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ALERT

DOL's Davis-Bacon Act Overhaul Brings Significant Changes to Federal Construction Contracting

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WHAT: Over a year after its notice of proposed rulemaking, the U.S Department of Labor (DOL) published its Final Rule Updating the Davis-Bacon and Related Acts (DBRA) Regulations. The Final Rule spans hundreds of pages of changes to definitions, wage rate calculations, fringe benefits, wage determinations, and scope of coverage. With the first major revision to Davis-Bacon regulations in 40 years, DOL has reverted some regulatory requirements to prior approaches while updating other requirements to (in DOL's view) better match evolving construction practices.

WHEN: DOL announced the Final Rule by press release on August 8, 2023. As this alert went to press, the final rule was scheduled to appear in the Federal Register on August 23, 2023. If that date holds, then the Final Rule will take effect on October 22, 2023.

WHAT DOES IT MEAN FOR INDUSTRY: On the surface, these changes may appear minor and, in some cases (like with wage rates), years away from directly affecting any particular project. We have a less sanguine view. Under the Final Rule, compliance has grown more complicated; wages and costs will likely rise, and more risk has shifted onto contractors' shoulders. As many entities are now just starting to apply Davis-Bacon provisions under the Inflation Reduction Act, Bipartisan Infrastructure Law, and similar programs, the prospect of compliance challenges has only increased.

Updated Definitions

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The Final Rule revised several definitions that require careful attention from contractors. As examples:

- "Building or work" now includes solar panels, wind turbines, broadband installation, and installation of electric car chargers on the non-exhaustive list of construction activities. The Final Rule also clarified that "building or work" and "public building or public work" definitions can be met even when the construction activity involves only a portion of the building or work.
- "Construction, prosecution, completion, or repair" received additional language identifying the five types of activities that qualify as "covered transportation" under Davis-Bacon.
- Other revisions worthy of review include definitional changes to "material supplier" and "prime contractor," as well as changes that clarify Davis-Bacon's coverage of demolition and removal work.

Notably, DOL did pull back on changes it had proposed for expanding the "site of work" where Davis-Bacon covered work is performed. DOL finalized a more incremental change: If a significant portion of the building or work is constructed at a secondary construction site, that work will be covered by Davis-Bacon if such construction is for use specifically in the Davis-Bacon covered building or work, versus being manufactured or constructed for sale to the general public, and the secondary site is either established specifically for the contract or project or is dedicated exclusively (or nearly so) to the contract or project for a specific period of time. (The Final Rule also defines "significant portion" and "specific period of time" and offers guidance on when work performed at any adjacent or virtually adjacent dedicated support sites also would be Davis-Bacon covered). Finally, DOL also included examples of other work locations, such as permanent home offices and fabrication plants, that typically would not be included in the definition of "site of work."

More broadly, the Final Rule makes clear that contractors can be held responsible (including possible debarment) for a lower-tiered subcontractor's Davis-Bacon violations. The DOL adopts additional recordkeeping obligations, too. In addition to keeping information such as employee Social Security numbers for submission to DOL, contractors now will be required also to provide telephone numbers and email addresses upon request, and also keep all Davis-Bacon related documents for three years after the completion of the project.

Reinstating the '30-Percent Rule' for Prevailing Wages

DOL has redefined the term "prevailing wage." DOL returned to a three-step process for determining whether a wage is prevailing, with the so-called "30-percent rule" reinserted as the second step. From the Davis-Bacon's passage in 1935 until revisions in 1982, DOL followed a three-step process for determining if a wage is prevailing in an area:

- The wage rate is paid to a majority of workers in the classification;
- If no majority rate, then the wage rate paid to at least 30% of workers in the classification; and
- If no rate is paid to at least 30% of workers, then the weighted average rate in the classification.

In 1982, DOL eliminated the 30-percent rule, asserting that it did not account for 70% of the remaining workers in some cases and gave undue weight to collectively bargained rates.

The Final Rule reintroduces the 30-percent rule based on the belief that eliminating this step led to an overuse of average rates. According to DOL, use of weighted averages in wage determinations has more than doubled since 1982. Weighted averages now provide most prevailing wage rates. Finding such heavy use of weighted averages to be inconsistent with the term "prevailing" and the purpose of Davis-Bacon to protect local wage standards, the Final Rule revives the 30-percent rule with the stated goal of cutting the use of weighted averages in half.

Adopting Bureau of Labor Statistics Wage Escalators

The Final Rule adds a provision for regularly updating non-collectively bargained prevailing wage rates between DOL's wage surveys – which are so irregularly timed as to seem almost random. Indeed, many years tend to pass between Davis-Bacon wage surveys in a given area. Those wage rates can end up effectively frozen, diminishing the wage rates' purchasing power.

Under the Final Rule, the periodic updates will be based on total compensation data from the Bureau of Labor Statistics Employment Cost Index (ECI), which tracks both wages and benefits. (The Final Rule provides for using ECI's successor, if there ever is one.) The Final Rule notes that periodic updates of non-CBA rates is consistent with the regulatory text allowing wage determinations to "be modified from time to time to keep them current."

DOL will use a compensation growth rate based on the change in the ECI total compensation index for construction, extraction, fishing, and forestry occupations to adjust non-CBA rates published in 2001 or later. The rate updates will occur at most once every three years. DOL believes the more frequent wage updates will better fulfill Davis-Bacon's purpose to prevent wages on covered construction projects from falling below wages prevailing for similar work in the private sector.

