submission of all certified payrolls by all subcontractors. A contracting agency or prime contractor may permit or require contractors to submit certified payrolls through an electronic system, as long as the electronic system requires a legally valid electronic signature; the system allows the contractor, the contracting agency, and the Department of Labor to access the certified payrolls upon request for at least 3 years after the work on the prime contract

has been completed; and the contracting agency or prime contractor permits other methods of submission in situations where the contractor is unable or limited in its ability to use or access the electronic system.

(B) *Information required*. The certified payrolls submitted must set out accurately and completely all of the information required to be maintained under paragraph (a)(3)(i)(B) of this section, except that full Social Security numbers and last known addresses, telephone numbers, and email addresses must not be included on weekly transmittals. Instead, the certified payrolls need only include an individually identifying number for each worker (e.g., the last four digits of the worker's Social Security number). The required weekly certified payroll information may be submitted using Optional Form WH–347 or in any other format desired. Optional Form WH–347 is available for this purpose from the Wage and Hour Division website at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347/.pdf or its successor website. It is not a violation of this section for a prime contractor to require a subcontractor to provide full Social Security numbers and last known addresses, telephone numbers, and email addresses to the prime contractor for its own records, without weekly submission by the subcontractor to the sponsoring government agency (or the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records).

(C) *Statement of Compliance*. Each certified payroll submitted must be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor, or the contractor's or subcontractor's agent who pays or supervises the payment of the persons working on the contract, and must certify the following:

(1) That the certified payroll for the payroll period contains the information required to be provided under paragraph (a)(3)(ii) of this section, the appropriate information and basic records are being maintained under paragraph (a)(3)(i) of this section, and such information and records are correct and complete;

(2) That each laborer or mechanic (including each helper and apprentice) working on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in 29 CFR part 3; and

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification(s) of work actually performed, as specified in the applicable wage determination incorporated into the contract.

(D) *Use of Optional Form WH–347*. The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH–347 will satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(C) of this section.

(E) *Signature*. The signature by the contractor, subcontractor, or the contractor's or subcontractor's agent must be an original handwritten signature or a legally valid electronic signature.

(F) *Falsification*. The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under 18 U.S.C. 1001 and 31 U.S.C. 3729.

(G) *Length of certified payroll retention*. The contractor or subcontractor must preserve all certified payrolls during the course of the work and for a period of 3 years after all the work on the prime contract is completed.

29 C.F.R. § 5.5(c): Revised to clarify that these recordkeeping provisions require contractors and subcontractors to maintain records of each worker's correct classification or classifications of work actually performed and the hours worked in each classification.

29 C.F.R. § 5.5(c) *CWHSSA required records clause*. In addition to the clauses contained in paragraph (b) of this section, in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other laws referenced by § 5.1, the Agency Head must cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor must maintain regular payrolls and other basic records during the course of the work and must preserve them for a period of 3 years after all the work on the prime contract is completed for all laborers and mechanics, including guards and watchpersons, working on the contract. Such records must contain the name; last known address, telephone number, and email address; and social security number of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid; daily and weekly number of hours actually worked; deductions made; and actual wages paid. Further, the Agency Head must cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph must be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview workers during working hours on the job.

In addition to these changes, the DOL also adopted new language clarifying that that contractors and subcontractors are required to make available not only payrolls and basic records, but also the payrolls actually submitted to the contracting agencies. The DOL also adopted a sanction for contractors that fail to make the required records available to the DOL within the time frame

specified by the DOL: contractors that fail to comply with WHD record requests would be precluded from introducing as evidence in an administrative proceeding under 29 CFR part 6 any of the required records that were not provided or made available to WHD despite WHD's request for such records.

REVISIONS TO RULES GOVERNING APPRENTICES

The DOL adopted non-substantive revisions to reorganize § 5.5(a)(4)(i) so that each of the four apprentice-related topics it addresses—rate of pay, fringe benefits, apprenticeship ratios, and reciprocity—are more clearly and distinctly addressed.

In addition, the DOL revised the paragraph of § 5.5(a)(4)(i) to reflect that contractors employing apprentices to work on a Davis-Bacon Act project in a locality other than the one in which the apprenticeship program was originally registered must adhere to the apprentice wage rate and ratio standards of the project locality.

> In order to better harmonize the Davis-Bacon regulations and ETA's apprenticeship regulations, the Department proposed in its NPRM to revise 29 CFR 5.5(a)(4)(i) to reflect that contractors employing apprentices to work on a DBRA project in a locality other than the one in which the apprenticeship program was originally registered must adhere to the apprentice wage rate and ratio standards of the project locality. As noted above, the general rule in § 5.5(a)(4)(i) is that contractors may pay less than the prevailing wage rate for the work performed by an apprentice employed pursuant to, and individually registered in, a bona fide apprenticeship program registered with ETA or an OA-recognized SAA. Under ETA's regulation at 29 CFR 29.13(b)(7), if a contractor has an apprenticeship program registered in one State but wishes to employ apprentices to work on a project in a different State with an SAA, the contractor must seek and obtain reciprocal approval from the project State SAA and adhere to the wage rate and ratio standards approved by the project State SAA. Accordingly, upon receiving reciprocal approval, the apprentices in such a scenario would be considered to be employed pursuant to and individually registered in the program in the project State, and the terms of that reciprocal approval would apply for purposes of the DBRA.

The DOL states that this revision "better comports with the Davis-Bacon Act's statutory purpose to eliminate the unfair competitive advantage conferred on contractors from outside of a geographic area bidding on a Federal construction contract based on lower wage rates (and, in the case of apprentices, differing ratios of apprentices paid a percentage of the journeyworker rate for the work performed) than those that prevail in the location of the project."

