FAQs REGARDING THE DAVIS-BACON FINAL RULE

INTRODUCTION 1

I. BACKGROUND 2

FAQ #1: What is the Davis-Bacon Act? 2

FAQ #2: What are the Davis-Bacon Related Acts? 2

FAQ #3: When does the Davis-Bacon Act apply? 2

FAQ #4: What is the prevailing wage? 3

FAQ #5: What is a wage determination? 3

FAQ #6: What is a general wage determination? 3

FAQ #7: What is a project wage determination? 4

FAQ #8: What types of construction are represented in wage determinations? 4

II. EFFECTIVE DATE 4

FAQ #9: What is the effective date of the Final Rule? 4

FAQ #10: Can missing contract clauses or wage determinations be added to contracts entered into before October 23, 2023? 4

FAQ #11: How long will the Final Rule be in effect? 4

III. LEGAL CHALLENGES 4

FAQ #12: Are there any legal challenges to the Final Rule? 5

IV. PREVAILING WAGE CALCULATIONS 5

FAQ #13: How does the Final Rule change the definition of "prevailing wage"? 5

FAQ #14: What are "functionally equivalent" wage and benefit rates? 6

FAQ #15: What is the geographic area used for wage determinations? 7

FAQ #16: What are "frequently conformed rates"? 8

FAQ #17: Will the DOL be permitted to adopt state and local wage determinations? 9

V. WAGE DETERMINATIONS 9

FAQ #18: What types of wage determinations are there? 9

FAQ #19: Can wage determinations be updated *after* the contract is awarded? 10

FAQ #20: Will the DOL update non-collectively bargained prevailing wage rates? 11

VI. COVERAGE PRINCIPLES 11

FAQ #21: What federal agencies are covered by the DBA? 11

FAQ #22: What types of construction activity are covered by the DBA? 11

FAQ #23: Does the DBA apply construction activity that involves only a portion of a building? 12

FAQ #24: Does the DBA apply to installation work? 12

FAQ #25: Does the DBA apply to construction activity that takes place away from the site of construction? 13

VII. FRINGE BENEFITS 14

FAQ #26: How does the "annualization" requirement affect how fringe benefits may be calculated? 14

FAQ #27: Are unfunded plans creditable against the fringe benefit obligations? 16

VIII. ANTI-RETALIATION 16

FAQ #28: What is the impact of the new anti-retaliation protections? 16

IX. RECORDKEEPING 16

FAQ #29: How does the Final Rule impact recordkeeping requirements under the DBRA? 16

X. APPRENTICES 19

FAQ #30: What are the rates of pay and benefits for apprentices? 19

FAQ #31: What are the allowable ratios for apprentices to journeyworkers? 20

FAQ #32: If a federal contractor or subcontractor is performing work in another jurisdiction, does the apprenticeship program in the contractor's home area apply? 20

FAQ #33: Does the Final Rule affect "trainees"? 20

FAQ #34: Does the Final Rule affect "pre-apprentices"? 21

FAQ #35: What if a contractor uses "pre-apprentices" on a project covered by DBA? 22

XI. ENFORCEMENT 22

FAQ #36: How does the "operation of law" provision impact federal contractors? 22

FAQ #37: How does "mandatory flow-down" provision impact federal contractors and subcontractors? 22

FAQ #38: Are upper-tier subcontractors strictly liable for DBA violations of lower-tier subcontractors? 23

FAQ #39: What is "withholding" and "cross-withholding"? 23

FAQ #40: How does the Final Rule affect "withholding" and "cross-withholding? 24

FAQ #41: What is "debarment"? 24

FAQ #41: How does the Final Rule impact the "debarment" under the DBA and DBRA? 24

FAQ #42: Are back pay and monetary relief available under the DBA? 25

INTRODUCTION

On August 8, 2023, the Department of Labor (DOL) published its Final Rule, "*Updating the Davis-Bacon and Related Acts Regulations*," to amend regulations issued under the Davis-Bacon Act (DBA) and the Davis-Bacon Related Acts (collectively, the DBRA).

The Final Rule represents the DOL's first comprehensive regulatory review in 40 years. A copy of the text of the Final Rule is available here: https://www.federalregister.gov/documents/2023/08/23/2023-17221/updating-the-davis-bacon-and-related-acts-regulations. According to the DOL, the changes will impact approximately 1.2 million construction workers.

