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Coverage and Compliance Principles

This section provides basic information regarding major aspects of compliance with the Davis-Bacon labor standards and CWHSSA overtime requirements. It addresses frequently asked questions such as:

- ◊ Who are the "laborers and mechanics" to whom the Davis-Bacon prevailing wage requirements apply?
- ◊ What is the "site of the work" where workers are covered by Davis-Bacon wage requirements?
- ◊ How are truck drivers affected by the "site of the work" limit on Davis-Bacon coverage?
- ◊ When can apprentices or trainees work on a Davis-Bacon project at less than the wages listed in the Davis-Bacon wage determination?
- ◊ Can helper classifications be used on Davis-Bacon covered projects?
- ◊ What happens if there is a dispute over how a worker should be classified?
- ◊ Does the Davis-Bacon prevailing wage include fringe benefits?
- ◊ How can a contractor's fringe benefits costs count towards Davis-Bacon prevailing wages?
- ◊ How do you compute overtime pay if CWHSSA applies to a Davis-Bacon job?

LABORERS AND MECHANICS

Definition 29 C.F.R. § 5.2(m).

◊ The term **"laborer and mechanic"** includes those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial duties.

The term includes:

◊◊ Apprentices

◊◊ Trainees

◊◊ Helpers

For overtime coverage under CWHSSA, also:

◊◊ Guards and watchmen

Note: Although guards and watchmen are not considered laborers or mechanics under DBA/DBRA, they are covered by CWHSSA by virtue of its express statutory language.

◊ The term laborer or mechanic does not include workers whose duties are primarily administrative, executive, or clerical, rather than manual.

◊ Categories of workers considered not to be laborers or mechanics when, in the course of their duties, they perform no manual or physical work on the construction project are:

◊◊ Architects and engineers

◊◊ Timekeepers

◊◊ Inspectors

Coverage of laborers and mechanics

◊ The DBA requires the payment of the applicable prevailing wage rates to all laborers and mechanics "regardless of any contractual relationship which may be alleged to exist."

◊ Non-exempt working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the exemption criteria of 29 C.F.R. Part 541, are laborers and mechanics for the time so spent. The working foreman is due the rate listed in the contract wage determination for the hours spent as a laborer or mechanic.

◊ Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 C.F.R. Part 541 are not deemed to be laborers or mechanics.

◊ In considering whether a business owner is an exempt, *see* 29 C.F.R. Part 541, Subparts B and H, along with 29 C.F.R. § 5.2(m).

SITE OF THE WORK

Definition 29 C.F.R. § 5.2(l).

◊ **5.2(l)(1)** – "Site of the work" is the physical place or places where the building or work called for in the contract will remain, and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.

For example:

◊◊ If a small office building is being erected, the "site of work" will normally include no more than the building itself and its grounds.

◊◊ In the case of larger contracts, such as for airports, highways, or dams, the "site of work" is necessarily more extensive and may include the whole area in which the construction activity will take place.

◊◊ Where a very large segment of the dam is constructed up-river and floated downstream to be affixed onto a support structure, the secondary construction site would be within the meaning of "site of the work" for Davis-Bacon purposes if it was established for and dedicated to the dam construction project.

◊ **5.2(l)(2)** - Except as provided in paragraph 5.2(l)(3), batch plants, borrow pits, job headquarters, tool yards, etc., are part of the "site", provided they are dedicated exclusively, or nearly so, to the contract or project, and are adjacent or virtually adjacent to the site of the work as defined in paragraph 5.2(l)(1).

◊ **5.2(l)(3)** - Not included in the "site of work" are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular federal or federally assisted project.

Also excluded from the "site of work" are fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph 5.2(l)(1), even where such operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

Labor standards applicability regarding of "site of the work"

◊ DBA applies only to those laborers and mechanics employed by a contractor or subcontractor on the **"site of the work"**.

◊ In 2000, DOL revised the regulatory definitions of the terms "site of the work" and "construction, prosecution, completion, or repair" to clarify the regulatory requirements in to reflect three U.S. appellate court decisions concerning the statutory limit on DBA coverage to workers employed ''directly upon the site of the work,'' and to address situations that were not contemplated when the earlier regulations were promulgated.

For a full discussion of the revisions made to the regulatory definition of the "site of the work" in 2000, see the final rule published in the *Federal Register* on December 20, 2000, 65 Fed. Reg. 80,268-80,278. (See *Building and Construction Trades Department, AFL-CIO* v. *United States Department of Labor Wage Appeals Board*, 932 F.2d 985 (D.C. Cir 1991) (*Midway*), *Ball, Ball and Brosamer* v. *Reich* (D.C. Cir. 1994), and *Cavett Company* v. *U.S. Department of Labor* 101 F.3d 1111 (6th Cir. 1996). The revised regulations took effect on January 19, 2001. The December 20, 2000, final rule is available at: http://www.dol.gov/_sec/regs/fedreg/final/2000032436.pdf.

