



Davis-Bacon and Related Acts General Overview



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

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Agenda

- Coverage
- Laborers and Mechanics
- Survey Process
- Wage Determinations
- Conformances and Appeals Process
- Fringe Benefits
- Davis-Bacon Act vs Service Contract Act
- All Agency Memorandum 247 (TAB workers)
- Anti-Retaliation



DBRA Coverage Overview



Davis-Bacon and Related Acts (DBRA)

- The DBRA applies to contractors and subcontractors performing on federal or federally assisted contracts in excess of \$2,000 for construction, alteration, or repair.
- Covered contractors and subcontractors must pay their laborers and mechanics working on the site of the work no less than the locally prevailing wages (including fringe benefits, if applicable) for corresponding work on similar projects in the area.

Agency Responsibilities

- Ensure proper wage determination (WD) is identified and incorporated into the prime contract
- Advise contractors which schedule of rates applies to various construction items
- Advise contractors regarding the duties performed by various crafts in the WD

Categories of Construction Projects

- “The minimum wage shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on *projects of a character similar* to the contract work” in the locality where the work is performed.” (40 U.S.C. 3142(b))
- WHD has identified four general categories of construction: Building, Residential, Highway, and Heavy
 - See AAM130



Laborers and Mechanics

Davis-Bacon Laborers and Mechanics

- Workers whose duties are manual or physical in nature
- Includes apprentices and helpers
- For Contract Work Hours and Safety Standards Act (CWHSSA), includes guards and watchpersons

Laborers and Mechanics (continued)

- Does not include
 - Timekeepers, inspectors, architects, engineers; or
 - Bona fide executive, administrative, and professional employees as defined under the Fair Labor Standards Act
- Working forepersons are generally non-exempt
 - Must be paid the Davis-Bacon prevailing wage rate for the classification of work performed if not exempt under 29 CFR part 541

Apprentices

- Persons individually registered in bona fide apprenticeship program registered with DOL's Employment Training Administration (ETA) Office of Apprenticeship (OA) or a State Apprenticeship Agency recognized by OA
- Individual in their first 90 days of probationary employment as an apprentice in such a program
- Regulations: 29 CFR 5.2 and 5.5(a)(4)(i)

Apprentices – Requirements

- Are laborers and mechanics; not listed on Wage Determinations (WDs)
- Permitted to work on covered projects and be paid less than the journey level WD rate when:
 - Individually registered in an approved apprenticeship program
 - Paid the percentage of hourly rate required by the apprenticeship program

Apprentices – Requirements (continued)

- Paid the fringe benefits specified in approved program; if the program is silent, the full amount of fringe benefits listed on the WD
- Are employed within the allowable ratio specified in the relevant program for the number of apprentices to journeyworkers
- Reciprocity of ratios and wage rates – 29 CFR 5.5(a)(4)(i)(D)

Apprentices – Ratios

- “The allowable ratio of apprentices to journeyworkers on the job site in any craft classification must not be greater than the ratio permitted to the contractor as to the entire work force under the registered program or the ratio applicable to the locality of the project pursuant to paragraph (a)(4)(i)(D) of this section.” 29 CFR 5.5(a)(4)(i)(C)
- Compliance with the applicable ratio is determined on a daily, not weekly, basis
- The use of fractions in computing the ratio is not permitted unless specified in the approved apprenticeship agreement



Survey Process

Importance of Survey Participation

- Greater survey participation leads to more complete wage determinations.
- Only data received during a survey is used in calculating prevailing wage rates based on WHD surveys.
- Complete wage determinations are dependent upon survey participation and the level of construction activities.

Impact of Low Participation

- Prevailing wage rates (basic hourly rate and fringe benefits) possibly based on a less substantial amount of data.
- Prevailing wage rates (basic hourly rate and fringe benefits) possibly based on data from outside the county where work is being performed.
- Wage determinations with missing classifications, creating uncertainty in the bidding process and an increased need for conformed rates.

Adoption of State or Local Rates

- Wage rates determined for public construction by State and/or local officials may be adopted, with or without modification, provided that certain conditions are met.
- Methods and criteria used by State or local officials may differ from those otherwise used by the Administrator.