Key changes in the Final Rule include:

- Returning to the three-step process for determining the "prevailing wage," including the "30% Rule";
- Clarifying and Expanding DBA Coverage;
- Automatically incorporating contract clauses and wage determinations into federal contractors by "operation of law";
- Simplifying and streamlining the calculation of the prevailing wage, including adoption of wage rates set by state and local governments;
- Increased recordkeeping requirements;
- New anti-retaliation protections for workers; and
- New and expanded DOL enforcement mechanisms.

The Final Rule is effective ***October 23, 2023***. Contracts entered into after this date will be impacted, and the DOL will implement the Final Rule's changes to the wage determination process to wage determinations completed after the effective date.

To assist SMACNA contractors who perform federal contract work, SMACNA has developed a list of frequently asked questions ("FAQs") regarding the DBA and the Final Rule.

I. BACKGROUND

FAQ #1: What is the Davis-Bacon Act?

The DBA[1] applies to every contract of the United States in excess of $2,000 for construction, alteration, and/or repair of public buildings or public works in the United States. The DBA requires contractors and subcontractors to "pay all mechanics and laborers employed directly on the site of the work" the prevailing wage.[2]

The prevailing wage is a minimum wage "determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed. . . ."[3]

FAQ #2: What are the Davis-Bacon Related Acts?

The DBRAs are federal statutes which authorize federal assistance in the form of grants, loans, loan guarantees, or insurance for programs such as the construction of hospitals, housing complexes, sewage treatment plants, highways, and airports. Included in the language of these statutes are references to the DBA labor standards provisions and the requirement that laborers and mechanics be paid prevailing wage rates. In contrast to direct federal contracts, DBRAs are indirect contracts for construction services provided to a private entity but funded with federal dollars.

DBRAs include the National Housing Act of 1934, Pub. L. 73-479; the Federal-Aid Highway Act of 1956, Pub. L. 84-627, and the Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58 (the Bipartisan Infrastructure Law). The DOL maintains a list of Related Acts on its government contracts compliance assistance website at https://www.dol.gov/agencies/whd/government-contracts.

FAQ #3: When does the Davis-Bacon Act apply?

The DBA applies to "every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia."[4]

Under the DBA, every covered contract must include the following stipulations:

---

[1] 40 U.S.C. § 3141, et. seq.

[2] 40 U.S.C. § 3142(c).

[3] 40 U.S.C. § 3142(b).

[4] 40 U.S.C. § 3142(a).

- (1) The contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics;

- (2) The contractor will post the scale of wages to be paid in a prominent and easily accessible place at the site of the work; and

- (3) There may be withheld from the contractor so much of accrued payments as the contracting officer considers necessary to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by the laborers and mechanics and not refunded to the contractor or subcontractors or their agents.[5]

FAQ #4: What is the prevailing wage?

The prevailing wage is the combination of the basic hourly wage rate and any fringe benefits rate listed for a specific classification of workers in the applicable Davis-Bacon wage determination. The contractor's prevailing wage obligation may be met by either paying each laborer and mechanic the applicable prevailing wage entirely as cash wages or by a combination of cash wages and employer-provided bona fide fringe benefits.

FAQ #5: What is a wage determination?

A wage determination is the list of basic hourly wage rates and fringe benefit rates for each classification of laborers and mechanics ("labor classification") in a predetermined geographic area for a particular type of construction. Wage Determinations are issued for four types of construction categories: building, residential, highway, and heavy. The DOL conducts surveys of local wages to determine the prevailing wage rates that are included in wage determinations.

There are two types of wage determinations: (1) general determinations and (2) project determinations.

FAQ #6: What is a general wage determination?

A general wage determination reflects wage rates determined by the DOL to be prevailing in a specific geographic area for a certain type of construction and does not expire. General wage determinations are published online at www.sam.gov.

[5] 40 U.S.C. § 3142(c)(1)-(3).

FAQ #7: What is a project wage determination?

A project wage determination is issued at the request of a contracting agency and is applicable to the named project only. These typically expire 180 calendar days from the date of issuance. Project Wage Determinations must be requested by the agency by submitting SF-308.

FAQ #8: What types of construction are represented in wage determinations?

Wage determinations are issued for four types of construction categories: building, residential, highway, and heavy.

II. EFFECTIVE DATE

FAQ #9: What is the effective date of the Final Rule?

The provisions relating to wage determinations apply to all wage determinations completed and published on or after October 23, 2023.