◊ Contracting agencies should consult the WHD when confronted with "site of work" issues.

◊ CWHSSA has no site of work limitation. An employee performing part of the contract work under a construction contract at the job site who then continues contract work at a shop or other facility located elsewhere is subject to CWHSSA overtime pay for all the hours worked at both locations and travel time between them. (Different wage rates might be paid, as the Davis-Bacon prevailing wage requirements would apply only to activities performed on "the site of the work".)

TRUCK DRIVERS

Definition 29 C.F.R. § 5.2(j).

◊ The terms **"construction, prosecution, completion, or repair"** mean all types of work done on a particular building or work at the site (including work at a facility deemed part of the "site of the work") by laborers and mechanics of a construction contractor or construction subcontractor including without limitation:

◊◊ Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site.

◊◊ Painting and decorating.

◊◊ The manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work.

◊◊ Transportation between the "site of the work" (within the meaning of 29 C.F.R. § 5.2(l)) and a facility which is dedicated to the construction of the building or work and deemed a part of the "site of the work" (within the meaning of 29 C.F.R. § 5.2(l)).

Coverage of truck drivers

◊ Truck drivers **are covered** by Davis-Bacon in the following circumstances:

◊◊ Drivers of a contractor or subcontractor for time spent working on the site of the work.

◊◊ Drivers of a contractor or subcontractor for time spent loading and/or unloading materials and supplies on the site of the work, if such time is not *de minimis*.

◊◊ Truck drivers transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site.

◊◊ Truck drivers transporting portion(s) of the building or work between a site established specifically for the performance of the contract or project where a significant portion of such building or work is constructed and the physical place(s) where the building or work called for in the contract(s) will remain.

◊ Truck drivers are **not covered** in the following instances:

◊◊ Material delivery truck drivers while off "the site of the work".

◊◊ Drivers of a contractor or subcontractor traveling between a Davis-Bacon job and a commercial supply facility while they are off the "site of the work."

◊◊ Truck drivers whose time spent on the site of the work is *de minimis*, such as only a few minutes at a time merely to pick up or drop off materials or supplies.

◊ DOL has an **enforcement position** with respect to bona fide owner-operators of trucks who own and drive their own trucks. Certified payrolls including the names of such owner-operators do not need to show the hours worked or rates paid, only the notation "owner-operator". This position does not apply to owner-operators of other equipment such as bulldozers, backhoes, cranes, welding machines, etc.

◊ Overtime pay requirements under CWHSSA apply to truck drivers regardless of whether the hours worked on the contract are on or off the site of the work.

Rulemaking background regarding material delivery truck drivers

◊ Three U.S. appellate court decisions in the 1990's led DOL to reexamine and revise the regulatory definition of "construction, prosecution, completion, or repair" as it applies to transportation. In view of three appellate court decisions that had concluded that DOL's application of the related regulatory definitions was at odds with the language of the Davis-Bacon Act that limits coverage to workers employed "directly upon the site of the work," revisions to the regulatory definitions were issued in 2000 to clarify the regulatory requirements.

◊ The rulemaking in 2000 addressed the application of Davis-Bacon prevailing wage requirements to material delivery truck drivers.

◊◊ The regulatory definition of "construction, … " has been changed to provide that the off-site transportation of materials supplies, tools, etc., is not covered unless such transportation occurs between the construction work site and a dedicated facility located "adjacent or virtually adjacent" to the work site.

◊◊ Also, as indicated in the rulemaking, as a practical matter, since generally the great bulk of the time spent by material delivery truck drivers is off-site beyond the scope of Davis-Bacon coverage, while the time spent on-site is relatively brief, DOL chooses to use a rule of reason and will not apply the Act's prevailing wage requirements with respect to the amount of time

spent on-site, unless it is more than "*de minimis*." Under this policy, the Department does not assert coverage for material delivery truck drivers who come onto the site of the work for only a few minutes at a time merely to drop off construction materials.

◊◊ For a full discussion of the regulatory changes, see the final rule published in the *Federal Register* on December 20, 2000, 65 Fed. Reg. 80,268-80,278. A section focused on "Coverage of Transportation – § 5.2(j)" appears on pages 80,275-6.) The December 20, 2000, final rule is available at:

www.dol.gov/_sec/regs/fedreg/final/2000032436.pdf.

APPRENTICES AND TRAINEES

Definition (29 C.F.R. § 5.2(j)).

◊ **Apprentices** are those persons employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration (ETA), Office of Apprenticeship (OA), or with a state apprenticeship agency recognized by ETA, or persons in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the BAT or a state apprenticeship agency (where appropriate) to be eligible for probationary employment as an apprentice.

