

Payroll Puzzles: The Davis-Bacon Act and Community Action

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Handouts:

1. PowerPoint Slides

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What is the Davis-Bacon Act?

- Federal law that requires contractors on federal construction projects to pay at least local "prevailing wage"
- US Department of Labor determines wage rates for each craft
- Covers laborers and mechanics performing contracts over \$2,000 on construction, alteration, or repair of public buildings or public works

40 USC § 3142

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When Does DBA apply?

- DBA applies to federal or federal construction projects, such as courthouses, post offices, military bases
- DBA applies in "Related Acts" which are federal statutes that apply prevailing wage provisions to certain projects assisted with federal funding, such as Head Start and housing

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How does DBA apply to WAP?

- The WAP authorizing legislation is not a "Related Act"; it doesn't impose DBA
- But the American Recovery and Reinvestment Act of 2009 ("ARRA") imposes DBA on most construction projects paid with stimulus funds
- DBA doesn't apply to WAP projects funded solely with non-ARRA funds

What Does ARRA Say?

Notwithstanding any other provision of law and in a manner consistent with other provisions in this Act, ***all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act*** shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code (Davis-Bacon Act).

Pub. L. No. 111-5, § 1606

To Whom Does DBA Apply?

- **Laborers and mechanics**, includes:
 - Private CAA employees
 - Contractors and subcontractors of private and public CAAs
- Focus is on **manual or physical labor**
 - Includes workers who use tools or perform work of a trade
 - Doesn't include workers whose duties are primarily administrative, executive, or clerical, rather than manual
 - **Doesn't include workers classified as "exempt" under FLSA in executive, administrative or professional capacities**
 - Working foremen who devote more than 20% of time to laborer or mechanic duties, and who aren't exempt under FLSA, are laborers and mechanics **for such time**

To Whom Does DBA Apply?

- **Auditors and inspectors?** NO. According to DOL Advisory Letter, "technicians conducting energy audits [are] not subject to [DBA] requirements."
 - If auditors or inspectors perform laborers or mechanics duties—i.e., replace light bulbs, carbon monoxide detectors, caulk window, install smoke detector, etc.—separate and apart from the audit or inspection, however, they must be paid prevailing wages for that work, even if it takes less than 20% of their time.

To Whom Does DBA Apply?

- **Trainees and apprentices?** Must be paid the full prevailing wage rate unless employed and working on the project pursuant to a bona fide apprenticeship or training program which is certified by the DOL, or in certain cases, the relevant State body, in which case you pay the rate set forth by that program.

To Whom Does DBA Apply?

- **Students or Summer Youth Employees.** Same as trainees or apprentices; must be employed pursuant to a bona fide youth opportunity program sponsored by union and management or by a governmental or community group.
- **Relatives?** No exception.
- How about **Volunteers?** No such thing.

To Whom Does DBA Apply?

- **Independent Contractors.** Every person performing duties of laborer or mechanic for a contractor is employed, regardless of whether contractor calls them employees or "independent contractors"
- **Sole Proprietors or Owners.** Covered by the DBA when performing laborers or mechanics work on the project, unless they are "exempt" under the FLSA.

What are DBA Requirements for Contractors (including WAP Providers)?

- Pay prevailing wages (including fringe benefits) **weekly**
 - Revised wage determinations available at http://www1.eere.energy.gov/wip/dol_wage_de_terminations_12-09.html
- Pay overtime pursuant to CWSSA and the FLSA
- Submit weekly certified payrolls for itself and subs to WAP Provider
 - May use Form WH 347, available at: www.dol.gov/esa/whd/forms/wh347instr.htm

More DBA Requirements for Contractors (including WAP Providers)

- Weekly certified payrolls, cont.
 - Covers wages paid during preceding weekly payroll period
 - Statement must be signed by contractor or sub or authorized officer
- Must insert DBA language in contracts
 - See Davis-Bacon Labor available at http://www1.eere.energy.gov/wip/pdfs/dba_clauses_weatherization.pdf

More DBA Requirements for Contractors (including WAP Providers)

- Only permitted deductions from pay
 - Remember the Copeland Act
- Keep payroll and related records for at least 3 years
- Post DBA rights poster
 - Poster available at <http://www.dol.gov/whd/regs/compliance/posters/fedprojc.pdf>

What are DBA Requirements for WAP Providers who employ contractors?

