
M E M O R A N D U M

**UNITED STATES DEPARTMENT OF LABOR
PROPOSES SUBSTANTIAL DAVIS BACON “UPDATE”**

Passed in 1931, the Davis Bacon Act requires that workers on federally funded public works projects be paid the prevailing area wage rates, which include certain fringe benefit rates. The scope of prevailing wage legislation has increased dramatically since 1931, and today there are 71 related laws linking prevailing wage obligations with federal construction spending.

In a 432-page Notice of Proposed Rulemaking released on Friday, March 18, 2022, the Department of Labor announced a substantial overhaul of Davis Bacon that would be the most significant expansion of Davis Bacon obligations since the Act was passed.

Davis Bacon has long been a political football, and the numerous new proposed rules will definitely tilt the playing field. The Department of Labor’s (“DOL”) announcement of new proposed rules pulls no punches, asserting that in some cases the last Davis Bacon rulemaking in 1983 was “mistaken” and indicating that the DOL “seeks to expand further on procedures that were introduced in that last major revision, or to propose new procedures.”

DOL has opened the proposed rulemaking to comments for a 60-day comment period for input on the new rules through May 17, 2022.

Found within the 400-plus pages of DOL comments and new proposed rules are a number of major changes to Davis Bacon:

I. The New Rules would expand the scope and coverage of Davis Bacon.

Although the proposed new rules contain many changes to Davis Bacon, the most significant changes are the proposed changes that would increase the scope and coverage of the Act.

A. Green energy projects will be explicitly covered.

The new rules explicitly include solar panels, wind turbines, broadband installations and the installation of electric car chargers on the list of construction activities covered by Davis Bacon, expanding the scope of “building or work” to clearly cover energy infrastructure and related work.

B. The New Rules would expand the coverage of modular work.

The new rules expand the scope of Davis Bacon to cover workers engaged in the construction of pre-engineered or modular construction components off the site of construction. They do so by redefining the “site of the work” to include off-site construction of modules if significant portions of the modules are for specific use in a designated building or work covered by Davis Bacon. Under this expansion, “significant portions” would be defined as “entire portions or modules” of the building or work if those modules can be assembled with minimal on-site construction work other than their installation. This off-site module construction work would be covered by Davis Bacon unless those same modules or components are also available for purchase by members of the general public.

C. The New Rules would expand the definition of “public works or buildings.”

A 2016 D.C. Circuit Court of Appeals decision held that Davis Bacon does not apply to construction projects when the government is not a party to the construction project agreement

and/or where the government does not fully fund or own the project. The new rules would administratively reverse this court decision and make any construction/repair activities – even if they only involve a portion of an improvement of “public work” – covered by Davis Bacon.

The new rules accomplish this by expanding the definition of “building or work” to read “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.” This would also include the construction or repair of only a portion of a building or work that is funded by federal monies, even if Davis Bacon does not cover the construction of the entire building. This would expand the coverage of Davis Bacon to cover construction activities involving only a portion of a building or work that is itself not subject to Davis Bacon. The new rules also specify that Davis Bacon applies to structures, buildings or improvements that will not be owned by the federal government when construction is completed, as long as the construction is carried on “directly by authority of or with funds of a federal agency to serve the interests of the general public.”

This would extend to a facility not owned by the government, as long as the government is going to have the use of the building (such as through a lease construction contract), which would mean that if the federal government is going to enter into a lease for a portion of an otherwise private building and pay for specific tenant improvements, Davis Bacon would apply to the tenant improvements paid for with federal funds.

D. The New Rules would expand Davis Bacon’s coverage of transportation.

The new rules add the term “transportation” to the activities covered by Davis Bacon and expand the coverage of Davis Bacon to cover transportation activities if:

1. The transportation takes place entirely on the site of work. This is not a change.
2. The transportation is between a secondary construction site and the primary construction site.

3. The transportation is between a nearby dedicated support site and either the primary or secondary construction site.
4. The transportation drivers are on-site more than a *de minimis* amount of time, even if they are only picking up and delivering materials. Trucking companies would be required to compensate their drivers for any “practically ascertainable time spent on the site of the work.”
5. The transportation activities are covered under a separate statute.

E. The New Rules would expand Davis Bacon’s application to material suppliers.

The new rules state that Davis Bacon will cover material suppliers unless they meet three criteria:

1. Their only obligations for work on the contract or project are the delivery of materials.
2. They also supply materials to the general public.
3. The facility manufacturing the materials being supplied was not established specifically for the contract and/or is not located at or contiguous to the site of work.