Lastly, the DOL removed the regulatory provisions regarding trainees currently set out in 29 C.F.R. § 5.2(n)(2) and 29 C.F.R. § 5.5(a)(4)(ii), and removed the references to trainees and training programs throughout parts 1 and 5 of the Davis-Bacon Act Regulations

REVISIONS TO REGULATIONS GOVERNING ENFORCEMENT OF DAVIS-BACON ACT REQUIREMENTS

The DOL revised its regulations governing enforcement of Davis-Bacon Act requirements in a variety of ways. The DOL revised 29 C.F.R. § 5.6(a)(2) to clarify that copies of certified payroll may be requested by the DOL regardless of whether the DOL has initiated an investigation or other compliance action, and that if a Federal agency has not maintained copies of the requested certified payrolls, the agency must obtain them from the contractor.

The DOL explained that:

> The proposed revisions were intended to clarify that an investigation or other compliance action is not a prerequisite to the Department's ability to obtain from a Federal agency certified payrolls submitted pursuant to § 5.5(a)(3)(ii). The proposed revisions also were intended to remove any doubt or uncertainty that each Federal agency has an obligation to produce or ensure the production of such certified payrolls, including in those circumstances in which it may not be the entity maintaining the requested certified payrolls. As the Department noted in the NPRM, these proposed revisions will make explicit the Department's longstanding practice and interpretation of this provision, and do not place any new or additional requirements or recordkeeping burdens on contracting agencies, as they are already required to maintain these certified payrolls and provide them to the Department upon request.

The DOL also revised 29 C.F.R. 5.6 to include a new 5.6(c) that:

> reflect[s] [DOL's] practice of redacting portions of confidential statements of workers or other informants that would tend to reveal those informants' identities. This proposed change was made to emphasize—without making substantive changes—that this regulatory provision mandating protection of information that identifies or would tend to identity confidential sources, applies to both the Department's and other agencies' confidential statements and other related documents. The proposed revisions codify the Department's longstanding position that this provision protects workers and other informants who provide information or documents to the Department or other agencies from having their identities disclosed.

Restitution, Criminal Action

Current Davis-Bacon Act regulations do not specifically provide for the payment of interest on back wages. The DOL adopted new regulations to reflect that administrative law judges already award interest on back wages and specify that interest would be calculated from the date of the underpayment or loss, using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621, and would be compounded daily.

Anti-Retaliation Provisions

The DOL added anti-retaliation provisions to the regulations to:

> discourage contractors, responsible officers, and any other persons from engaging in—or causing others to engage in—unscrupulous business practices that may chill worker participation in WHD investigations or other compliance actions and enable prevailing wage violations to go undetected. The proposed anti-retaliation provisions were also intended to provide make-whole relief for any worker who has been discriminated against in any manner for taking, or being perceived to have taken, certain actions concerning the labor standards provisions of the DBA, CWHSSA, and other Related Acts, and the regulations in parts 1, 3, and 5.

The changes include a new contract clause at 29 C.F.R. § 5.5(a)(11) that will be added to contracts covered by the Davis-Bacon Act. The new contract clause provides that:

> *Anti-retaliation.* It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:
>
> (i) Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the DBA, Related Acts, this part, or 29 CFR part 1 or 3;
>
> (ii) Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under the DBA, Related Acts, this part, or 29 CFR part 1 or 3;
>
> (iii) Cooperating in any investigation or other compliance action, or testifying in any proceeding under the DBA, Related Acts, this part, or 29 CFR part 1 or 3; or
>
> (iv) Informing any other person about their rights under the DBA, Related Acts, this part, or 29 CFR part 1 or 3.

The regulations also add a new contract clause at 29 C.F.R. § 5.5(b)(5), which states:

> (5) *Anti-retaliation.* It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:
>
> > (i) Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the Contract Work Hours and Safety Standards Act (CWHSSA) or its implementing regulations in this part;

> (ii) Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under CWHSSA or this part;
>
> (iii) Cooperating in any investigation or other compliance action, or testifying in any proceeding under CWHSSA or this part; or
>
> (iv) Informing any other person about their rights under CWHSSA or this part.

The DOL explained that these new contract clauses and anti-retaliation provisions are intended to be broad, to protect workers who make internal complaints or assert their rights, and to deter, and remedy interference with DOL investigations.

The DOL also added a new 29 C.F.R. § 5.18, which establishes remedies for violations of the new anti-retaliation provisions. The DOL stated that:

> Make-whole relief and remedial actions under this proposed provision were intended to restore the worker subjected to the violation to the position, both economically and in terms of work or employment status (*e.g.*, seniority, leave balances, health insurance coverage, 401(k) contributions, etc.), that the worker would have occupied had the violation never taken place.

The sanctions available to the DOL under 29 C.F.R. § 5.18 are extensive, and include:

- Award of back pay and benefits denied or lost by reason of the violation;
- Award of other actual monetary losses or compensatory damages sustained as a result of the violation;
- Interest on back pay or other monetary relief from the date of the loss;
- Appropriate equitable or other relief such as reinstatement or promotion;
- Expungement of warnings, reprimands, or derogatory references;
- Mandatory provision of a neutral employment reference; and
- Posting of notices that the contractor or subcontractor agrees to comply with the DBRA anti-retaliation requirements.

The new 29 C.F.R. § 5.18 states:

> 5.18 Remedies for retaliation.
>
> (a) *Administrator request to remedy violation.* When the Administrator finds that any person has discriminated in any way against any worker or job applicant in violation of § 5.5(a)(11) or (b)(5), or caused any person to discriminate in any way

against any worker or job applicant in violation of § 5.5(a)(11) or (b)(5), the Administrator will notify the person, any contractors for whom the person worked or on whose behalf the person acted, and any upper tier contractors, as well as the relevant contracting agency(ies) of the discrimination and request that the person and any contractors for whom the person worked or on whose behalf the person acted remedy the violation.