◊ The **Step-Up** program is an apprenticeship program designed to enable low-income persons, particularly those living in HUD-assisted housing, to enter jobs and training in the construction and maintenance fields. This program combines formal apprenticeship with preparatory educational and life skills training, to encourage participants to gain the education, skills and work experience that they need to successfully enter and complete an apprenticeship (or to pursue other career training and employment). The program is called **Step-Up**. Apprentices enrolled in step-up programs must meet the same regulatory criteria as all other apprentices to receive less than the prevailing wage rate.

◊ **Trainees** are persons registered and receiving on-the-job training in a construction occupation under a program approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that administration.

Coverage of apprentices and trainees

◊ Apprentices and trainees are laborers and mechanics but are not listed on a wage determination. These classifications are permitted to work on DBA/DBRA covered projects only under very controlled circumstances, as follows.

◊ Apprentices and trainees may be used on DBA/DBRA covered projects and paid less than the specified journeyman rate for the work performed if:

1. The apprentice or trainee is **individually registered** in an **approved** apprenticeship or training program.

◊◊ The **apprenticeship program** has to be approved by the ETA/OA or by a state apprenticeship agency recognized by the ETA/OA.

◊◊ The registration requirements do not apply to apprentices and trainees performing on highway construction projects funded by the **Federal-Aid Highway Act** and enrolled in programs certified by the U.S. Department of Transportation.

2. The apprentices/trainees must be paid **the percentage (%) of the basic hourly rate required or fringe benefits specified in the approved apprenticeship program** and in accordance with their level of progression.

3. The contractor is limited in the number of apprentices/trainees permitted on the DBA/DBRA job site based on the **allowable ratio** of apprentices/ trainees to journeymen specified in the approved program.

   ◊◊ The ratio is determined on a daily, not weekly basis.

   ◊◊ The use of "fraction thereof" in computing apprenticeship ratios is not permitted unless specified in the approved apprenticeship program.

4. **Fringe benefits** should be paid to apprentices/trainees in accordance with the provisions of the apprenticeship/trainee program. If the program is silent on the payment of fringes, the apprentices/trainees are to receive the full amount of the fringe benefits stipulated on the wage decision unless it is determined that a different practice prevails for the applicable apprentice/trainee classification.

5. When the contractor has exceeded the allowable ratio of apprentices/ trainees, the legal apprentices/trainees are those who **first came to work** at the DBA/DBRA job site. Individuals who are employed in excess of the allowable ratio must be paid the full wage determination rate for the classification of work performed.

HELPERS

Definition 29 CRR 5.2(n)(4).

◊ A distinct classification of "helper" will be issued in Davis-Bacon wage determinations only where all of the following conditions are met:

◊◊ The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;

◊◊ The use of such helpers is an established prevailing practice in the area; and

◊◊ The helper is not employed as a trainee in an informal training program.

A "helper" classification will be added to wage determinations pursuant to § 5.5(a)(1)(ii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

Note: Helpers may be employed on a DBA/DBRA covered construction project only if the helper classification is listed in the Davis-Bacon wage determination in the contract or the classification is added with approval by DOL. Helper classes are issued or approved only where they are within the scope of the definition stated above.

Background information regarding "helpers"

◊ On November 20, 2000, DOL amended regulatory provisions concerning helpers. (See the *Federal Register* notice published on November 20, 2000, 65 Fed. Reg. 69,674-69,693.)

◊ DOL regulations that were in effect during early 1991 and much of 1992 and 1993, had defined **"helpers"** as semi-skilled workers who worked under the direction of and assisted journeymen who, under the journeymen's supervision and direction, could perform a variety of duties including those requiring them to use the tools of the trade, and whose duties could vary according to area practice. Effective on October 21, 1993, the regulations implementing that definition of helpers were formally suspended. (See the *Federal Register* notices published on November 5, 1993 and December 30, 1996.)

◊ The regulatory changes issued on November 20, 2000, amended the regulations replaced the suspended definition of "helpers" to with a new regulatory definition in 29 C.F.R. § 5.2(n)(4) that incorporate the WHD's longstanding policy of recognizing helper classifications and wage rates only where certain specified conditions are met. The revised regulatory definition explicitly states that a

"helper" classification will be added to wage determinations by the conformance process, pursuant to the contract clause at 29 C.F.R. § Sec. 5.5(a)(1)(ii)(A), only where the work to be performed by the helper is not performed by a classification in the wage determination.

◊ In issuing the final rule published on November 20, 2000, the Department pointed out that:

◊◊ It is not intended that a helper classification never be issued on a Davis-Bacon wage determination simply because some workers in another classification occasionally perform the work in question,

◊◊ The Department intends to issue helper classifications where the duties in question are not routinely performed by another classification on the wage determination and it is the prevailing practice in the area for helpers/tenders to perform the work in question, provided the other criteria of the regulation are met.

AREA PRACTICE

To determine the proper classification for work performed on a Davis-Bacon covered project, it may be necessary to examine **local area practice**.

◊ There are no nationwide standard classification definitions under the DBA. (This differs from the SCA, as SCA classifications are defined in the *SCA Directory of Classifications*.)