Adoption of State or Local Rates - Criteria

- State or local government survey or other process is open to full participation by all interested parties;
- Wage rate reflects a basic hourly rate and prevailing fringe benefits which each can be calculated separately;
- Laborers and mechanics are classified in a recognized manner within the construction field; and
- Criteria for setting prevailing wage rates are substantially similar to DOL's criteria.

Periodic Rate Adjustments

- Adjustments to non-collectively bargained prevailing wage and fringe benefit rates on general wage determinations based on U.S. Bureau of Labor Statistics Employment Cost Index (ECI) data or its successor data.
- Such rates may be adjusted based on ECI data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication.
- WHD will issue modifications to general wage determinations with such adjusted rates.

Definition of Prevailing Wage Rate

- Wage paid to the majority (at least 50%),
- If the majority wage is not paid, then prevailing wage will be the wage paid to the greatest number, *provided* at least 30%, or
- If no wage rate is paid to 30%, the prevailing wage will be the average.

Functionally Equivalent Rates

- Variable wage rates paid by contractor(s) may be treated as the same wage rate where the rates are functionally equivalent, as explained by:
 - One or more collective bargaining agreements or
 - Written policies maintained by contractor(s)

Wage Determinations



Wage Determinations

- Two types of wage determinations:
 - General wage determinations
 - Project wage determinations
- Most often, general wage determinations will be applicable.

“Project” Wage Determinations

- Issued at request of funding agency through Standard Form (SF) 308
 - No “General” WD in effect
 - Virtually all work (100%) on contract performed by a classification not listed on General WD, or
 - Where a project requires work in multiple counties
- Agency to provide wage data
- Application to a specific project only
- Effective for 180 days

Application of Multiple WDs

- When a project has construction work in more than one category of construction, the wage determination from each category will apply if the cost of the work involved in the category is substantial.
- The cost is generally considered substantial if it exceeds 20% of the overall cost of the project or is over \$2.5 million.

Retroactive Incorporation of Wage Determinations

Incorporation of WD after contract award or start of construction:

- Failure to incorporate a WD into contract
- Incorporation of wrong WD into the contract



Reading and Interpreting Wage Determinations

Interpreting “General” Wage Determinations

- “General” Wage Determination (WD) segments:
 - Cover Sheet
 - Body of WD (classifications, rates & fringe benefits)
 - Explanation of rate identifiers

Interpreting “General” WDs: Cover Sheet-Decision Number

- Decision Number (supersedes)
 - Annual publication-General WDs
 - Replace prior wage determinations
 - WD numbers reflect new year
- State
- County
- Type of construction
 - Description of construction
 - Include and exclude language

Interpreting “General” WDs: Cover Sheet-Modifications

Record of Modifications:

- List of all modifications of the WD
- Results of new survey
- Update collectively bargained rates
- Adjustment of non-collectively bargained rates based on ECI
- List of classifications and rates
- Basis for rates – Identifiers:
 - Union Identifiers
 - SU Identifiers

Interpreting “General” WDs: Union Rates

Union Identifiers

ELEV0101-001 10/01/2017

ELEVator Constructors: International Union

Local 101: Local union Number

001: Internal Processing Number

10/01/2017: Date the rate became effective on the CBA

Interpreting “General” WDs: Body – Union Average

UAVG- Union Weighted Average Identifiers

- **UAVG-CO-0016** 01/01/2016

	Rates	Fringes
• OPERATOR: Bulldozer.....	\$ 37.85	\$22.72

- A UAVG rate prevails where 100% of the data reported for the classification is union data, but more than one union performed work in the classification in the locality and no single rate prevailed
- UAVG rates are updated annually

Interpreting “General” WDs: Body – Survey Rate

SU Identifiers

SUCO2015-015

07/31/2015

SU: **SU**rvey – Basis of Rate(s)
CO: Colorado
2015: Date of Survey
015: Internal numbering
7/31/2015: Date submitted for publication