- Include copy of current prevailing wage determination in each solicitation
 - Must condition award of contract on acceptance of wage determination
 - Available at http://www1.eere.energy.gov/wip/pdfs/dba_clauses_weatherization.pdf
- Include DBA Contract Provisions in RFP and contracts with contractor

More DBA Requirements for WAP Providers who employ contractors

- Provide training to contractors if unfamiliar with DBA requirements on certified payrolls, recordkeeping, etc.
- Monitor compliance by contractors
 - Must report all suspected or reported violations to DOE
- See DOE Weatherization Program Notice 09-9; Guidance on Implementation of the ARRA Davis-Bacon Act Prevailing Wage Requirements (July 21, 2009) available at <http://www.waptac.org/si.asp?id=1392>

Recent DBA Developments

- The impact of ARRA on the DBA
- DOL Opinions and Decisions
- DOE Opinions and Decisions

DBA and Head Start

- DBA incorporated in 1994 in Head Start Act at 42 U.S.C. § 9839 (g)(3)
 - All laborers and mechanics employed by contractors or subcontractors in the construction or renovation of facilities *to be used to carry out Head Start programs* shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the DBA
- Compliance with DBA also outlined in 45 CFR §1309.54
- Head Start DBA webpage:
http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20Management/Facilities/construction/compliance/facili_of_01006a2_071205.html

DBA Head Start Requirements

- Generally, DBA should be applied to Head Start Act construction projects in the same way it is applied to WAP projects
- A few differences in the application include:
 - DOL created specific weatherization classifications for workers performing ARRA WAP projects
 - Head Start grantees should use the DOL classifications in the wage determinations regularly used for their county, <http://www.wdol.gov/dba.aspx#0>
 - Head Start grantees should use the DOL contract labor standards as set forth in 29 CFR 5.5(a) rather than those prepared by DOE for WAP, http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_5/29CFR5.5.htm

What are "Prevailing Wages"?

- DOL determines hourly rate for classes of workers by locality
 - Based on survey of local wages
 - Equals **wage and fringe benefits** paid to the majority (more than 50%) of laborers or mechanics in the classification on similar projects in area during period in question
 - If same wage is not paid to majority of those employed in classification, equals average of wages paid, weighted by total employed in classification

Fringe Benefits

- In addition to the hourly wage listed in the wage determination, the contractor or subcontractor must pay the listed fringe benefits.
- Fringe benefits include:
 - The rate of contribution irrevocably made by a contractor to a trustee or to a third person under a fund, plan or program;
and

Fringe Benefits

- The rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing benefits to laborers and mechanics in accordance with an enforceable commitment:
 - To carry out a financially responsible plan or program
 - Has been communicated in writing to the laborers and mechanics affected
 - Is for:
 - Medical or hospital care
 - Pensions upon retirement or death

Fringe Benefits

- The commitment is for:
 - Compensation for injuries or illness resulting from occupational activity
 - Insurance to provide any of the foregoing benefits
 - Life insurance
 - Disability and sickness insurance
 - Accident insurance
 - Vacation and holiday pay
 - Defraying costs of apprenticeships or other similar programs
 - **Other bona fide fringe benefits.**

Fringe Benefits

- Fringe benefits do not include costs of benefits required to be provided by any other federal, state, or local law
- If the bona fide fringes offered do not offset the entire DBA fringe rate, the difference must be paid to the employees in cash
- If bona fide fringes exceed the DBA fringe rate, they offset the DBA wage rate by the overage
 - Example, if the DBA fringe rate is \$.75/hr., and the bona fide fringes are \$1.00/hr., the additional \$.25/hr may be used to offset the DBA wage rate.