(b) *Administrator directive to remedy violation and provide make-whole relief.* If the person and any contractors for whom the person worked or on whose behalf the person acted do not remedy the violation, the Administrator in the notification of violation findings issued under § 5.11 or § 5.12 will direct the person and any contractors for whom the person worked or on whose behalf the person acted to provide appropriate make-whole relief to affected worker(s) and job applicant(s) or take appropriate remedial action, or both, to correct the violation, and will specify the particular relief and remedial actions to be taken.

(c) *Examples of available make-whole relief and remedial actions.* Such relief and remedial actions may include, but are not limited to, employment, reinstatement, front pay in lieu of reinstatement, and promotion, together with back pay and interest; compensatory damages; restoration of the terms, conditions, and privileges of the worker's employment or former employment; the expungement of warnings, reprimands, or derogatory references; the provision of a neutral employment reference; and the posting of a notice to workers that the contractor or subcontractor agrees to comply with the Davis-Bacon Act and Related Acts anti-retaliation requirements.

Debarment Regulations

The regulations implementing the Davis-Bacon Act and the other statutes applying the Davis-Bacon Act requirements currently reflect different standards for debarment. Since 1935, the Davis-Bacon Act has mandated 3-year debarment "of persons . . . found to have *disregarded their obligations to employees and subcontractors."*40 U.S.C. 3144(b) (emphasis added); *see also* 29 CFR 5.12(a)(2) (setting forth the Davis-Bacon Act's "disregard of obligations" standard). In contrast, implementing regulations under the Related Acts have, since 1951, imposed a heightened standard for debarment for violations under the Related Acts, providing that "any contractor or subcontractor . . . found . . . to be in *aggravated or willful violation of the labor standards provisions"* of any Related Act will be debarred "for a period not to exceed 3 years." 29 CFR 5.12(a)(1) (emphasis added).

To harmonize the Davis-Bacon Act and related statutes debarment-related regulations, the DOL made a number of revisions to the debarment regulations to promote consistent enforcement and clarify the debarment standards and procedures. Specifically, the DOL made five changes to the Related Act debarment regulations so that they mirror the provisions governing Davis-Bacon Act debarment.

Debarment Standard

First, the DOL adopted the Davis-Bacon Act statutory debarment standard—*disregard of obligations to employees or subcontractors*—for all debarment cases, thus eliminating the regulatory "aggravated or willful" debarment standard used by other statutes in applying the Davis-Bacon Act. Because the Davis-Bacon Act and the other statutes applying the Davis-Bacon Act provide for the same labor standard protections, the DOL concluded that there is "no apparent need for a different level of culpability for Related Acts debarment than for DBA debarment." Notably, case law applying the DBA "disregard of obligations" debarment standard will now also apply to debarment determinations under all other statutes applying the Davis-Bacon Act.

Revisions to the debarment standard are reflected in the reorganized 29 C.F.R. § 5.12(a).

Length of Debarment Period

The DOL revised 29 C.F.R. § 5.12(a)(1) and (2) to make 3-year debarment mandatory under both the Davis-Bacon Act and the other statutes applying the Davis-Bacon Act. Additionally, the DOL eliminated the provision at 29 C.F.R. § 5.12(c) that allows for the possibility of early removal from the debarment list for Related Acts contractors and subcontractors.

Debarment of Responsible Officers

Revisions to 29 C.F.R. § 5.12 also expressly state that responsible officers of contractors and subcontractors may be debarred if they disregard obligations to workers or subcontractors. The DOL explains that the purpose of debarring individuals along with the entities in which they are, for example, owners, officers, or managers is to close a loophole where such individuals could otherwise continue to receive Davis-Bacon contracts by forming or controlling another entity that was not debarred.

Debarment of Other Entities

The DOL also revised 29 C.F.R. § 5.12(a)(1) to state that, when appropriate, "any firm, corporation, partnership, or association in which such contractor, subcontractor, or responsible officer has an *interest*" must be debarred under the Related Acts, as well as the Davis-Bacon Act.

Other regulations apply a "substantial interest" standard, so this revision creates uniformity by clarifying that under the Davis-Bacon Act regulations, entities in which debarred entities or individuals have an "interest" may be debarred.

Debarment Scope

Finally, the DOL revised the regulatory language specifying the scope of debarment under other statutes that apply the Davis-Bacon Act so that it mirrors the language specifying the scope of Davis-Bacon Act debarment set forth in the current 29 C.F.R. 5.12(a)(2).

In the revised 29 C.F.R. § 5.12(a)(1), under other statutes that apply the Davis-Bacon Act, as well as Davis-Bacon Act cases, any debarred contractor, subcontractor, or responsible officer would be barred for three years from "[being] awarded any contract or subcontract of the United States or

the District of Columbia and any contract or subcontract subject to the labor standards provisions of any of the statutes referenced by § 5.1."

REVISIONS TO THE PROCESS FOR SETTING THE PREVAILING WAGE

The DOL made several changes to how it will calculate and determine the prevailing wage. While the DOL believes these process changes will not, by themselves, result in increases in the prevailing wage rates, the changes will likely result in higher wages being used in the calculation of prevailing wage rates.

Definition of Prevailing Wage Revised to Use the Wages Paid to the Greatest Number of Laborers, Provided That Such Greatest Number Constitutes at Least 30 Percent of Those Employed.