*** SU rates remain unchanged until new survey or ECI adjustment conducted**

Letters of Inadvertence

- Clerical error in WD
- Letter of Inadvertence correcting the error will be issued by DOL
- Corrected WD to be included in contract retroactively



Wage Determinations: Conformance & Appeals Process

Conformance Process

- Unlisted classifications needed for work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29 CFR 5.5(a)(1)(iii)).
- Conformance requests are not needed for bona fide:
 - Apprentices
 - Welders

Criteria for Conformance Actions

Conformance of an additional classification and wage rate and fringe benefits is appropriate only when all the following criteria have been met:

- The work to be performed by the proposed classification is not performed by a classification already in the wage determination (WD)
- The proposed classification is used in the area by the construction industry
- The proposed wage rate bears a reasonable relationship to WD rates

“Reasonable Relationship”

When determining whether a proposed rate bears a “reasonable relationship” to wage rates in the wage determination:

- Determine the category of the classification in question (skilled craft, laborer, equipment operator, or truck driver)
- Determine whether the rates in that category are predominantly CBA or survey rates
- Consider the rates that category (or all the rates in that category, if neither CBA nor survey rates predominate) and determine whether the proposed rate is reasonable in light of those rates
- Do not automatically use the lowest rate in the category

“Reasonable Relationship” – Example

Based on the following, does the proposed hourly rate of \$20.99 plus \$10.04 in fringe benefits (\$31.03 in total) for a skilled craft bear a reasonable relationship to the rates on the WD? In this case, the amount proposed does not bear a reasonable relationship to the rates on the WD.

Classification	Sector	Hourly Wage	FB	Total
Carpenter	CBA	\$26.06	\$10.56	\$36.62
Cable Splicer	CBA	\$28.62	3% + \$12.98	\$42.46
Electrician	CBA	\$28.37	\$13.98	\$42.35
Ironworkers	CBA	\$31.09	\$19.60	\$50.69
Cement Mason/Finisher	Survey	\$20.22	\$7.98	\$28.20
General Laborer	CBA	\$21.04	\$9.65	\$30.69

Contracting Agency & Contractor Responsibilities

Pre-Bid/Pre-Award

- Review the WD
- Compare the WD with the project work
- Anticipate needed classifications
- Apply conformance criteria

Contractor Responsibilities

After-Award:

- Identify additional classification(s) needed
 - At the pre-construction conference
 - From certified payrolls
- Advise agency of the needed classification(s)
- Complete Contractor Part of SF-1444
- Apply Conformance Key Criteria
- Forward SF-1444 to agency for review, signature, and submission to DOL

Submitting the SF-1444

- Contracting Officers may submit completed SF-1444 Requests to the Department of Labor via email. Please scan the completed form and all supporting documents into a 'pdf' file and attach to the email. Include the Contracting Officer's name, address, telephone, and email address.
- DBAConformance@dol.gov
- <https://sam.gov/content/wage-determinations/resources/dba-conformances>

Appeal Process: WDs & Conformances

Has an initial determination been made on a:

- Published WD
- Wage survey
- Letter setting forth a position, or
- A conformance determination

Frequently Conformed Rates

- If there is insufficient wage survey data to determine the prevailing wage for a classification for which conformance requests are regularly submitted, the Administrator may list the classification, wage rate, and fringe benefit rate for the classification on the wage determination, provided certain criteria are met.

Initial Contacts

- Initial contact on survey related matters should be directed to the WHD, National Office, Branch of Wage Surveys
- Initial contact on WD and conformance actions should be directed to the WHD, National Office, Branch of Construction Wage Determinations
 - <http://www.dol.gov/whd/govcontracts/stateassignments.htm>

Review & Reconsideration

Requests for review and reconsideration are submitted to the Administrator, WHD:

- In writing or by email to:
DBABCWDAppeal@dol.gov
- Include supporting data
- Response or notification of additional time needed within 30 days

Final Rulings: WHD and ARB

- A final ruling will be issued by the WHD Administrator and may be appealed to the Administrative Review Board (ARB).
- The ARB issues final agency decisions on behalf of the Secretary of Labor:
 - Requests for review of WDs must be timely (29 CFR 7.4(a))
 - The ARB will not request that a contracting agency postpone contract action (29 CFR 7.4(b))

DBRA Fringe Benefits



Davis-Bacon Fringe Benefits

- What are fringe benefits under the Davis-Bacon and Related Acts (DBRA)?
- When may a contractor or subcontractor claim a credit towards their prevailing wage obligation for providing bona fide fringe benefits to covered workers?