All other provisions, including the operation-of-law provision[6] apply to new contracts awarded *on or after* October 23, 2023.

Any contracts awarded *before* October 23, 2023, the terms of those contracts and the regulations that were effective at the time those contracts were entered into (as interpreted by case law and the DOL's guidance) will continue to govern the duties of contractors and contracting agencies and the enforcement actions of the DOL.

FAQ #10: Can missing contract clauses or wage determinations be added to contracts entered into before October 23, 2023?

If a contract awarded before October 23, 2023 is missing the required contract clauses or wage determinations, the DOL may seek to address any omissions through existing post-award modification provisions in 29 C.F.R. § 1.6(f). The Final Rule makes clear that "[t]he contractor must be compensated for any increases in wages resulting from incorporation of a missing wage determination."[7]

FAQ #11: How long will the Final Rule be in effect?

The Final Rule will remain in effect until the DOL proposes and finalizes a new or modified rule.

III. LEGAL CHALLENGES

[6] 29 C.F.R. § 5.5(e).

[7] 29 C.F.R. § 1.6(f)(3).

FAQ #12: Are there any legal challenges to the Final Rule?

No, we are not aware of any legal challenges to the Final Rule. On August 8, 2023, the Associated Builders and Contractors (ABC) released a statement threatening to "take appropriate legal action to address the numerous illegal provisions of the final rule."[8] However, to date, we are unaware of any legal challenges to the Final Rule.

IV. PREVAILING WAGE CALCULATIONS

FAQ #13: How does the Final Rule change the definition of "prevailing wage"?

For nearly 50 years, "***prevailing wage***" was defined by the DOL to mean "the wage (hourly rate of pay and fringe benefits) paid to the greatest number of laborers or mechanics in the classification on similar projects in the area during the period in question, *provided* that the wage is paid to ***at least 30% of those employed in the classification***."[9] That is, under the pre-1982 definition, determining the prevailing wage required a three-step process: (1) Any wage rate paid to a majority of workers; and, if there was none, then (2) the wage rate paid to the greatest number of workers, provided it was paid to at least 30 percent of workers, and, if there was none, then (3) the weighted average rate. The second step is referred to as the "30-percent rule."

Then, in 1982, the DOL abruptly removed the second step in the three-step process—the 30-percent rule.[10] The new process required only two steps: (1) identifying if there was a single wage rate paid to more than 50 percent of workers, and then (2) if no wage rate is greater than 50 percent of workers, relying on a weighted average of all the wage rates paid.[11]

The DOL's elimination of the long-standing 30-percent rule was first and foremost inconsistent with the text and purpose of the Davis-Bacon Act. "***Prevailing***" means "[t]o be ***commonly accepted or predominant***."[12] For a wage to be "***commonly accepted***" or "***predominant***," there is

[8] Available at: https://www.abc.org/News-Media/News-Releases/abc-final-davis-bacon-rule-undermines-taxpayer-investments-in-infrastructure.

[9] 29 C.F.R. § 1.2(a) (1935).

[10] See 47 Fed. Reg. 23644, 23645 (May 28, 1982).

[11] Id. at 23645; see also 29 C.F.R. § 1.2(a)(1) (1982) ("The 'prevailing wage' shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the 'prevailing wage' shall be the average of the wages paid, weighted by the total employed in the classification.").

[12] Prevail, Black's Law Dictionary (11th ed. 2019); see also Webster's New Collegiate Dictionary (defining "prevailing" to mean "having superior force in influence; most frequent."); Webster's Third New International Dictionary (1976) (defining the term "prevailing" as "most frequent" or "generally current," descriptive of "what is in general or wide circulation or use . . . .").

no requirement that the rate be received by a "majority" (i.e., more than 50 percent) of workers.[13] Indeed, if Congress had intended the DOL to determine the "majority" wage, then it could have easily crafted the statutory text to so reflect.