Note: The Dictionary of Occupational Titles, published by the Department's Employment and Training Administration, cannot be relied on for making Davis-Bacon determinations regarding proper employee classification.

◊ The Wage Appeals Board ruled in *Fry Brothers Corp.* (WAB Case No. 76-6, 6/14/77) that the proper classification of work performed by laborers and mechanics is that classification used by firms whose wage rates were found to be prevailing in the area and incorporated in the applicable Davis-Bacon wage determination.

◊ Questions as to the proper classification for the work performed by a laborer or mechanic are resolved in accordance with prevailing local area practice. An "area practice survey" may be conducted by the WHD or by the contracting agency to determine proper classification of workers.

For advice regarding proper classification of workers and for guidance on the need to conduct an area practice survey to determine proper classification of laborers and mechanics on DBRA covered projects, consultation with the WHD Regional Wage Specialist is appropriate. (*See* http://www.dol.gov/whd/programs/dbra/regions.htm.)

Basic Principles for Conducting Surveys to Determine Prevailing Local Area Practice

◊ In accord with *Fry Brothers Corp.*, information to be considered in the area practice survey is from firms whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination.

◊◊ If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are non-union rates, the dispute will be resolved by examining the practice(s) of non-union contractors in classifying workers who have been performing the duties in question in the area.

◊◊ If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are union rates, the

dispute will be resolved by examining the practice(s) of union contractors in classifying workers who have been performing the duties in question in the area.

◊◊ If a combination of union and non-union rates are listed in the wage determination for the classifications that may have performed the work in the area, the dispute will be resolved based on the combined information from:

◊◊◊ union contractors for the classification(s) for which union rate(s) are listed,

and

◊◊◊ non-union contractors for the classification(s) for which non-union rate(s) are listed.

◊ Proper classification of the laborers or mechanics performing the work in question will be resolved by examining the classification practice(s) of contractors who performed the work in question on:

◊◊ similar construction projects (building construction, residential construction, highway construction, heavy construction),

◊◊ in progress in the same area (normally the same county),

◊◊ during the year preceding the wage determination lock-in date for the contract in question (as discussed below; *see* 29 C.F.R. § 1.6(c)).

◊◊◊ In the case of contracts entered into pursuant to competitive bidding procedures (as contrasted with contracting by negotiation), the year prior to bid opening;

◊◊◊ The year prior to contract award in the case of contracts entered into pursuant to contracting by negotiation (such as contracts arrived at through requests for proposals (RFPs) or similar contracting methods;

◊◊◊ In the case of projects assisted under the National Housing Act, the year prior to beginning of construction or the date the mortgage was initially endorsed, whichever occurred first; or,

◊◊◊ In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, the year prior to beginning of construction or the date the agreement to enter a housing assistance payments contract was executed, whichever was first.

◊ The extent of the information required for making area practice determinations will depend on the facts in each case. For example:

◊◊ If, in gathering preliminary data, all of the parties agree as to the proper classification, the area practice is thus established (i.e., a **"limited"** area practice survey).

◊◊ However, if all parties do not agree (i.e., jurisdictional dispute between two unions, or management does not agree with the union, or where non-union rate(s) in the wage determination may apply and the practice among non-union contractors in the area varies), it will be necessary to determine by a **"full"** area practice survey which classification actually performed the work in question.

Preliminary Steps for Conducting Surveys to Determine Prevailing Local Area Practice

1. Develop a clear description of the specific work for which a determination on proper classification is needed. (Examples: tying reinforcing rods for highway construction on a bridge, installation of process piping in a treatment plant, installing the metal roof on a building.)

2. Note the local area (generally the county) where the area practice issue is to be resolved, and the type of construction (building, residential, highway, or heavy) on which the work in question is to be performed.

3. Identify the area practice survey timeframe. (What is relevant is contractors' classification practices prior to award (or other applicable lock-in date) for the project on which the question of proper classification is to be resolved.)

4. Determine what classifications listed in the applicable contract wage determination (same county and type of construction) might perform the work duties in question.

5. Examine the "identifiers" for each such classification and determine whether the rate for each reflects a union negotiated or non-union wage rate.

◊ Non-union rates in a Davis-Bacon wage determination are normally listed in a wage rate block that has an "SU" identifier, and appear in alphabetical order in the list of classifications in the wage determination. See the "Wage Determinations" section of this Resource Book for further information.

◊ Union rates are listed under identifiers that refer to the union whose rates are reflected in a given wage rate block in the Davis-Bacon wage

determination. A list of identifiers used to designate various craft unions appears in the "Wage Determinations" section of this book; usually the local union number follows that designation.

How to conduct a limited area practice survey to determine the proper classification of work

If the applicable wage determination reflects union rates for the all classifications involved:

6. Contact the unions that may have jurisdiction over the work in question to determine whether the union workers performed the work on similar projects in the county in the year prior to the wage determination lock-in date (contract award date, or other date, as described above) for the project at issue.