What are Fringe Benefits?

Examples of fringe benefits:

- Life Insurance
- Health Insurance
- Pension
- Vacation
- Holiday
- Sick Leave

Deductions: 29 CFR 3.5

- 29 CFR 3.5 lists deductions that an employer can make from the prevailing wage rate without the approval of the Secretary of Labor
- Examples include Social Security and federal or state taxes, certain court-ordered payments, bona fide pre-payment of wages, certain payments of union dues, and voluntary charitable donations

Deductions: 29 CFR 3.6

- 29 CFR 3.6 generally provides that the Secretary may approve other deductions whenever all of the following conditions are met
 - The contractor does not profit directly or indirectly from the deduction
 - The deduction is not otherwise prohibited by law
 - Either the employee voluntarily consented to the deduction in writing in advance of the time that the work was performed or the deduction is under the terms of a collective bargaining agreement
 - The deduction serves the convenience and interest of the employee

Funded Fringe Benefit Plans

- Contractors may take credit (without prior approval from DOL) for bona fide fringe fund contributions made to third-party trustees or insurers that:
 - Are *irrevocably* paid; and
 - Are made regularly, not less often than *quarterly*
- Credit is for payments made for individual workers eligible to participate in the plan, program, or fund

Unfunded Fringe Benefit Plans

Costs for an “unfunded” FB plan count towards the prevailing wage obligation if specific criteria are met:

- The contributions reasonably anticipate the cost to provide a bona fide FB;
- Contributions are made pursuant to an enforceable commitment;
- That is carried out under a financial responsible plan;
- The plan has been communicated in writing to affected workers; and
- The plan has been approved by WHD, pursuant to the procedure outlined in 29 CFR 5.28(c).

Administrative Expenses

- The administrative expenses incurred by a contractor or subcontractor in connection with the administration of a bona fide FB plan are not creditable towards the prevailing wage under Davis-Bacon



Davis-Bacon Act vs Service Contract Act

Davis-Bacon Act – Coverage

The Davis-Bacon Act applies to contracts:

- In excess of \$2,000,
- To which the Federal Government or the District of Columbia is a party,
- For construction, alteration, and/or repair, including painting and decorating, of
- Public buildings or public works