The Davis-Bacon Act require laborers and mechanics on covered projects to be paid a prevailing wage as set by the DOL, but the statutes do not define the term "prevailing." Instead, the DOL issues wage determinations for specific geographic areas, defining what constitutes the "prevailing wage" for that area. The DOL's regulations, at 29 C.F.R. § 1.2, describe how the DOL determines the "prevailing wage" for a particular locality.

Under the final rule, the DOL revised the definition of the "prevailing wage" at 29 C.F.R. § 1.2 to mean:

> (1) The wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question;
>
> (2) If the same wage is not paid to a majority of those employed in the classification, the prevailing wage will be the wage paid to the greatest number, provided that such greatest number constitutes at least 30 percent of those employed; or
>
> (3) If no wage rate is paid to 30 percent or more of those so employed, the prevailing wage will be the average of the wages paid to those employed in the classification, weighted by the total employed in the classification.

This is a change from the method the DOL had been using to determining the prevailing wage. In 1982, the DOL adopted a methodology for determining the "prevailing wage" that did not include the second step in the methodology described above. That is, the DOL's methodology required only two steps: first identifying if there was a wage rate paid to more than 50 percent of workers, and then, if not, relying on a weighted average of all the wage rates paid.

This change may impact the prevailing wage determinations. Under the DOL's current rules, the majority of prevailing wages are determined through the use of the average of the wages paid to those employed in the classification, weighted by the total employed in the classification. This means that all wages paid in a classification are considered, on a weighted basis regardless of the

number of laborers paid the wage. Under the new rule, the prevailing wage will be the wage paid to the greatest number of laborers, provided that such greatest number constitutes at least 30 percent of those employed. This means that a wage rate paid to 40 percent of the laborers in a classification will be used as the prevailing wage, whereas, before, those rates would have been factored into the calculation, but would not have controlled the prevailing wage.

The DOL described the process for determining the prevailing rate as follows:

> In the three-step process, the first step is to adopt the majority rate if there is one. Under both the proposed three-step process and the current majority-only rule, any wage rate that is paid to a majority of workers would be identified as prevailing. Under either method, the weighted average will be used whenever there is no wage rate that is paid to more than 30 percent of employees in the survey response. The difference between the current majority process and the three-step methodology is solely in how a wage rate is determined when there is no majority, but there is a significant plurality wage rate paid to between 30 and 50 percent of workers. In that circumstance, the current "majority" rule uses averages instead of the rate that is actually paid to that significant plurality of the survey population. This is true, for example, even where the same wage rate is paid to 45 percent of workers and no other rate is paid to as high a percentage of workers. In such circumstances, the Department believes that a wage rate paid to between 30 and 50 percent of workers—instead of an average rate that may be actually paid to few workers or none at all—is more of a "prevailing" wage rate.

The DOL believes that this change will not cause a meaningful increase in construction costs:

> After considering the available data, and assuming for the purposes of this discussion that costs are in fact a permissible consideration in defining the term "prevailing wage," the Department is not persuaded that returning to the 30 percent threshold will cause a meaningful increase in Federal construction costs. Based on the Department's demonstration in the economic analysis of what the prevailing wage would be after applying the 30-percent threshold to a sample of recently published prevailing wage rates, the Department found no clear evidence of a systematic increase in the prevailing wage sufficient to affect prices across the economy. The illustrative analysis in section V.D. shows returning to the 30-percent rule will significantly reduce the reliance on the weighted average method to produce prevailing wage rates. Applying the 30-percent threshold, some prevailing wage determinations may increase and others may decrease, but the magnitude of these changes will, overall, be negligible. Even where wage determinations may increase, the Department is persuaded by recent

> peer-reviewed research, which generally has not found a significant effect from wage increases related to prevailing wage requirements on the total construction costs of public works project.

Use of Variable Rates That Are Functionally Equivalent in Establishing the Prevailing Wage

The DOL amended 29 C.F.R. § 1.3, which sets forth procedures by which the DOL obtains and compiles wage rate information, to include a new paragraph at 29 C.F.R. § 1.3(e) that permits the DOL to count wage rates together—for the purpose of determining the prevailing wage—if the rates are "functionally equivalent" and the variation can be explained by a collective bargaining agreements (CBA) or the written policy of a contractor. The revised regulation states:

> In determining the prevailing wage, the Administrator may treat variable wage rates paid by a contractor or contractors to workers within the same classification as the same wage where the pay rates are functionally equivalent, as explained by one or more collective bargaining agreements or written policies otherwise maintained by a contractor or contractors.

The DOL explained that this change is intended "to ensure that prevailing wage rates reflect wage rates paid for the same underlying work, and do not instead give undue weight to artificial differences that can be explained because workers are being compensated for something other than the underlying work."

For example, where workers perform work under the same labor classification for the same contractor or under the same CBA on projects in the same geographical area being surveyed and get paid different wages based on the time of day that they performed work—in other words, a night premium— revised 29 C.F.R. § 1.3(e) authorizes the DOL to count the normal and night-premium wage rates as the "same wage" rates for the purposes of calculating the prevailing wage rate. Other examples of potential "functional equivalency" include variations in wages due to "escalator clauses" in CBAs or due to "zone rates" for work on projects in different zones covered by the same CBA. The DOL does not intend for the functional equivalence concept to apply to situations where wage differentials are attributable to fundamentally different underlying work that requires different skills, or to differences in construction type.

The addition of 29 C.F.R. § 1.3(e) responds to the Administrative Review Board's (ARB) 2006 decision in the matter of *Mistick Construction & Assoc. Builders & Contractors of Western Penn., Inc.*, ARB No. 04–051, 2006 WL 861357, at *5–7. In *Mistick*, the ARB strictly interpreted the regulatory language of § 1.2(a) and held that, with the exception of escalator clauses, the DOL could not consider variable rates under a CBA to be the "same wage" under § 1.2(a) as the regulation was written. *Id.* As a result, if no "same wage" prevailed under the majority rule for a given classification, the DOL would have to use the fallback weighted average to determine the prevailing wage. *Id.* at * 7.