Application by Operation of Law

It's long been established that Davis-Bacon obligations are not self-executing, but instead must be determined to apply to a contract (or other agreement). Now, thanks to the Final Rule, DOL can decide that a contract was incorrectly deemed not to be Davis-Bacon contract, then order that the contract be treated as having included those requirements since the beginning of performance. Contractors and subcontractors in this situation may find themselves facing instant backpay obligations and increases in go-forward costs. This change comes with the Final Rule's promise that contractors will be compensated for these cost increases, though of course DOL (in promulgating the Final Rule) will not be the agency tasked with paying, or refusing to pay, these unexpected cost increases.

Many contractors might initially question why this change is notable. It sounds like a regulatory version of the *Christian* doctrine, which reads into government contracts mandatory clauses of significant importance that were omitted. Court and Board decisions had been consistent, though, that labor-standards provisions are not

self-executing: If a contract does not have any provisions for Davis-Bacon (or the equivalent for service contracts, the Service Contract Act), the decisional law held that the provisions could not just be read into the contract. Now, the risk calculus has changed: Contractors could find Davis-Bacon obligations added to their contracts years into performance, with backpay owed as well, and a hazy-at-best path to recovery. If nothing else, this new burden on contractors only underscores our long-standing advice that contractors should always clarify with the contracting agency whether Davis-Bacon (or the Service Contract Act) applies whenever there's uncertainty about coverage.

Note: As the Final Rule's preamble notes in several places, two authors of this Wiley alert submitted comments in their own names on the proposed rule's operation-of-law terms.

Adding Fringe Benefit Annualization Requirements

The Final Rule adds a new paragraph to codify annualizing bona fide and unfunded fringe benefits. Annualization requires a contractor performing Davis-Bacon covered work to spread its fringe benefit contributions for a worker across hours worked on all projects, both Davis-Bacon and non-Davis-Bacon. The purpose is to keep contractors from applying fringe benefits provided for non-Davis-Bacon projects to the contractors' obligations on Davis-Bacon projects. DOL had provided for annualization through subregulatory guidance, but this is the first time the requirement has appeared in the regulations themselves.

The new rule does include a limited exception to the annualization requirement when: (i) the benefit provided is not continuous in nature; and (ii) the benefit does not compensate both private work and Davis-Bacon-covered work. This exception applies only when the plan has been submitted to DOL for review and approved, however.

Codifying Administrative Cost Restrictions

The Final Rule codifies the Wage and Hour Division's (WHD) policy that contractors cannot take Davis-Bacon credit for their own administrative expenses incurred administering their fringe benefit plans. The new rule divides administrative expenses into "creditable" and "noncreditable" costs.

"Noncreditable" costs are "[a] contractor's own administrative expenses incurred in connection with the provision of fringe benefits [that] are considered business expenses of the firm and are therefore not creditable towards the contractor's prevailing wage obligations, including when the contractor pays a third party to perform such tasks in whole or in part."

"Creditable" costs are "[t]he costs incurred by a contractor's insurance carrier, third-party trust fund, or other third-party administrator that are directly related to the administration and delivery of bona fide fringe benefits to the contractor's laborers and mechanics can be credited towards the contractor's obligations under a Davis-Bacon wage determination."

The Final Rule includes examples of the types of costs that typically fit into one category or the other, which may help given the frequency with which contractors encounter uncertainty about classifying these types of expenses.

Undoing the Separation of Metropolitan and Rural Wage Rates

DOL removed language that had barred considering wages from both metropolitan and rural areas when determining a prevailing wage rate. Under the previous rule, DOL could not use wage rates from a metropolitan county when determining the prevailing wage rate for a nearby rural county. Instead, DOL would apply wage rates only from other rural counties. The Final Rule explains that residents of the rural counties may work on projects in neighboring metropolitan counties, and so applying other rural counties' wages could result in a prevailing wage that it is lower than the actual rates prevailing in a metropolitan-rural labor market. DOL believes eliminating this separation could allow WHD to publish more rates at the surrounding-counties group level and publish more rates for more classifications when required to rely on statewide data.

Application of State or Local Prevailing Wage Rates

New paragraphs will allow DOL to adopt prevailing state and local wage rates as Davis-Bacon wage rates under certain circumstances. Four criteria must be met:

- 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;
- The state or local wage rate must reflect both a basic hourly rate of pay as well as any locally prevailing bona fide fringe benefits, which can be calculated separately;
- The state or local government must classify laborers and mechanics in a manner that is recognized within the field of construction; and
- The state or local government's criteria for setting prevailing wage rates must be substantially similar to those DOL uses for making wage determination under 29 CFR Part 1.

Under the new paragraphs, DOL must obtain wage rates and any relevant supporting documentation and data from the state or local entity. Even with these criteria now in place, under certain circumstances DOL will be able to adopt a state or local wage rate even if the process and rules the state or locality uses for wage determinations differ from DOL's.

Through these additions, DOL expects to reduce outdated Davis-Bacon wage rates and avoid performing wage surveys that duplicate those already performed by a state or locality.

Updating the Anti-Retaliation Provisions for Workers

DOL expanded the suite of remedies it can order when finding that a contractor or subcontractor has retaliated against workers. Under the current rules, DOL could debar contractors but not order relief akin to the remedies that might be expected in an employment-type matter, such as front pay, reinstatement, and neutral employment references. The Final Rule now provides for these types of remedies, for current or former

employees, in a variety of scenarios. The Final Rule also updates the standard Davis-Bacon poster to include anti-retaliation information.

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For contractors, the new anti-retaliation provisions perhaps sum up the Final Rule in a nutshell: a collection of seemingly small changes affecting performance issues, years away from possibly materializing but carrying significant increases in risk when and if they do.