F. The New Rules would expand Davis Bacon’s application to survey workers.

The new rules also expand Davis Bacon’s coverage of survey workers and would specify that survey crew members who spend most of their time on a covered project taking or assisting in taking measurements are covered by Davis Bacon if they do not meet the tests for exemption (most frequently as a professional employee). Similarly, if the work of a survey crew is performed on the site of construction, immediately prior to or during construction, or in direct support of construction crews, then the survey crew workers would be covered by Davis Bacon.

G. Davis Bacon would cover more demolition work.

The new rules bring more demolition work under the scope of Davis Bacon. Currently, demolition and/or removal activities are only covered if they constitute construction, alteration, and/or repair of an existing public building or work are they covered by Davis Bacon. Under the new rules, if there will be subsequent construction that will be covered in whole or in part by Davis Bacon, whether that work is planned or just contemplated, the demolition work would be covered by Davis Bacon.

II. The proposed New Rules include major adjustments to the way that prevailing wage rates will be calculated.

The methods used by DOL to calculate prevailing wage rates have been the subject of considerable discussion, modification and litigation. The proposed new rules both increase the DOL's discretion for purposes of establishing a prevailing wage rate and eliminate some of the procedural safeguards currently in place to ensure that the prevailing area wage rates are accurate.

A. The New Rules would reinstate the old "30% rule."

Until 1983, the Department of Labor calculated the prevailing wage using a "30% rule" under which if there was not a single wage rate paid to the majority of the workers in a specific classification in the area, then the most common pay rate would be considered "prevailing" if it was paid to at least 30% of the workers at issue. This changed during the Reagan era, and currently at least 51% of the wages surveyed by the DOL need to be within a specific margin for a wage rate to be considered prevailing.

The Department of Labor's proposed return to the 30% rule would adopt a three-step process to identify the prevailing wage:

1. The DOL would first utilize any wage rate paid to the majority of applicable workers in a specific category in a defined geographical area.
2. If there is no wage rate paid to the majority of applicable workers in the defined geographical area, then the wage rate paid to the greatest number of workers would be used as long as it was paid to at least 30% of actual relevant workers. This is referred to as the "30% rule."
3. If the requirements of 30% rule are not met, then the DOL would use a weighted average rate of wages paid in the relevant area.

The reintroduction of the 30% rule will increase the weight given to collective bargaining agreements for establishing a prevailing wage and will decrease the ability of lower wage rates to affect the overall prevailing wage.

B. The New Rules would allow a single prevailing wage rate to cover multi-jurisdictional projects.

The proposed new rules would also change the definition of "area" for multi-jurisdictional projects and authorize the DOL to issue project-based wage determinations with a single rate for each category of workers rather than establishing separate rates depending on the location in which the work is performed. The new rules would also allow the DOL to use designated state highway districts and/or transportation divisions in place of political geographical boundaries for purposes of making relevant wage determinations for highway projects. Both of these proposed changes would allow the DOL to avoid basing determinations on the geographic location of each portion of a project.

C. The New Rules would factor heavy/highway rates into the prevailing wage calculations for building and residential work.

In 1983, the DOL separated heavy/highway construction projects from building and residential construction projects unless there was insufficient building wage data to determine a separate prevailing wage rate for building and residential construction. This lowered the prevailing wage rate for building and residential construction.

The DOL's proposed new rules would increase the use of federal heavy/highway project data for calculating building and residential prevailing wage rates, which would have the effect of increasing building and residential prevailing wage rates by factoring the usually higher heavy/highway wage rates into the calculation.

D. The New Rules would allow the DOL to set prevailing wage rates without a survey.

The proposed new rules allow the DOL to establish prevailing rates without the support of a prevailing wage survey if the DOL received insufficient data through its wage survey program.

E. The New Rules would give DOL the authority and discretion to adopt state or local wage determinations.

The new rules would allow the DOL to adopt a state or local prevailing wage determination, even if the state's definition of "prevailing wage" is different from the federal definition under Davis Bacon.

F. The New Rules would eliminate the category of "trainees."

Employers are currently permitted to employ a category of worker referred to as "trainees" on covered work sites. Typically, these workers (enrolled in certified on-the-job training programs)

are paid at lower rates. By eliminating “trainees,” the Department of Labor would essentially remove one of the lowest pay categories of worker from a covered project.