The *Mistick* decision contributed to the increased use of weighted average rates—a response that the DOL intends to abate through the addition of the functional equivalency concept of 29 C.F.R. § 1.3(e).

Definition of the Term "Area" When Calculating the Prevailing Wage

The term "area" describes the relevant geographic units that the DOL uses to determine the prevailing wage rates that laborers and mechanics must, at minimum, receive on covered projects. Therefore, the definition of "area" has consequences for both how the DOL gathers wage rate information and how it calculates prevailing wages.

Under the current regulations, "area" is defined in 29 C.F.R. § 1.2(b) as "the city, town, village, county or other civil subdivision of the State in which the work is to be performed." In practice, the DOL generally uses the county as the default area for a wage determination, and it will normally gather wage survey data for each county and carry out the three-step process for each classification of worker and construction type in that county.

The DOL retained the core definition of "area" as is currently written; however, it also adopted two limited additions to the definition of "area" to (1) clarify the definition for projects spanning multiple counties and (2) address state highway districts specifically.

Multi-County Project Wage Determinations

Under current DOL rules, the DOL will issue wage determinations for each county, such that if a construction project encompasses multiple counties, a laborer's wage rate will change based on which county in which they are working, even if they are working on the same project. DOL is revising the definition of "area" in 29 C.F.R. § 1.2 to permit the DOL to issue a single wage determination for a single project that will apply to that entire project, even if the project encompasses multiple counties. This will permit contractors to pay a single wage rate to workers on the project, even if they are working in different counties. The project wage determination will be based on the prevailing rate in each of the counties included in the project:

> Thus, if a multi-county area is used, then the wage data from all counties where the project will take place would be combined together before the Department determines whether there is a modal wage rate that prevails for each classification and construction type.

Notably, the DOL did not make the use of a multi-county wage determination mandatory; it is only an option for the DOL:

> Accordingly, the Department is disinclined to make multi-county areas mandatory for any multi-county project wage determination or to make them available as a matter of course at the request of interested parties other than the contracting agency. Instead, the final rule adopts the language as proposed, which allows the Department to use multi-county areas for multi-county project wage determinations but does not require their use…. Thus, as LIUNA

> noted, a multi-county area may be inappropriate for a classification of workers on a project wage determination if it would result in the use of an average rate where existing individual county wage determinations would otherwise identify prevailing wage rates under the Department's preferred modal methodology. Similarly, a single multi-county area for certain classifications of workers on a project wage determination might be inconsistent with the purpose of the statute if the procedure results in average wage rates that are substantially lower than the prevailing wage rate would be in one of the included counties under the default general wage determination.

State Highway Districts

The DOL also revised the definition of "area" in 29 C.F.R. § 1.2 to allow the use of State highway districts or similar transportation subdivisions as the relevant wage determination area for highway projects. The DOL explained that:

> The use of State highway districts or similar subdivisions as the areas for highway project wage determinations has the potential to reduce burdens and streamline highway projects that may cross county lines. These projects otherwise will require the use of multiple wage determinations for the same classification of workers and may often require the same individual workers to be paid different rates for doing the same work on different parts of the project.

As is the case with the use of multi-county wage determinations, the DOL has the option to use State highway districts as the basis for a wage determination but is not required to do so:

> the proposed language does not make it mandatory for the Department to use State highway districts as "areas" for highway projects, and instead gives the Department discretion to use them where they are appropriate. Relevant here, the Federal-Aid Highway Act of 1956 (FAHA), one of the Related Acts, uses the term "immediate locality" instead of "civil subdivision" for identifying the appropriate geographic area of a wage determination. 23 U.S.C. 113. The FAHA requires the application of prevailing wage rates in the immediate locality to be "in accordance with" the DBA, *id.*, and, as noted above, WHD has long applied these alternative definitions of area in the Related Acts in a manner consistent with the "civil subdivision" language in the original Act. The FAHA "locality" language, however, is helpful guidance for determining whether certain State highway districts, while within the broadest meaning of "civil subdivision of a State," may be too large to be used as the default areas for general wage determinations.

> Similarly, it would not be consistent with the purpose of the DBRA to use State highway districts as "areas" in a State where doing so would result in a significant increase in the use of average rates instead of modal prevailing wage rates on wage determinations. The Department therefore will need to take similar precautions with regard to the use of State highway districts as with multi-county project wage determinations.

"Metropolitan" and "Rural" Wage Data in Surrounding Counties

Prevailing wage determinations are generally done on a county-by-county basis and determined based on wage surveys of specific counties. The existing 29 C.F.R. § 1.7(b) prohibits the DOL from considering metropolitan wage rates when establishing the prevailing wage for a nearby rural county, and vice versa:

> If there has not been sufficient similar construction within the area in the past year to make a wage determination, wages paid on similar construction in surrounding counties may be considered, *Provided* That **projects in metropolitan counties may not be used as a source of data for a wage determination in a rural county**, and **projects in rural counties may not be used as a source of data for a wage determination for a metropolitan county**.

