

More Legal Mandates & Changes Impacting the U.S. Construction Industry: Department of Labor's Updated Davis-Bacon & Related Acts FINAL RULE is Effective October 23, 2023

Labor & Employment Law Update

By Jeffrey Risch on September 19, 2023

Hold onto your hard hat! What you thought you knew about federal Davis-Bacon prevailing wage law is changing --- substantially changing decades of well-established rules, precedent and interpretations as to the applicability and scope of federal prevailing wage laws to construction projects and how contractors must comply with the legal mandates. Remember, federally funded projects that involve construction work in excess of \$2,000, will trigger Davis-Bacon obligations.

Under the new rule, "construction" is being greatly expanded in ways that will trigger federal prevailing wage obligations that were never contemplated before. Additionally, the prevailing wage rate (hourly base plus fringe benefits) will now be tied to the area-wide union collective bargaining agreement --- therefore, taxpayers should see about a 30% increase in labor costs tied to such projects from what they are now and what they will be under the new rule. Labor costs will also increase annually in ways that were not felt before through automatic rate escalators. And, while the new rule is aimed to assert union area-wide agreements into setting the prevailing wage rate, the U.S. DOL will rely solely on local union input on what is covered work, what trade/job classification should be performing specific tasks on a particular project, and what hourly rates and fringe benefits must be applied to the unique project.

Some of the more noteworthy highlights of the changes taking effect on October 23, 2023 include:

- Prevailing wage rates can now be set through the local area-wide union CBA (so long as the union makes up at least 30% of the work performed in the local area)

- Rates established in urban areas can be applied to rural areas where rate data is deemed by the U.S. DOL as “not sufficient”
- The U.S. DOL may adopt local or state prevailing wage determinations where and when the U.S. DOL thinks the local or state methodology is in line with the U.S. DOL’s methodology (this will likely revert to the rates established through the area-wide union contract)
- Automatic adjustments to rates can and will be made based on the U.S. Bureau of Labor Statistics Employment Cost Index data
- Transportation of supplies and material onto a project site (even by or through the supplier) may trigger prevailing wage obligations if the driver is on the site for more than a “de minimis” amount of time
- Off-site fabrication (aka shop work) may be subject to prevailing wage obligations if the work is solely dedicated to a Davis-Bacon job
- Green Energy Projects of various sorts will be subject to Davis-Bacon mandates (i.e. simple installation of solar panels, broadband and electric car chargers)
- Demolition work and related site preparation work will now be covered
- Installation of equipment into a building will fall under the Davis-Bacon
- Site and material surveyors will be deemed laborers (covered) and not professionals (who are not covered)
- Flagging work done off site will be deemed covered work
- Contractors working outside the locality in which their apprenticeship program is registered must follow the ratio and wage rate standards in the locality where the project is taking place --- unless there is not registered program in that outside locality
- Limits now placed on fringe benefit credits taken for contributions made to an apprenticeship program
- Requiring an annualization of fringe benefits (resulting in non-union contractors having to apply benefits over ALL hours worked vs. paying the applicable fringe benefits for the Davis-Bacon hours only)
- Self-funded insurance programs must be approved by the U.S. DOL in order to use such programs as a credit to meet the fringe benefit component (however, there is no approval needed for retirement plans that are defined contribution plans with 100% immediate vesting or for union pension plans)
- Subcontractors (in addition to the Prime) are now liable for penalties and violations (and, even if they receive no notice that Davis-Bacon applied to the project)
- Harsher debarment penalties and much easier for the U.S. DOL to debar contractors and primes from future Davis-Bacon projects
- New Anti-Retaliation provisions and related penalties

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- New paperwork and related reporting burdens
- More serious criminal penalties to seek and secure
- Interest to now accrue on any back wage assessment

The U.S. DOL has published a side-by-side comparison of the “old” rule vs. the “new” rule. Construction industry developers, financiers, contractors of all levels and associated vendors/suppliers should carefully review this summary available on the DOL website.

Remember, state prevailing wage laws (i.e. CA, IL, MI, OH, NY) vary greatly and are quite unique. What you know about CA prevailing wage law will not help you when complying with IL’s law and vice versa. Also, state prevailing wage compliance is much different than federal Davis-Bacon compliance. 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 and examined --- on its own --- as what may be required will likely be truly unique for that specific project.

The reality is that the current federal authorities are doing everything in their power to discourage non-union contractors from performing this work, while creating new standards that allows for crippling penalties for any contractor performing such work that draws the ire of the local unions. All contractors (union and non-union) really need to take note and have a solid understanding of their prevailing wage obligations on a project-by-project basis.

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