The Final Rule returns to the pre-1982 "3-step process" for determining a prevailing wage. Specifically, the Final Rule defines "prevailing wage" as follows:

> The term "prevailing wage" means:
>
> (1) The wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question;
>
> (2) If the same wage is not paid to a majority of those employed in the classification, the prevailing wage will be the wage paid to the greatest number, provided that such greatest number constitutes at least 30 percent of those employed; or
>
> (3) If no wage rate is paid to 30 percent or more of those so employed, the prevailing wage will be the average of the wages paid to those employed in the classification, weighted by the total employed in the classification.[14]

Stated differently, after October 23, 2023, the DOL will calculate the prevailing wage using the following three-step process:

- (1) If a majority (over 50%) of wage rates in a classification are the same, that is the prevailing wage;
- (2) If there is no majority, then the wage rate earned by the greatest number of workers, provided that at least 30% earn that rate, is the prevailing wage; and
- (3) If no wage rate is earned by at least 30% of workers in the classification, use a weighted average.

FAQ #14: What are "functionally equivalent" wage and benefit rates?

---

[13] See Staff of the H. Subcomm. on Lab., 88th Cong., Administration of the Davis-Bacon Act, Rep. of the Subcomm. on Lab. of the Comm. on Educ. and Lab. (Comm. Print 1963) ("***It should be kept in mind that "prevailing" means only a greater number. It need not be a majority***."); see also 5 Op. O.L.C., Determination of Wage Rates Under the Davis-Bacon and Service Contract Acts, at 175–76 (June 12, 1981) ("[W]e believe that it is proper under both Acts to define the prevailing wage rate in terms of the lowest rate only where the lowest rate is also that which occurs with ***greatest frequency***. Use of an average is permissible in situations in which no single rate can fairly be said to be 'generally current.'")

[14] 29 C.F.R. § 1.2 (eff. Oct. 23, 2023).

In the past, when reviewing wage survey data, the DOL considered wage rates that may not be exactly the same to be "functionally equivalent" – and, as a result, counted as the same for wage determination purposes – as long as there was an underlying logic that explained the difference between them.

In 2006, the DOL's Administrative Review Board (ARB) concluded that, with the exception of escalator clauses, the DOL could not consider variable rates under a CBA to be the "same wage" under the existing regulations.[15]

The Final Rule expressly authorizes the DOL to count wage rates that are not identical as the same rate if those rates are "functionally equivalent":

> In determining the prevailing wage, the Administrator may treat variable wage rates paid by a contractor or contractors to workers within the same classification as the same wage where the pay rates are functionally equivalent, as explained by one or more collective bargaining agreements or written policies otherwise maintained by a contractor or contractors.[16]

The functional equivalence determination must be based on collective bargaining agreements or a written policy or policies of a contractor or contractors. Using this methodology, DOL is expressly permitted to treat functionally equivalent variable or premium rates – such as escalator-clause rates, zone rates, night premiums, or foreperson premiums – as the same for the purpose of determining the prevailing wage.

FAQ #15: What is the geographic area used for wage determinations?

The DOL uses the county as the default area for a wage determination. As a result, it will normally gather wage survey data for each county and carry out the three-step process for each classification of worker and construction type in that county.

Previously, the DOL was prohibited from considering any data from "metropolitan" counties in making wage determinations for "rural" counties. The regulation did not define the terms metropolitan and rural.

The Final Rule allows the DOL to expand the scope of data considered in determining the prevailing wage "only when there is not sufficient current wage data in a county to determine a prevailing wage for a particular classification for that county."

Where there is not sufficient current wage data in surrounding counties, the Final Rule progressively expands the geographic scope of wage data that may be used to groups of comparable counties and, when necessary, statewide data (still for the same classification of workers):

---

[15] Mistick Construction, ARB No. 04–051, 2006 WL 861357, at *5–7 (Mar. 31, 2006).

[16] 29 C.F.R. § 1.3(e).

(b) If sufficient current wage data is not available from projects within the county to make a wage determination, wages paid on similar construction in surrounding counties may be considered.

(c) If sufficient current wage data is not available in surrounding counties, the Administrator may consider wage data from similar construction in comparable counties or groups of counties in the State, and, if necessary, overall statewide data.

(d) If sufficient current statewide wage data is not available, wages paid on projects completed more than 1 year prior to the beginning of the survey or the request for a wage determination, as appropriate, may be considered.[17]

FAQ #16: What are "frequently conformed rates"?

Under the old regulations, if a wage determination did not include a rate for a certain classification, then the contractor would need to seek a "conformance" using a procedure outlined in the rules. Each year, the DOL receives thousands of conformance requests.