Fringe Benefits

- An employer receives DBA credit **only** for contributions reasonably related to the cost of the benefits provided
 - Such is regardless of the employee benefit plan being funded or unfunded
- To qualify as an offset, the employer's contribution must occur at least quarterly
- Contributions made to a plan that are used to offset periods of non-DBA work may not be applied as an offset

Fringe Benefits

- While they do count toward the Overtime (OT) regular rate, fringes must be paid for **all** hours worked, both straight time and OT
- The DBA does not permit deductions from employee's pay (*i.e.*, from the DBA wages) for the cost of furnishing equipment to employees, such as gloves, harnesses, tools, etc.
- The contributions upon which a contractor bases a fringe offset must be **made with respect to each individual laborer or mechanic**
 - *i.e.*, the amount contributed for each employee must be determined separately – averages may not be used

Fringe Benefits

- What types of benefits are commonly used to offset the fringe benefit obligation?
 - Health insurance
 - 401k Contributions
 - Pension
 - Life insurance
 - Disability or sickness insurance
 - Accident insurance
 - Vacation pay
 - Holiday pay
 - Apprenticeship program pay
 - Supplemental insurance (unemployment funds or AFLAC)
- **NOTE:** Discretionary bonuses are not benefits which may be used to offset the fringe rate.

Computing Hourly Fringe Benefit Equivalents

- In determining cash equivalent credit for fringe benefit payments, the period of time to be used is the period covered by the contribution

Computing Hourly Fringe Benefit Equivalents

- For example, if an employer contributes to a hospitalization plan on a weekly basis, the total hours worked (DBA covered and noncovered) each week by each employee must be used to determine the hourly cash equivalent for which the employer is entitled to take credit for each employee.
 - If contributions are made bi-weekly, cash equivalents would be computed bi-weekly.
 - If contributions are made quarterly, cash equivalents would be computed quarterly, etc.

Computing Hourly Fringe Benefit Equivalents

- On occasion, a contractor or subcontractor may offset the annual cost of a particular fringe benefit by converting such costs to a hourly cash equivalent

Computing Hourly Fringe Benefit Equivalents

- For example, the hourly cash equivalent may be determined by dividing the cost of the fringe benefit by the total number of working hours (DBA and non-DBA) to which the cost is attributable
 - Total hours worked by employees must be used as a divisor since employees may work both DBA and non-DBA hours during the year and employers are prohibited from using contributions made for non-DBA work to offset their DBA obligations
- NOTE: If the amount of contribution varies per employee, credit must be determined separately for the amount contributed on behalf of each employee

Computing Hourly Fringe Benefit Equivalents

- If the plan requires contributions be made during the eligibility waiting period, credit may be taken for such contributions
- Credit may not be taken for contributions for employees who by definition are not eligible to participate
 - Ex., employees excluded because of age or part-time employment
- If employee cannot participate in or receive benefits from the fund that the employer is required to contribute to regardless of eligibility, such as a union fund, the employee must be paid the fringe benefits in cash

Computing Hourly Fringe Benefit Equivalents

- Example: Many hospitalization plans require a waiting period of 30 days before an employee can participate in the plan. Since the employer normally makes no contribution for the employee during the waiting period, the employee must be paid the fringe benefit in cash or furnished other bona fide fringe benefits equal in monetary value.

Computing Hourly Fringe Benefit Equivalents

- **Vacation plans, sick leave plans and Holiday Pay**
 - Most vacation plans, sick leave plans and holiday pay are from unfunded plans
 - An unfunded fringe benefit plan will be considered to be a bona fide plan for DBA purposes if the plan:
 - Reasonably can be anticipated to provide benefits described in the DBA;
 - Represents a commitment that can be legally enforced,
 - Is carried out under a financially responsible plan or program; and
 - Has been communicated in writing to the affected employees

Computing Hourly Fringe Benefit Equivalents

- **EXAMPLE:** An employee works as an electrician where the wage determination rate is \$12.00 (basic hourly rate) plus \$2.50 in fringe benefits.
 - Where the employer provides the electrician with medical insurance in the amount of \$200 per month (\$2,400 per year), the employer would divide the total annual cost of the benefit by 2,080 hours (40 hours x 52 weeks) to arrive at the allowable fringe benefit credit.
 - $(\$200 \times 12 \text{ months}) \div 2080 \text{ hours} = \1.15 per hour.