III. The New Rules would expand employer liability.

As part of the current Administration’s push towards increasing accountability for employers and expanding the scope of liability beyond direct employing entities, the DOL’s proposed new rules would increase the number of business entities that can be held responsible for and ultimately punished for prevailing wage violations.

A. The New Rules would create a new definition and a specific classification for “prime contractor.”

The new rules would for the first time define “prime contractor” (a term that is currently undefined under Davis Bacon) and define a prime contractor as the person(s) or entities holding the contract covered by Davis Bacon. However, prime contractors would also include:

- a. The controlling shareholder(s) or any member of any entity holding a prime contract;
- b. The joint venturers or partners in any joint venture or partnership holding the prime contract; and
- c. Any contractor that has been delegated all or substantially all of the responsibilities for overseeing or performing the construction on the covered project.

Because this would mean that more than one entity would be considered the “prime contractor,” any of the defined entities could share liability for subcontractor violations of Davis Bacon, could be subject to DOL cross-withholding for alleged violations and could potentially be subject to debarment for subcontractor violations. The new definition of prime contractor would increase the legal exposure of not only the actual contracting party, but would also increase the legal exposure of related entities.

B. The New Rules would eliminate the requirement that subcontracts include “pass down” language obligating the subcontractor to comply with Davis Bacon.

Under current law, the contractor on a project covered by Davis Bacon is required to include pass down language in its subcontract that obligates its subcontractors performing covered work to comply with Davis Bacon. This requirement occasionally causes problems when contractors inadvertently omit the pass down language or wrongfully conclude that a subcontractor is not performing work covered by Davis Bacon. The new rules propose to eliminate any confusion in this regard by making pass down automatic. This would make subcontractors automatically responsible for prevailing wages on covered projects, even if they had no notice that the project was covered by Davis Bacon.

The new rules would accomplish this by incorporating the DOL’s standard contract clauses (and the appropriate prevailing wage) into all covered contracts and subcontracts retroactively and automatically by operation of law. It would also permit the DOL to immediately assess back wages and seek withholding, despite the fact that the Davis Bacon requirements were not known to the subcontractor.

This new rule would also make the prime contractor retroactively responsible for the payment of applicable prevailing wages to all workers under the contract – including workers of their subcontractors – as of the contract award date or as of the beginning of construction (whichever occurs first). Although DOL believes this would be offset by adding a provision that would compensate the prime contractor for any retroactive increases, this would essentially make the prime contractor immediately liable for unknown increases but would not require the DOL to immediately compensate the prime contractor. This requirement would apply only to prime contractors and not subcontractors.

C. The New Rules would create a new administrative claim for whistleblowers.

The new rules would create a separate cause of action for retaliation under Davis Bacon, making it unlawful to “discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any manner discriminate against” any worker or applicant for:

1. Notifying any contractor of any conduct which the worker reasonably believes violates Davis Bacon;
2. Filing a complaint or asserting rights under Davis Bacon;
3. Cooperating in an investigation or other compliance action.

Employers found to have retaliated against an employee, former employee or applicant for conduct protected by the new Davis Bacon anti-retaliation provisions would be subject to an administrative proceeding and could ultimately be liable for a full “make-whole” remedy including reinstatement with full back wages and benefits.

Conclusion

The United States Department of Labor’s proposed Davis Bacon rulemaking extends far beyond clarifying existing law and actually proposes substantial changes to the interpretation of Davis Bacon. While Congress gave the Department of Labor substantial discretion in making rules for the purpose of enforcing Davis Bacon, Congress did not authorize the DOL to change Davis Bacon or expand its scope, and doing so would exceed the DOL’s authority. Only Congress can amend Davis Bacon.

The DOL’s proposed new rules are currently open for public comment. The public comment period ends on May 17, 2022. Employers and associations concerned by the proposed new rules should make their concerns known by submitting public comments. This can be accomplished at www.federalregister.gov (the online site for the United States Federal Register)

at the following link -- <https://www.federalregister.gov/documents/2022/03/18/2022-05346/updating-the-davis-bacon-and-related-acts-regulations> .

The full text of the proposed new rules can be found through the same link.

In closing, this article is intended to be a short summary of a very lengthy federal submission. It is by necessity overgeneralized because nobody would read a 50-page article summarizing changes to Davis Bacon!

If you would like additional information or to discuss any of the contents of this article, please contact Andy Martone at andymartone@hessemartone.com.