To reduce the number of conformance request, the Final Rule includes a provision expressly allowing the DOL to list classifications and corresponding wage and fringe benefit rates on wage determinations even when the DOL has received insufficient data through its wage survey process. Specifically, if there is a classification for which conformance requests are regularly submitted, and for which the DOL received insufficient data through its wage survey process, the DOL is expressly authorized to essentially "pre-approve" certain conformed classifications and wage rates, thereby providing contracting agencies, contractors, and workers with advance notice of the minimum wage and fringe benefits required to be paid for those classifications of work.

The DOL will list "frequently conformed rates" on wage determinations, provided that:

(1) The work performed by the classification is not performed by a classification in the wage determination;

(2) The classification is used in the area by the construction industry; and

(3) The wage rate for the classification bears a reasonable relationship to the wage rates contained in the wage determination.[18]

The use of "frequently conformed rates" is intended to reduce the need for contracting agencies to submit requests for conformances and promote greater certainty in the bidding process.

---

[17] 29 C.F.R. § 1.7(b)-(d).

[18] 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(3).

FAQ #17: Will the DOL be permitted to adopt state and local wage determinations?

Yes. The Final Rule expressly permits the DOL to adopt State or local prevailing wage rates, with or without modification, if doing so would be consistent with the purpose of the DBA.

In general, in order to adopt State or local rates, the DOL must review the rate and processes used by the State or local government and determine that:

(1) The State or local government sets wage rates, and collects relevant data, using a survey or other process that is open to full participation by all interested parties;

(2) The wage rate reflects both a basic hourly rate of pay as well as any prevailing fringe benefits, each of which can be calculated separately;

(3) The State or local government classifies laborers and mechanics in a manner that is recognized within the field of construction; and

(4) The State or local government's criteria for setting prevailing wage rates are substantially similar to those the Administrator uses in making wage determinations under this part. This determination will be based on the totality of the circumstances, including, but not limited to, the State or local government's definition of prevailing wage; the types of fringe benefits it accepts; the information it solicits from interested parties; its classification of construction projects, laborers, and mechanics; and its method for determining the appropriate geographic area(s).[19]

To adopt such rates, the DOL is required to obtain them and any relevant supporting documentation from the state or local government, and review both the rate and the processes used to derive the rate.[20]

V. WAGE DETERMINATIONS

FAQ #18: What types of wage determinations are there?

There are two types of wage determinations: (1) general determinations and (2) project determinations.

[19] 29 C.F.R. §§ 1.3(g)(1)-(4).

[20] 29 C.F.R. § 1.3(h).

The Final Rule clarifies that general wage determinations are the default and project wage determinations are the exception.[21] The Final Rule also sets out criteria for when project wage determinations are appropriate.

FAQ #19: Can wage determinations be updated *after* the contract is awarded?

Under the old regulations, a wage determination modification issued after contract award or the start of construction would generally not apply to the contract. However, in certain circumstances, such as substantial contract modifications or the exercise of options, an updated wage determination modification must be included in the contract after contract award.

The Final Rule adds language explaining that, in some additional circumstances, wage determinations must be updated after contract award:

> If a revised wage determination is issued after contract award (or after the beginning of construction where there is no contract award), it is not effective with respect to that project, except under the following circumstances:
>
> (A) Where a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order, or to require the contractor to perform work for an additional time period not originally obligated, including where an option to extend the term of a contract is exercised, the contracting agency must include the most recent revision of any wage determination(s) at the time the contract is changed or the option is exercised. This does not apply where the contractor is simply given additional time to complete its original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental.
>
> (B) Some contracts call for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project. Examples of such contracts include, but are not limited to, indefinite-delivery-indefinite-quantity construction contracts to perform any necessary repairs to a Federal facility over a period of time; long-term operations-and-maintenance contracts that may include construction, alteration, and/or repair work covered by Davis-Bacon labor standards; or schedule contracts or blanket purchase agreements in which a contractor agrees to provide certain construction work at agreed-upon prices to Federal agencies.[22]

[21] 29 C.F.R. § 1.7(a) ("In making a wage determination, the 'area' from which wage data will be drawn will normally be the county unless sufficient current wage data (data on wages paid on current projects or, where necessary, projects under construction no more than 1 year prior to the beginning of the survey or the request for a wage determination, as appropriate) is unavailable to make a wage determination.").

[22] 29 C.F.R. § 1.6(c)(2)(iii).

The Final Rule also provides that wage determinations in contracts requiring construction over a period of time that are not tied to the completion of any particular project (such as IDIQ contracts, schedule contracts, or long-term operations and maintenance contracts) must be updated annually.