The DOL eliminated the language in 29 C.F.R. § 1.7(b) barring the consideration of metropolitan and rural wage data at the surrounding-counties level. The DOL explained that:

> By excluding a metropolitan county's wage rates from consideration in a determination for a bordering rural county, the strict ban implemented in the 1981–1982 rulemaking disregarded the potential for projects in neighboring counties to compete for the same supply of construction workers and be in the same local construction labor market. In many cases, the workers working on a metropolitan county's projects may themselves live across the county line in a neighboring rural county and commute to the metropolitan projects. In such cases, under the current bar, the Department cannot use the wage rates of these workers to determine the prevailing wage rate for projects in the rural county in which they live, even where there is otherwise no data from that rural county to rely on. Instead, WHD would import wage rates from other "rural"-designated counties, potentially somewhere far across the State. As the Department noted in the NPRM, this practice can result in Davis-Bacon wage rates that are lower than the wage rates that actually prevail in a cross-county metropolitan-rural labor market.

Instead, the DOL revised the regulations to permit the DOL to analyze data and other evidence on a state-by-state basis to determine appropriate county groupings. The DOL explained that this change was intended to give it flexibility in cases where there is insufficient wage information at the individual county level:

> There are two reasons why, as a practical matter, the Department will "generally" not combine metropolitan and rural data under the current proposal. First, aside

> from the exceptions of multi-county projects and highway projects described above, no cross-consideration will occur for any county (rural or metropolitan) for which a survey results in sufficient current wage data to make a wage determination. Second, even when there is no sufficient current wage data in a rural county, the Department will generally not need to combine the available rural wage data with metropolitan data as part of the surrounding-counties grouping. For rural counties surrounded by other rural counties, the Department will usually look only to these neighboring rural counties as part of the surrounding-counties grouping. The only cross-consideration at the surrounding-counties grouping will generally be where a "rural county" shares a border with a metropolitan county and reasonably can be considered to be part of the local construction labor market.

Defining "Surrounding Counties"

The DOL declined to provide further clarity or definition to the term "surrounding counties" in 29 C.F.R. § 1.7(b)'s revised language that "[i]f sufficient current wage data is not available from projects within the county to make a wage determination, wages paid on similar construction in **surrounding counties** may be considered." The DOL explained that it did not believe additional definitions were necessary, and that the DOL retained the discretion to determine what constitutes a "surrounding county":

> The Department has elected to retain the reference to "surrounding counties" without further definition in the regulatory text, given that the term already has accrued meaning through litigation in the ARB. *See Chesapeake Housing*, ARB No. 12–010, 2013 WL 5872049. As noted, a surrounding-counties grouping generally should be a contiguous group of counties that approximate a local labor market, either through the adoption of OMB designations or on the basis of some other appropriate evidence of economic relationship between the included counties…. Accordingly, while the Department has identified certain potentially appropriate types of surrounding-counties groupings (for example, following the lines of OMB "combined statistical areas"), there may be other methodologies to identify whether counties are reasonably within the same local construction labor market and thus can be appropriately grouped together as "surrounding counties." For example, as the Department noted in the NPRM, the Department could rely on county groupings in use by State governments for state prevailing wage laws, as long as they are contiguous county groupings that reasonably can be characterized as "surrounding counties." Notwithstanding this flexibility, it will generally not be appropriate to include noncontiguous counties within a surrounding-counties grouping; all of the counties within a first-level grouping should border at least one other county in the grouping.

Use of Survey Data from Federal Projects to Determine Prevailing Wages

29 C.F.R. § 1.3(d) currently limits the use of such wage determinations on other Federal projects to establish prevailing rates unless there are circumstances in which "there is insufficient wage data to determine the prevailing wages in the absence of such data." The DOL considered revising

this regulation to expand the situations in which Federal project data could be used to make determinations, but ultimately concluded that it would not change this restriction:

> After considering the comments supporting and opposing a regulatory change, the Department has decided not to revise § 1.3(d) and to continue to consider submitted Federal project data in all instances when calculating prevailing wage rates for heavy and highway construction and, in calculating prevailing wage rates for building and residential construction, to consider Federal project data whenever "it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data." 29 CFR 1.3(d). As the current regulatory text reflects, § 1.3(d) does not erect an absolute barrier to considering Federal project data when determining prevailing wage rates for building and residential construction, but rather provides that Federal project data will be used whenever the Department has determined that there is insufficient private data to determine such prevailing rates. The Department therefore will continue to solicit and receive Federal project data in all Davis-Bacon wage surveys of building and residential construction, and, consistent with § 1.3(d) and existing practice, will use such data in determining prevailing wage rates for those categories of construction whenever insufficient private data has been received.

Adoption of State/Local Prevailing Wage Rates

The DOL added new paragraphs (g), (h), (i), and (j) to 29 C.F.R. § 1.3 to permit the WHD, under specified circumstances, to determine Davis-Bacon wage rates by adopting prevailing wage rates set by State and local governments. These amendments were largely adopted in response to a 2019 report by the Office of Inspector General, which expressed concern about the high number of out-of-date Davis-Bacon wage-rates, noting that at the time, twenty-six states and the District of Columbia had their own prevailing wage laws. The report recommended that the DOL "should determine whether it would be statutorily permissible and programmatically appropriate to adopt [S]tate or local wage rates other than those for highway construction."

Under the new 29 C.F.R. § 1.3(h)**,** the DOL is permitted to adopt State or local prevailing wage rates only if the Administrator, after reviewing the rate and the processes used to derive the rate, concludes that they meet the following criteria:

- The State or local government must set prevailing wage rates, and collect relevant data, using a survey or other process that generally is open to full participation by all interested parties. State or local processes must reflect a good-faith effort to derive a wage that prevails for similar workers on similar projects within the relevant geographic area within the meaning of the Davis-Bacon Act statutory provisions.