    ◊ **Note the following criteria for usable data:**

    a. **Similar projects** (same type of construction).

    b. In the **same county** as the project in question.

    c. Usable time frame is **one year prior to the wage determination lock-in date** for the contract in question, as established by 29 CFR 1.6(c).

    If union contractors performed the work, each union should be asked how the individuals who performed the work in question were classified.

    If no union workers performed any of the work in question in the county during the survey timeframe, Wage and Hour should be contacted for further guidance.

7. The information provided by the unions should be confirmed with collective bargaining representatives of management, *i.e.*, the contractor representatives.

    ◊ These would include contractors' associations such as:

    Local chapters of the Associated General Contractors of America (AGC)

    The National Electrical Contractors Association (NECA)

    Local contractor associations that bargain with the unions

    (If, in response to the limited area practice survey, specific contractors who may have performed the work in question are identified, they may be contacted to confirm whether they have been performing the work in question in the area.)

If all parties agree as to the proper classification for the work in question, the area practice is established.

If a contracting agency encounters a situation where two unions are engaged in a jurisdictional dispute over a specific type of work and both have performed the work in question during the applicable time period, the contracting officer should contact Wage and Hour for further guidance.

If the applicable wage determination reflects non-union rates for all the classifications involved:

6. Contact open shop contractors (many are members of the Associated Builders and Contractors of America (ABC)) and ask whether they performed the work in question on similar projects underway in the county during the survey timeframe.

    ◊ If so, these contractors should be asked how the employees who performed this work were classified.

    ◊ If all contractors agree, or if a clear majority of the contractors agree, the area practice is established.

    ◊ If no open shop contractor performed the work at issue in the county during the survey timeframe, contact Wage and Hour for further guidance.

If the applicable wage determination reflects a mix of union and non-union rates for the classifications involved:

6. Contact the unions, and contact union and open shop contractors (and/or their associations) to determine who performed the work at issue on similar projects during the survey timeframe.

    ◊ If all parties agree, or if a clear majority of the parties agree on the classification, the area practice is established.

    ◊ Wage and Hour should be contacted if no work of the type at issue was performed in the county during the applicable time frame discussed above.

For any type of wage determination (whether based on union rates, non-union rates, or a mixed schedule):

◊ If the parties contacted in the limited area practice survey **do not** agree (i.e., jurisdictional dispute between the unions, management does not agree with union, or disagreement between the open shop contractors), or if there is no clear majority in agreement, then it is necessary to conduct a **full area practice survey**. When a full area practice survey is needed, the contracting agency should contact the Wage and Hour Regional Wage Specialist for assistance, guidance and coordination in the conduct of the survey.

How to conduct a full area practice survey to determine the proper classification of work

6. Identify similar projects in the same geographical area as the project under investigation (usually the county) which were in progress during the period one year prior to the wage determination lock-in date of the contract involved in the dispute/investigation.

    ◊ If no similar projects were built in the area during that time frame, contact Wage and Hour for advice in expanding the survey's geographic scope and/or its time frame.

7. Identify firms that performed the work in question on these projects and determine those from which data should be collected – according to whether the relevant classifications in question in the wage determination are either non-union rates, union rates, or both. (For example, only non-union wage rates in the wage determination are involved, information from union contractors is not relevant; if only union rates are involved, information from open shop contractors is not relevant.)

8. For each project, obtain data from the week in which the greatest number of employees performed the work in question, and record how many performed such work on each project and how such employees were classified and paid.

9. Compile all relevant information received and total the number of employees who performed the work in question in each classification reported.

    ◊ **The classification which has the clear majority of employees performing the work in question is the proper classification.**

    ◊ If the data does not show that at least 60% of the workers who performed the duties in question were classified in the same classification, contact Wage and Hour for further guidance.

FRINGE BENEFITS

Definition 29 C.F.R. § 5.2(p).

◊ Under the Davis-Bacon Act, the terms **"**wages," "scale of wages," "wage rates," and "prevailing wages" include:

◊◊ The basic hourly rate of pay,

◊◊ Any contribution irrevocably made by a contractor or subcontractor to a trustee or third party pursuant to a bona fide fringe benefit fund, plan or program, and

◊◊ The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated to the employees in writing.

◊ The statutory language of the Davis Bacon Act regarding fringe benefits is found at 40 U.S.C. § 3141, and is reiterated at 29 C.F.R. § 5.23.

In practice

◊ The Davis-Bacon "prevailing wage" is made up of two interchangeable components – a basic hourly rate and fringe benefits that have been found prevailing in an area and published in a Davis-Bacon wage determination. Along with the basic hourly rate listed on the wage determination, a fringe benefit will be listed for any classification for which fringe benefits were found prevailing. The total, including any fringe benefits listed, comprises the Davis-Bacon "prevailing wage" requirement.