Task orders issued under such IDIQ-type contracts must incorporate the most recent wage determination modification in the master contract at the time the task order is awarded.

FAQ #20: Will the DOL update non-collectively bargained prevailing wage rates?

Yes. The Final Rule expressly permits the DOL to periodically adjust certain non-collectively bargained prevailing wage and fringe benefit rates between Davis-Bacon wage surveys so that these rates do not become out-of-date and fall behind prevailing rates in the area. Such rates may be adjusted based on U.S. Bureau of Labor Statistics Employment Cost Index (ECI) data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication.[23]

VI. COVERAGE PRINCIPLES

FAQ #21: What federal agencies are covered by the DBA?

The Final Rule revises the definition of "agency" to clearly encompass state and local agencies that enter into contracts for projects that are subject to Davis-Bacon labor standards and that allocate federal assistance under a DBRA to sub-recipients.[24]

The Final Rule also adds a definition of "Federal agency" as a sub-definition of "agency" to distinguish those situations where the regulations refer specifically to an obligation or authority that is limited solely to a federal agency that enters into DBA-covered contracts or allocates federal assistance under a DBRA.[25]

FAQ #22: What types of construction activity are covered by the DBA?

The term "Public building or public work" includes "a building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency."[26]

[23] 29 C.F.R. § 1.6(c)(1).

[24] 29 C.F.R. § 1.2.

[25] 29 C.F.R. § 1.2.

[26] 29 C.F.R. § 1.2.

The term "building or work" generally includes "construction activities of all types, as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work." The regulation provides a non-exclusive list of examples of such activities:

> The term includes, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, solar panels, wind turbines, broadband installation, installation of electric car chargers, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping.[27]

Note that the Final Rule clarifies that the term "building or work" adds modern construction activities such as "solar panels, wind turbines, broadband installation, and installation of electric car chargers" to the non-exclusive list of examples of construction activities.

The Final Rule also clarifies that the term includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work.

FAQ #23: Does the DBA apply construction activity that involves only a portion of a building?

Yes. The final rule adds language to the definitions of building (or work) and public building (or public work) to clarify that these definitions can apply even when the construction activity involves only a portion of an overall building, consistent with longstanding policy:

> The term "building or work" also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work.[28]

FAQ #24: Does the DBA apply to installation work?

Yes, in some cases. The Final Rule also adds language to the definitions of building (or work) and public building (or public work) to expressly reflect that installation (where appropriate) of equipment or components into a building or work is covered by the DBRA, consistent with longstanding policy. Specifically, the Final Rule includes the following definition of "Public building or public work":

> The term "public building or public work" includes . . . [t]he construction, prosecution, completion, or repair of a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or

[27] 29 C.F.R. § 1.2.

[28] 29 C.F.R. § 1.2.

work, may still be considered a public building or work, even where the entire building or work is not owned, leased by, or to be used by a Federal agency, as long as the construction, prosecution, completion, or repair of that portion of the building or work, or the installation (where appropriate) of equipment or components into that building or work, is carried on by authority of or with funds of a Federal agency to serve the interest of the general public.[29]

FAQ #25: Does the DBA apply to construction activity that takes place away from the site of construction?

It depends. The prior regulations defined "site of the work" to include three types of locations: (1) "the physical place or places where the building or work called for in the contract will remain," (2) "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," and (3) "job headquarters, tool yards, batch plants, borrow pits, etc." that are both "dedicated exclusively, or nearly so, to performance of the contract or project" and "adjacent or virtually adjacent to the site of the work" itself.

The Final Rule revises the second definition of "site of work." Specifically, the Final Rule includes a new term: "secondary construction site."[30] A "secondary construction site" is covered by the DBA if the following three requirements are met:

- *First*, a "significant portion" of the building or work is constructed.
    - The Final Rule defines "significant portion" to mean "one or more entire portion(s) or module(s) of the building or work, such as a completed room or structure, with minimal construction work remaining other than the installation and/or final assembly of the portions or modules at the place where the building or work will remain."
    - The Final Rule also makes clear that a "significant portion" does *not* include "materials or prefabricated component parts such as prefabricated housing components."
- *Second*, the "significant portion" is constructed for "*specific use* in that building or work and does *not* simply reflect the manufacture or construction of a *product made available to the general public*."
- *Third*, the site is "either [(a)] established specifically for the performance of the contract or project, or [(b)] is dedicated exclusively, or nearly so, to the performance of the contract or project for a specific period of time."

