Federal Court Invalidates Parts of the US DOL's Davis-Bacon Act (DBA) Rule – Particularly Impacting the Transportation of Supplies & Materials

Labor & Employment Law Update

By Jeffrey Risch on July 10, 2024

On June 24, 2024, a federal district court judge enjoined parts of the United States Department of Labor's (US DOL's) August 23, 2023 prevailing wage rule that greatly expanded the definition of "construction" on federal prevailing wage projects. Such expansion of what constitutes covered "construction" work on federal prevailing wage projects was never contemplated by the actual federal prevailing law itself (the Davis-Bacon Act or DBA). In a fairly scathing rebuke of the US DOL's 2023 rule, the court found **"…[the US DOL]… usurped Congress' law-making power and attempted substantive amendments to the DBA. Presidents and their agencies act ultra vires and do violence to the Constitution when they attempt to unilaterally amend Acts of Congress to suit their policy choices…"** Interestingly, the court's decision came *before* the US Supreme Court eliminated the *Chevron* deference doctrine.

Federal projects that involve construction work in excess of $2,000, and involve the federal government as the direct funding source, will trigger obligations under the DBA. Historically, pursuant to the DBA, the transportation of supplies and material onto or away from a federal prevailing wage project did not trigger prevailing wage obligations. Additionally, the DBA's requirements were never deemed applicable to work performed merely as a material supplier (i.e. aggregate suppliers) – regardless if they were also performing actual prevailing work on the applicable project. Further, subcontractors were not liable for any DBA violations if their underlying agreement never expressly included reference to the application of the DBA to the project. The US DOL's 2023 rule essentially reversed each of these decades-long principles.

However, the court's June 24 order invalidates the US DOL's 2023 rule, in part, as follows:

- Truck drivers who are simply transporting supplies and material onto or from a project are not subject to the DBA's requirements.
- Delivering and unloading product onto a prevailing wage construction project by the supplier is not deemed covered work under the DBA, even if that supplier also happens to be performing covered work on the same project as a construction contractor.
- DBA does not apply to a federal construction contract simply by "operation of law." Therefore, contractors are not liable for penalties and violations if they don't receive actual written notice that the project is covered by the DBA. In other words, liability by "operation of law" is not valid and the federal government must be certain to include specific reference to the application of the DBA in the underlying written contract.

Again, a lot of the US DOL's 2023 rule remains intact. But the current injunction is welcomed relief for many -- particularly those in the transportation and trucking industry and, of course, the taxpayers who are the ones actually funding federal construction projects.

Remember, prevailing wage laws vary greatly and are quite unique. It is imperative that those operating in the construction industry become intimately familiar with the plethora of state and federal prevailing wage mandates applicable to their operations. Every project should be closely reviewed, examined and understood -- on its own.