Service Contract Act – Coverage

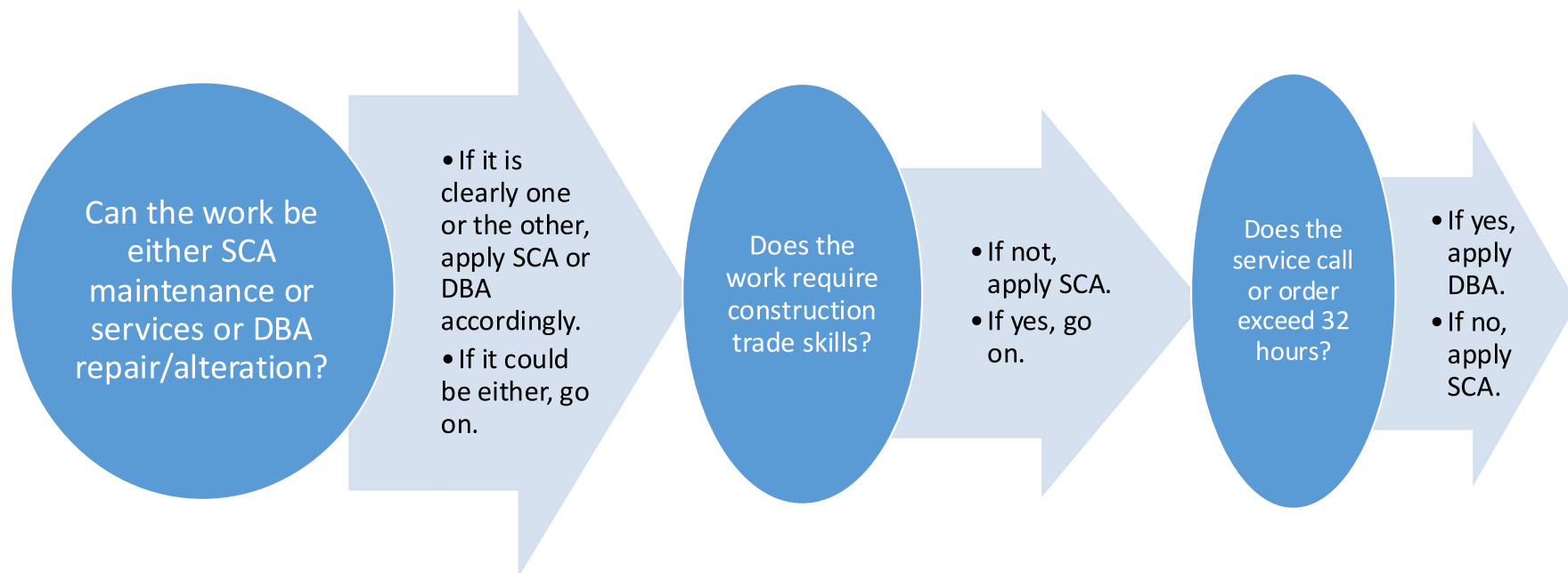
The Service Contract Act applies to “any contract” that

- “is made by the Federal Government or District of Columbia,”
- “involves an amount exceeding \$2,500,” and
- “has as its principal purpose the furnishing of services in the United States,”
- “through the use of service employees.”

Contracts Requiring SCA and DBA

- 29 CFR – 4.116(c)(2) - SCA and DBA both apply to contracts “principally” for services that:
 - Contain specific requirements for substantial amounts of construction, alteration, or repair work
 - Physically or functionally separate from other work called for by the contract

Applying 48 CFR 222.402-70(d)



Alteration or Repair

- Restoration or improvement of a facility by modifications to the facility's components, systems, or materials is considered to be alteration or repair.
- Alterations or repairs will generally improve the building or work, either by fixing something that is broken or by improving upon the building or work's existing condition.
- In contrast, maintenance work that is routinely and regularly performed to keep the building or work functioning in the same condition is not considered construction.

SCA Maintenance

- SCA Maintenance – Work is typically
 - Scheduled, regular and recurring maintenance activities
 - Routine to keep something in state of continuous utilization
 - Examples: custodial service, routine HVAC filter changes, snow removal

DBA Repair Work

- Typically covers activities such as restoration of facility
- One time fix to something not functioning
- Restoration, alteration or replacement of fixed components
- Examples: building structural repair, renovation, roof shingling, paving repairs

Repair versus Maintenance

Factors Indicating Work Is Alteration or Repair	Factors Indicating Work Is Maintenance Work
Correction of individual problems or defects as separate and segregable incidents	Work is performed continuously/repetitively over time
Items of work require more time to complete	Items of work are completed comparatively quickly
The work improves the facility's structural strength, stability, safety, capacity, efficiency, or usefulness	Work does not affect an integral component or system of the facility, but merely maintains it in its existing condition
Skills necessary for the work are typical of one or more construction trades	Skills necessary for the work are not typical of the construction trades

Work Requiring Construction Trade Skills

- Brief tasks that do not require the skills or tasks of any construction trade performed on an existing, properly functioning building will typically not be construction work performed by a laborer or mechanic.
- Brief tasks are tasks that typically only take a few minutes to perform.