◊◊ This obligation may be met by any combination of cash wages and creditable "bona fide" fringe benefits provided by the employer:

◊◊◊ The total, including any fringe benefits listed for the classification, may be paid entirely as cash wages;

◊◊◊ Payments made or costs incurred by the contractor for "bona fide" fringe benefits may be creditable towards fulfilling the requirement; or

◊◊◊ A combination of cash wages paid and "bona fide" fringe benefits may be used together to meet the total required prevailing wage.

◊◊ Fringe benefits for DBRA must be paid for all hours worked – both straight time and overtime hours.

◊◊ Under DBRA, each classification stands alone and each laborer and mechanic is due the full prevailing wage, including fringe benefits, if listed for the classification, for all hours worked.

Example:

A Davis-Bacon wage determination requires:

Basic hourly rate	$10.00
Fringe benefit	1.00
Total prevailing rate	$11.00

The contractor can comply by paying:

1. $11.00 in cash wages;

2. $10.00 plus $1.00 in pension contributions or other "bona fide" fringe benefits; or

3. $9.00 plus $2.00 in pension contributions or any combination of "bona fide" fringe benefits. (In this case, to compute the minimum overtime rate under CWHSSA, half the basic rate listed, i.e. $5.00 must be added to the full $11,00 straight time "prevailing wage." Thus, under CWHSSA, the **overtime rate would be $16.)**

Note**:** Under DBA/DBRA monetary wages paid in excess of the basic hourly rate may be used as an offset or credit to satisfy fringe benefit obligations, and vice versa.

Application to all hours worked

◊ Under Davis-Bacon, fringe benefits must be paid for **all** hours worked, including overtime hours. However, the fringe benefit amounts listed in the applicable wage determination may be excluded from the half-time premium due as overtime compensation.

For example:

An employee worked 44 hours as an electrician. The wage determination rate was $12.00 (basic hourly rate) plus $2.50 in fringe benefits. The electrician would be due:

44 hours x $14.50	=	$638.00 - (straight time pay)
4 hours x ½ of $12.00		= 24.00 - (overtime pay)
		$662.00

Crediting fringe benefit contributions to meet DBA/DBRA requirements

◊ The Davis-Bacon Act (and 29 C.F.R. § 5.23), list fringe benefits to be considered.

Examples:

Life insurance

Health insurance

Pension

Vacation

Holidays

Sick leave

◊ The use of a truck is not a fringe benefit; a Thanksgiving turkey or Christmas bonus is not a fringe benefit. (See *Cody-Zeigler, Inc.*, WAB Case No. 89-19, April 30. 1991.)

◊ No credit may be taken for any benefit required by federal, state or local law, such as:

Workers compensation

Unemployment compensation

Social security contributions

Funded fringe benefit plans

◊ The contractor's fringe benefit contributions made irrevocably to a trustee or third party pursuant to a fund, plan or program, can be credited toward meeting the prevailing wage requirement, without prior DOL approval. For example:

◊◊ Contractor pays for health insurance monthly premiums.

◊◊ Contractor makes quarterly contributions to retirement plan trust.

◊ The amount of contributions for fringe benefits must be paid **irrevocably** to the trustee or third party.

◊ Contributions to fringe benefit plans must be made regularly, not less often than **quarterly**. (This requirement is specified in the standard Davis-Bacon contract clauses at 29 C.F.R. § 5.5(a)(1)(i).)

◊◊ Annual contributions into a plan do not meet this requirement. While profit sharing plans are bona fide within the meaning of the Act, profits are not determined until the end of the year. Therefore, the DOL requires contractors to escrow money at least quarterly on the basis of what the profit is expected to be.

◊ The contractor must make payments or incur costs in the amount specified by the applicable wage decision **with respect to <u>each</u> individual laborer or mechanic**. Thus, the amount contributed for each employee must be determined separately, and credit taken accordingly towards the prevailing wage requirement for each individual. (It is not permissible to take credit based on the average premium paid or average contribution made per employee.)

◊ Credit may not be taken for fringe benefit contributions made on behalf of employees who are not eligible to participate in the plan (e.g., those excluded due to age or part-time employment).

◊◊ Some plans provide that contributions and allocations under the plan will only be made on behalf of participants who are employed on the last day of the plan year. No credit is permitted for such participants for whom no contribution is made or for contributions made for employees whose accounts receive no allocation solely because they are not employed on the last day of the plan year.

◊◊ On the other hand, it is not required that all employees <u>participating</u> in a fringe benefit plan be entitled to receive benefits from the plan at all times. For example, an employee who is eligible to participate in an insurance plan may be prohibited from receiving benefits from the plan during a 30-day waiting period. Contributions made on behalf of these employees would be creditable against the contractor's fringe benefit obligations.

◊ A pension plan that meets the Employment Retirement Income Security Act (ERISA) requirements may be considered “bona fide” for DBA/DBRA purposes.