- State or local wage rates must reflect both a basic hourly rate of pay as well as any locally prevailing bona fide fringe benefits; each of these can be calculated separately. *See* 40 U.S.C. 3141(2)(B); 29 C.F.R. 5.20 (requiring that a prevailing wage rate under the Davis-Bacon Act must include fringe benefits); 29 C.F.R. 5.25(a) (obligating the Secretary to "make a separate finding of the rate of contribution or cost of fringe benefits.").

- To ensure that the classification system does not result in lower wages than are appropriate, the State or local government must classify laborers and mechanics in a manner that is recognized within the field of construction.

- The State or local government's criteria for setting prevailing wage rates must be substantially similar to those the Administrator uses in making wage determinations under 29 C.F.R. part 1.

The new 29 C.F.R. § 1.3(g) permits the DOL to adopt State or local wage rates with or without modification. The DOL explained that this provision was intended to encompass situations where the DOL reviews a State or local wage determination and determines that although the State or local wage determination might not satisfy the above criteria as initially submitted, it would satisfy those criteria with certain modifications.

Under the new 29 C.F.R. § 1.3(i), the DOL is required to obtain the wage rates and any relevant supporting documentation and data from the State or local entity before adopting a State or local government prevailing wage rate.

Finally, the new 29 C.F.R. § 1.3(j) provides that nothing in the new paragraphs precludes the Administrator from considering State or local prevailing wage rates in a more holistic fashion, consistent with § 1.3(b)(3), or from considering information obtained from State highway departments, consistent with § 1.3(b)(4), as part of the Administrator's process of making prevailing wage determinations under 29 C.F.R. part 1.

Report of Agency Construction Programs

29 C.F.R. § 1.4 currently provides that, to the extent practicable, agencies using wage determinations under the Davis-Bacon Act must submit annual reports to the DOL outlining proposed construction programs for the coming year. The intent is to assist DOL in making decisions regarding when to survey wages for particular types of construction in a particular locality.

Due to a lack of consistent submission of these reports by agencies, the DOL revised 29 C.F.R. § 1.4 to remove the language in the regulation that currently allows agencies to submit reports only "to the extent practicable." Instead, 29 C.F.R. § 1.4 will require Federal agencies to submit the construction reports, including exercise of options of current construction contracts. The DOL's goal is to require agencies to more consistently submit these reports to the DOL.

Frequently Conformed Rates

When developing wage determinations, the DOL generally determines prevailing wage rates for laborers based on wage survey data that is provided voluntarily by contractors and other invested parties in a given area. Thus, when the DOL receives robust participation in its wage surveys, it is able to publish wage determinations that list prevailing wage rates for numerous construction classifications (such as painters, bricklayers, plumbers, electrician, etc.). Where survey participation is more limited, however, the DOL often lacks data necessary to publish prevailing wage rates for various classifications. In such instances, 29 CFR 5.5(a)(1)(ii)(A) provides that the

missing classification and an appropriate wage rate must be added to the wage determination on a contract-specific basis through a process known as "conformance." The DOL explained:

> WHD typically receives thousands of conformance requests each year. In some instances, including instances where contractors are unaware that the work falls within the scope of work performed by an established classification on the wage determination, WHD receives conformance requests where conformance is not appropriate because the wage determination already contains a classification that performs the work of the proposed classification. In other instances, however, conformance is necessary because the applicable wage determination does not contain all of the classifications that are necessary to complete the project. The need for conformances due to the absence of necessary classifications on wage determinations reduces certainty for prospective contractors in the bidding process, who may be unsure of what wage rate must be paid to laborers and mechanics performing work on the project, and taxes WHD's resources. Such uncertainty may cause contractors to underbid on construction projects and subsequently pay less than the required prevailing wage rates to workers.

To address those issues—and to improve clarity and efficiency in the conformance process—the DOL revised 29 CFR 1.3 and 5.5(a)(1) to expressly authorize the DOL to list classifications and corresponding wage and fringe benefit rates on wage determinations even when the DOL has received insufficient data through its wage survey process. The DOL may list such classifications and wage rate data provided that:

> (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and (2) The classification is used in the area by the construction industry; and (3) The proposed wage rate [for the classification], including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

See 29 CFR 5.5(a)(1)(ii)(A); 1.3(f). In other words, for a classification for which conformance requests are regularly submitted, and for which the DOL received insufficient data through its wage survey process, the DOL is expressly authorized to essentially "pre-approve" certain conformed classifications and wage rates, thus providing contracting agencies, contractors, and workers with advance notice of the minimum wage and fringe benefits required to be paid for those classifications of work.

Conformance remains available for interested parties with questions or concerns about how particular work should be classified and remains required for circumstances where any needed classifications are not listed on the wage determination.

The amendments in line with the changes to "frequently conformed rates" include:

- Adding include a new paragraph at 29 C.F.R. § 1.3(f) with instructions relating to the listing of rates for frequently conformed classifications.

- Adding language to 29 C.F.R. § 5.5(a)(1) to state that the conformance process may not be used to split or subdivide classifications listed in the wage determination, and to clarify that conformance is appropriate only where the work which a laborer or mechanic performs under the contract is not within the scope of any classification listed on the wage determination, regardless of job title.

- Non-substantive revisions to 29 C.F.R. § 5.5(a)(1)(ii)(B) and (C) that more clearly describe the conformance request process, including by providing that contracting officers should submit the required conformance request information to WHD via email using a specified WHD email address.

- Adding language to the contract clauses at 29 C.F.R. § 5.5(a)(1)(vi), (a)(6), and (b)(4) requiring the payment of interest on any underpayment of wages or monetary relief required by the contract.

Reconsideration by the Administrator of Wage Determinations

Historically, 29 C.F.R. § 1.8 provided:

> Any interested person may seek reconsideration of a wage determination issued under this part or of a decision of the [WHD] Administrator regarding application of a wage determination. Such a request for reconsideration shall be in writing accompanied by a full statement of the interested person's views and any supporting wage data or other pertinent information. The Administrator will respond within 30 days of receipt thereof, or will notify the requestor within the 30-day period that additional time is necessary.