Computing Hourly Fringe Benefit Equivalents

- If the employee receives no other "bona fide" fringe benefits, then for each hour worked on a covered contract the individual is due \$12.00 (basic hourly rate) plus \$1.35 paid as cash (the difference between the \$2.50 per hour fringe benefit required under the applicable wage determination and the credit allowed for the medical insurance) Thus:

Basic hourly rate	\$12.00
Medical insurance benefit	\$ 1.15
<u>Additional cash due</u>	<u>\$ 1.35</u>
Total due per hour	\$14.50 (\$12.00 + \$2.50)

OT and the Contract Work Hours and Safety Standards Act (CWHSSA)

- In addition to DBA wages (including fringes), contractors and subcontractors must pay overtime pursuant to the CWHSSA
- OT required for all work on project in excess of 40 hours in a workweek
- The OT requirement is weekly, not daily
- CWHSSA parallels the FLSA

OT Required Under CWHSSA

- "Hours worked" or "working time" is computed using FLSA principles
- Fringe payments are not included in calculating the "regular rate" upon which CWHSSA overtime is paid, unless those fringes offset the basic hourly wages, in which case, that wage must be used
- Similarly, cash-in-lieu of fringes may, in some rare instances, count toward the regular rate.

Copeland "Anti-Kickback" Act

- The Copeland "Anti-Kickback" Act provide for the following safeguards:
 - Prohibits "kickbacks" of wages and back wages.
 - Requires contractors on covered projects to submit weekly a "Statement of Compliance" (i.e. certifying that the contractor has paid the required wages).
 - Regulates payroll deductions from wages.

Copeland "Anti-Kickback" Act

- Copeland permits the following deductions from wages without the approval of the Secretary of Labor:
 - Social security or federal or state income tax withholding
 - Bona fide prepayment of wages
 - Court ordered payments
 - Contributions to fringe benefit plans, provided that:
 - The deduction is not prohibited by law
 - The deduction is either voluntarily consented to by the employee in writing in advance the work being done or provided for in a collective bargaining agreement
 - No profit or other benefit is obtained by the contractor and
 - The deduction serves the convenience of the employee

Copeland "Anti-Kickback" Act

- Purchase of U.S. savings bonds when voluntarily authorized by the employee
- Repayment loans or to purchase shares in a credit union
- Voluntarily authorized contributions to organizations such as the Red Cross, United Way, or similar charitable organizations
- Ultimately, Copeland prohibits deductions intended to "buy down" the DBA obligation, by agreement or otherwise

Penalties

- DBA is remedial, not punitive
- Contractors or subcontractors found to have disregarded their obligations to employees, or to have committed aggravated or willful violations while performing work on DB covered projects, may be:
 - Responsible for back payment of wages and fringe benefits
 - Subject to contract termination
 - Subject to debarment from future contracts for up to three years

Penalties

- Contract payments may be withheld in sufficient amounts to satisfy liabilities for unpaid wages and liquidated damages
- Falsification of certified payroll records or the required kickback of wages may subject a contractor or subcontractor to civil or criminal prosecution, the penalty for which may be fines and/or imprisonment
- Violation of the CWHSSA carries liquidated damages penalties
- DBA was enacted for the benefit of workers not contractors or subcontractors
- No private right of action

Scenario Three

- The HUD ARRA Lead Hazard Control Contract pays Nevada state prevailing wage rates. The contract is designed to work in tandem with the federal WAP and LIHEAP programs providing matching funds. The work is staged with all lead work and hazard control activities taking place before the weatherization activities occur. The weatherization activities that are targeted for the lead match include: window and door replacements; minor siding or housing envelope repairs; and replacement of door and window trim.

Scenario Three, cont.

- We may leverage the DOE WAP with the HUD program; however, the federal DBA labor rates are much lower than the Nevada prevailing wage rate. Will there be any problems if we are paying two different rates on the same job site?
- Do you see a problem with a contractor sending out their assessors to assess the job and then allocating the work, after the assessment, to either a DOE ARRA or LIHEAP contract?

Additional Resources

- DOE, DOL and WAPTAC Davis Bacon Act online reference material:
 - http://www1.eere.energy.gov/wip/davis-bacon_act.html
 - <http://www.dol.gov/whd/contracts/dbra.htm>
 - <http://www.gpo.gov/davisbacon/referencemat.html>
 - <http://www.waptac.com/sp.asp?id=9398>
- CAPLAW website:
<http://www.capl原因.org/DavisBacon/CAPLAW-Davis-BaconIndex.html>

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We hope you will join us for CAPLAW's
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Minneapolis Marriott City Center
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