◊ Some pension plans contain “vesting” requirements. Where an employer contributes to the plan, employees may be required to complete a certain length of service before they have a nonforfeitable right to benefits based on the employer’s contributions to the plan. Thus, an employee who leaves employment before completing the specified length of service may forfeit all or part of the accrued benefit.

◊◊ Such forfeitures are permitted, provided the plan is a bona fide plan that meets applicable requirements under ERISA, including minimum vesting requirements.

◊◊ Forfeited Davis-Bacon contributions may not revert to the employer, but should be distributed among the remaining plan participants.

Unfunded plans

◊ A fringe benefit plan or program under which the cost a contractor may reasonably anticipate in providing benefits that will be paid from the general assets of the contractor (rather than funded by payments to a trustee or third party) is generally referred to as an **unfunded plan**. These generally include:

◊◊ Holiday plans

◊◊ Vacation plans

◊◊ Sick pay plans

◊ No type of fringe benefit is eligible for consideration as an unfunded plan unless it meets the following criteria:

1. It can be reasonably anticipated to provide benefits described in the Davis-Bacon Act;

2. It represents a commitment that can be legally enforced;

3. It is carried out under a financially responsible plan or program; and

4. The plan or program has been communicated in writing to the laborers and mechanics affected.

◊ To insure that such plans are not used to avoid compliance with the Act, the DOL directs the contractor to set aside, in an account, no less often than quarterly, sufficient assets to meet the future obligation of the plan.

Annualization:

◊ Davis-Bacon credit for contributions made to fringe benefit plans are allowed based on the effective annual rate of contributions for all hours worked during the year by an employee.

◊ Examples:

◊◊ For a defined benefit pension plan, or for a defined contribution pension plan which does not provide for immediate or essentially immediate vesting, if a contractor wishes to receive $2.00 per hour credit for a pension contribution, the contractor must contribute at this same rate for all hours worked during the year. If this is not done, the credit for Davis-Bacon purposes would have to be revised accordingly.

◊◊ If the firm's contribution for the pension benefit was computed to be $2,000 a year for a particular employee, the employee worked 1,500 hours of the

year on a Davis-Bacon covered project and 500 hours of the year on other jobs not covered by the Davis-Bacon provisions, only $1,500 or $1.00 per hour would be creditable towards meeting the firm's obligation to pay the prevailing wage on the Davis-Bacon project. (Annual contribution – $2,000, divided by total hours worked – 1,500+500 = 2000; i.e. $2,000/2000hours = $1.00 per hour.)

◊ For contributions made to defined contribution pension plans which provide for immediate participation and immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), and certain approved supplemental unemployment benefit plans, a contractor may take Davis-Bacon credit at the hourly rate specified by the plan. Under such plans, contributions are irrevocably made by the contractor, most, if not all, of the workers will become fully vested in the plan, and the higher contributions made during Davis-Bacon work result in an increase in the value of the individual employee's account. The amount of contributions to such plans should be in conformance with any limitations imposed by the Internal Revenue Code.

◊ 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 x 12 months) divided by 2080 hours = $1.15 per hour.

◊◊ If the employee in this example 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 provision of medical insurance.) Thus,

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

CWHSSA/OVERTIME PAY

◊ CWHSSA applies to **laborers, mechanics, guards and watchmen** for the time spent on covered contract work only.

◊◊ Total up all time each employee spent working **on covered contracts** – off-site as well as on site on DBRA projects;

◊◊ Exclude all commercial, non-government work.

◊ CWHSSA requires the payment of time and one-half the basic rate of pay for all hours worked in excess of 40 hours in a week. (The daily overtime requirement under CWHSSA was repealed in 1986.)

◊ The basic rate of pay under CWHSSA is the straight time hourly rate and can not be less than the basic hourly rate required in an applicable wage determination. Under DBRA, amounts paid to fulfill the fringe benefit portion of the prevailing wages listed in the wage determination – both contributions to bona fide benefit plans and cash payments made to meet wage determination fringe benefits requirements – are excluded in computing overtime obligations under CWHSSA.

◊ If in a single workweek an employee works in more than one classification for which different non-overtime rates of pay have been established, the overtime pay may be computed based on the weekly average rate (or "regular rate") – the total straight time pay for work (at all such rates) during the week, divided by the total number of hours worked at all jobs worked in the workweek. (An employee who performs work in two or more classifications for which different straight time hourly rates are established may agree in advance of performing the work, to be paid during the overtime hours at a rate not less than one and one-half times the non-overtime rate established for the type of work he performs during such overtime hours.) 29 C.F.R. § 778.6, 778.115, and 778.415-419.

◊ CWHSSA does not have a site of work limitation on coverage. All hours worked on covered contracts (even at a fabrication shop away from the site) are combined for determining CWHSSA compliance. (For example: if an employee starts the day performing covered work at the fabrication shop and then travels to the work site, the time at the fabrication shop and the **travel time** between the fabrication shop and the work site is hours worked covered by CWHSSA.)