In practice, when parties seek rulings, interpretations, or decisions from the Administrator regarding the Davis-Bacon labor standards, the DOL often has such decisions made in the first instance by an authorized representative. The DOL's revisions to the reconsideration process explicitly provide procedures in line with that practice.

First, the DOL amended 29 C.F.R. § 1.8 to provide that if a decision for which reconsideration is sought was made by an authorized representative of the Administrator, the interested party seeking reconsideration may send such a request to the Administrator. Requests for consideration generally must be submitted within 30 days from the date a decision is issued; however, that time period may be extended for "good cause" at the Administrator's discretion upon a request by the interested party.

Second, the DOL amended 29 C.F.R. § 5.13 to similarly provide that the Administrator's reconsideration of rulings and interpretations may be issued by an authorized representative.

Process for Using Wage Determinations

The DOL made several revisions to 29 C.F.R. § 1.5 to clarify certain rules to be consistent with "longstanding Department practice and subregulatory guidance" in connection with the publication and use of prevailing wage determinations

Publication of General Wage Determinations and Procedure for Requesting Project Wage Determinations

29 C.F.R. § 1.5(a): Added language to explain that a general wage determination contains, among other information, a list of wage rates determined to be prevailing for various classifications of laborers and mechanics for specified type(s) of construction in a given area.

29 C.F.R. § 1.5(b): Added language to explain circumstances under which an agency may request a project wage determination, namely, where

> (1) the project involves work in more than one county and will employ workers who may work in more than one county, to reflect the DOL's revision to the definition of "area" in 29 C.F.R.§ 1.2 that permits the issuance of project wage determinations for multicounty projects where appropriate;
>
> (2) there is no general wage determination in effect for the relevant area and type of construction for an upcoming project; or
>
> (3) all or virtually all of the work on a contract will be performed by one or more classifications that are not listed in the general wage determination that would otherwise apply, and contract award or bid opening has not yet taken place.

The addition of the last two circumstances was made to reflect the DOL's existing practice.

The DOL also revised 29 C.F.R. § 1.5(b) to address the means by which agencies request wage determinations and the information that must be submitted with those requests.

Incorporation of Multiple Wage Determinations into a Contract

The DOL adopted revisions to 29 C.F.R. § 1.6(b) to clarify when contracting agencies must incorporate multiple wage determinations into a contract. The language states that when a construction contract includes work in more than one "area" (as the term is defined in 29 C.F.R. § 1.2), and no multi-county project wage determination has been obtained (as contemplated by the revisions to 29 C.F.R. § 1.2), the applicable wage determination for each area must be incorporated into the contract so that all workers on the project are paid the wages that prevail in their respective areas, consistent with the Davis-Bacon Act.

The DOL also adopted language stating that when a construction contract includes work in more than one "type of construction" (as that term is defined in propose amendments to 29 C.F.R. § 1.2), the contracting agency must incorporate the applicable wage determination for each type of construction where the total work in that type of construction is substantial.

Finally, the DOL decided to continue interpreting the meaning of "substantial" in subregulatory guidance in according with longstanding practice.

Clarification of Responsibilities of Contracting Agencies, Contractors, and Subcontractors Regarding Determination of Applicable Wage Determination

The DOL added language to 29 C.F.R. § 1.6(b)(1) to state that contracting agencies are responsible for making the initial determination of the appropriate wage determination(s) for a project:

> 29 C.F.R. § 1.6(b)(1): Contracting agencies are responsible for making the initial determination of the appropriate wage determination(s) for a project and for ensuring that the appropriate wage determination(s) are incorporated in bid solicitations and contract specifications and that inapplicable wage determinations are not incorporated. When a contract involves construction in more than one area, and no multi-county project wage determination has been obtained, the solicitation and contract must incorporate the applicable wage determination for each area. When a contract involves more than one type of construction, the solicitation and contract must incorporate the applicable wage determination for each type of construction involved that is anticipated to be substantial. The contracting agency is responsible for designating the specific work to which each incorporated wage determination applies.

The DOL also revised 29 C.F.R.§ 1.6(b)(2) to clarify that contractors and subcontractors have an affirmative obligation to ensure that wages are paid to laborers and mechanics in compliance with the Davis-Bacon Act labor standards:

> 29 C.F.R. § 1.6(b)(2): The contractor or subcontractor has an affirmative obligation to ensure that its pay practices are in compliance with the Davis-Bacon Act labor standards.

Consideration of Area Practice in Resolving Questions about Wage Determinations

The DOL also adopted revisions to 29 C.F.R. § 1.6(b), which currently states that the Administrator "shall give foremost consideration to area practice" in resolving questions about "wage rate schedules." Explaining the need for revision, the DOL noted that the current language has "created unnecessary confusion because stakeholders have at times interpreted it as precluding the DOL from considering factors other than area practice when resolving questions about wage determinations." In particular, the directive to give "foremost consideration" to area practice was in tension with the DOL's longstanding recognition that when "it is clear from the nature of the project itself in a construction sense that it is to be categorized" as either building, residential, heavy, or highway construction, "it is not necessary to resort to an area practice survey" to determine the proper category of construction.

The revised 29 C.F.R § 1.6(b) resolves that tension by clarifying that, while the DOL should continue considering area practice, the DOL may consider other relevant factors, particularly the nature of the project in a construction sense.

Learn more about this and other related topics here.

This article summarizes aspects of the law and does not constitute legal advice. For legal advice for your situation, you should contact an attorney.