Activities Performed Prior To Acceptance

- Some activities are considered construction when performed during the construction of a building or work, prior to final acceptance by the contracting agency, even if they would be considered maintenance in other contexts.
- Examples of such activities include:
 - Cleaning work, such as window scraping and washing, removal of excess paint, and sweeping
 - Landscaping
 - Carpet laying and hanging curtains

Important Considerations – DBA Coverage

- DBA-covered when:
 - Work involves alteration or repair
 - Work is part of a construction contract performed prior to acceptance by owner
 - Subsequent construction is already contemplated at the site

Important Considerations – SCA Coverage

- SCA-covered when:
 - Activity is scheduled routine maintenance and upkeep
 - Work would be considered maintenance and is performed after construction has been completed and has been finally accepted by the contracting agency
 - No construction is contemplated at the site



All Agency Memorandum 247



AAM 247 – TAB Workers

- WHD recently issued AAM 247 clarifying the applicability of Davis-Bacon labor standards to workers who perform testing, adjusting and balancing (TAB) work on HVAC systems:
- AAM 247 discusses two issues:
 - Are workers who perform TAB work on HVAC systems “laborers or mechanics” to whom Davis-Bacon requirements may be applicable?
 - Under what circumstances is TAB work on HVAC systems part of the construction, alteration, and/or repair on a DBRA-covered project, and hence subject to Davis-Bacon labor standards?

TAB Workers – Laborers and Mechanics

- Workers performing TAB duties generally are considered “laborers or mechanics” within the meaning of the DBRA because TAB work generally involves duties that are primarily “manual or physical in nature.” 29 CFR 5.2.
- Because job titles can vary, consideration of the actual duties a TAB worker performs is important to determine if they are “laborers or mechanics” under the DBRA and its implementing regulations

When is TAB Work Subject to the DBRA?

- Examine the contract's Scope of Work
- TAB work may be DBRA covered, or it may be SCA covered
 - Is the contract for construction?
 - Is the contract for routine, scheduled maintenance or servicing?
- Coverage may also be affected by the sequencing of the TAB work in relation to contracts whose scopes of work include construction, alteration, and/or repair work

When is TAB Work Not Subject to DBRA?

- Construction activities undertaken in segregable phases that are distinct in purpose, time and place
- Construction not yet contemplated
- Contracts solely for inspection (i.e., testing) of HVAC installation or rehabilitation work
- Must consider scope of work in any Task Order, Purchase Order, or other similar instrument issued under multi-year IDIQ contracts



Davis-Bacon and Related Acts Anti-Retaliation

Anti-Retaliation Provisions

- Intended to discourage contractors, responsible officers, and any other persons from engaging in – or causing others to engage in – unscrupulous business practices that may chill worker participation in WHD investigations or other compliance actions and enable prevailing wage violations to go undetected.

Protected Activities

- Workers or job applicants are protected from being retaliated against for the following activities:
 - Making a contractor aware of any conduct the worker reasonably believes is a violation
 - Asserting DBRA rights on behalf of themselves or others, such as filing a complaint
 - Cooperating in an investigation or other compliance action
 - Informing another person of their rights under the DBRA

Prohibited Actions

- It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for engaging in protected activities.

Potential Retaliation Remedies

- Back pay and benefits denied or lost
- Other actual monetary losses sustained as a result of the violation
- Interest on back pay or other monetary relief from date of the loss
- Restoration of prior conditions and privileges of the worker's employment or former employment
- Removal of warnings, reprimands, or derogatory references
- The provision of a neutral employment reference
- Debarment

Debarment

- Contractors can be debarred for retaliation against workers OR applicants
- The standard for debarment for retaliation is the same as for other DBRA violations – a disregard of obligations
- Period of debarment is 3 years, with no option for early removal from debarred parties list



Resources

Internet Sites

- Wage Determinations: <https://sam.gov>
- Wage and Hour Division: <http://www.dol.gov/agencies/whd/government-contracts>
- WHD Protections for Workers in Construction under the Bipartisan Infrastructure Law: <https://www.dol.gov/agencies/whd/government-contracts/protections-for-workers-in-construction>
- Resource Book: <https://www.dol.gov/agencies/whd/government-contracts/prevaling-wage-resource-book>
- Office of the Administrative Law Judges Law Library: <https://www.dol.gov/agencies/oalj/topics/libraries/LIBDBA>
- Prevailing Wage Topic videos: <https://www.dol.gov/agencies/whd/government-contracts/construction/presentations>

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