◊ The following examples reflect the correct computations under DBRA and CWHSSA for an employee who worked 44 hours on a covered contract as an electrician, where the wage determination rate for an electrician is $12.00 (basic hourly rate) plus $2.50 in fringe benefits.

◊◊ If the employer paid $12.00 in cash wages and $2.50 in fringe benefits, the electrician would receive:

44 hours x $12.00 = $528.00 for cash wages
44 hours x $ 2.50 = $110.00 in fringe benefits
4 hours x ½ x $12.00 = $ 24.00 for CWHSSA earnings
$662.00

◊◊ If the employer paid $10.00 in cash wages and $4.50 in fringe benefits:

44 hours x $10.00 = $440.00 in cash wages
44 hours x $ 4.50 = $198.00 in fringe benefits
4 hours x ½ x $12.00 = $ 24.00 in CWHSSA earnings
$662.00

◊◊ If the employer paid $14.00 in cash wages and $0.50 in fringe benefits:

44 hours x $14.00 = $616.00 in cash wages
44 hours x $ 0.50 = $ 22.00 in fringe benefits
4 hours x ½ x $12.00 = $ 24.00 in CWHSSA earnings
$662.00

◊ The following examples provide two methods for the computation of overtime premium pay required under CWHSSA and/or FLSA for an employee who worked in different job classifications and at different rates of pay in the same work week.

An employee is hired to perform work on a covered construction contract in two job classifications: painter and electrician. The wage determination rate for an electrician is $12.00 (basic hourly rate) plus $2.50 in fringe benefits. The wage determination rate for a painter is $10.00 (basic hourly rate) plus $3.00 in fringe benefits. The payroll shows that the worker performed painting and electrical duties as follows:

	S	M	T	W	T	F	S
Painter hours	10	10	10				
Electrician hours					10	8	

Method 1: Computation of the overtime **premium** based on the weekly average "regular rate" for the work week.

Step 1: Determine the straight time wages due – excluding fringe benefits

30 hours at the painter's rate of $10.00 = $300.00
18 hours at the electrician's rate of $12.00 = 216.00
Total straight time wages = $516.00

Step 2: Calculate the "regular rate"

($516.00 / 48 hours worked)= $10.75 "regular rate"

Step 3: Compute the overtime premium due

½($10.75) x 8 overtime hours worked = $43.00

Method 2: Computation of the overtime premium based on the "rate in effect" when the overtime hours were worked.

In this example the eight overtime hours occurred on a Saturday.

The overtime **premium** could be computed as follows:

½($12.00) x 8 = $48 (established rate).

Note: In some cases, a question arises over whether a cash payment made to a laborer or mechanic is paid in lieu of a fringe benefit contribution or whether it is simply part of the individual's normal straight time wages. In the latter situation, the cash payment is not excludable in computing the overtime pay obligation.

Overtime requirements under the Fair Labor Standards Act (FLSA), as amended

◊ On contracts to which CWHSSA does not apply (prime contract $100,000 or less) overtime pay requirements may apply under other laws. On contracts to which CWHSSA does apply, the overtime pay requirements of other laws may also apply.

◊ Laborers and mechanics performing DBA/DBRA work may be subject to overtime compensation provisions of other laws which may apply concurrently to them, including the Fair Labor Standards Act. 29 C.F.R. § 778.6.

◊ As a general standard, Section 7(a) of the Fair Labor Standards Act, as amended, provides that an employer shall not employ any employee to work in excess of 40 hours in a workweek unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which her or she is employed. 29 C.F.R. § 778.101.

◊ Unless specifically exempted from FLSA overtime pay requirements, an employee who performs work on both federally funded/federally financed projects and commercial work in the same workweek must receive an overtime premium for hours worked in excess of 40 in the workweek. 29 C.F.R. § 778.

(Note: 29 C.F.R. §§ 5.32 and 778.6 discuss dual application of Davis-Bacon and FLSA overtime requirements.)

◊ CWHSSA requires the payment of an overtime premium only if the laborer or mechanic works in excess of 40 hours in a work week on covered contract(s). Overtime hours worked, which are not subject to CHWSSA, may be subject to FLSA overtime pay.

◊ Where questions arise concerning overtime pay obligations under the FLSA, consultation with the local WHD office is appropriate. The Department of Labor (DOL) developed the ***elaws*** Advisors to help employees and employers understand their rights and responsibilities under numerous Federal employment laws. The Fair Labor Standards Act ***elaws*** Advisor is available at http://www.dol.gov/elaws/flsa.htm.

State and Local Wage and Hour Laws

◊ Federal laws regarding minimum wages and overtime pay do not preempt the requirements of similar State and local laws. These laws set minimum requirements and can apply concurrently. Thus, compliance with each applicable law is appropriate, in accord with the requirements of each. Where questions arise regarding wage and overtime pay requirements under State (or local) law, the appropriate State (or local) government agency should be consulted regarding compliance with the non-federal requirements.