[29] 29 C.F.R. § 1.2.

[30] 29 C.F.R. § 5.2.

- The Final Rule defines "specific period of time" to mean "a period of weeks, months, or more, and does not include circumstances where a site at which multiple projects are in progress is shifted exclusively or nearly so to a single project for a few hours or days in order to meet a deadline."

The Final Rule also makes clear that fabrication plants are not primary or secondary construction sites if they were in operations prior to opening of bids or operate without regard to the federal project:

> "[S]ite of the work" does *not* include:
>
> (i) 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 contract or project; or
>
> (ii) Fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a material supplier, which are established by a material supplier for the project before opening of bids and not on the primary construction site or a secondary construction site, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

VII. FRINGE BENEFITS

FAQ #26: How does the "annualization" requirement affect how fringe benefits may be calculated?

The Final Rule codifies the principle of annualization used to calculate the amount of Davis-Bacon credit that a contractor may receive for contributions to a fringe benefit plan when the contractor's workers perform work on both DBRA-covered projects and projects that are not subject to DBRA requirements (referred to as "private" work or projects) in a particular year or other shorter time period.

For many years, the DOL has required contractors to annualize contributions for most types of fringe benefit plans, including health insurance plans, apprenticeship training plans, vacation plans, and sick leave plans.[31]

The Final Rule first addresses how to "annualize" fringe benefits:

> To annualize the cost of providing a fringe benefit, a contractor must divide the total cost of the fringe benefit contribution (or the reasonably anticipated costs of

[31] See, e.g., Rembrant, Inc.,WAB No. 89–16, 1991 WL 494712, at *1 (Apr. 30, 1991) (noting WHD Deputy Administrator's position that "fringe benefit contributions creditable for Davis-Bacon purposes may not be used to fund a fringe benefit plan for periods of non-government work").

> an unfunded benefit plan) by the total number of hours worked on both private (non-DBRA) work and work covered by the Davis-Bacon Act and/or Davis-Bacon Related Acts (DBRA-covered work) during the time period to which the cost is attributable to determine the rate of contribution per hour. If the amount of contribution varies per worker, credit must be determined separately for the amount contributed on behalf of each worker.[32]

Next, the Final Rule makes clear that annualization of fringe benefits is required unless a contractor obtained an exception with respect to a particular fringe benefit plan:

> Except as provided in this section, contractors must 'annualize' all contributions to fringe benefit plans (or the reasonably anticipated costs of an unfunded benefit plan) to determine the hourly equivalent for which they may take credit against their fringe benefit obligation."[33]

Contractors, plans, and other interested parties may request an exception to the annualization requirement by submitting a request to the DOL, but such exceptions are only available if the following requirements are met:

> (i) The benefit provided is not continuous in nature. A benefit is not continuous in nature when it is not available to a participant without penalty throughout the year or other time period to which the cost of the benefit is attributable; and
>
> (ii) The benefit does not compensate both private work and DBRA-covered work. A benefit does not compensate both private and DBRA-covered work if any benefits attributable to periods of private work are wholly paid for by compensation for private work.[34]

Finally, the Final Rule exempts contributions to defined contribution pension plans (DCPPs) from the annualization requirement, provided that the DCPP contributions meet the exception criteria and the plan provides for immediate participation and vesting:

> Contributions to defined contribution pension plans (DCPPs) are excepted from the annualization requirement, and exception requests therefore are not required in connection with DCPPs, provided that each of the requirements of paragraph (c)(3) is satisfied and the DCPP provides for immediate participation and essentially immediate vesting (i.e., the benefit vests within the first 500 hours worked).

---

[32] 29 C.F.R. § 5.25(c)(1).

[33] 29 C.F.R. § 5.25(c).

[34] 29 C.F.R. § 5.25(c).

FAQ #27: Are unfunded plans creditable against the fringe benefit obligations?

Consistent with the DOL's longstanding position, the Final Rule clarifies that the cost of apprenticeship programs may be credited against the fringe benefit obligations under the DBRA. The Final Rule also provides that, in the absence of evidence to the contrary, the DOL will presume that amounts the employer is required to contribute by a collective bargaining agreement, or by a bona fide apprenticeship plan (whether or not the plan is collectively bargained), are creditable against fringe benefit obligations under the DBRA.[35]

VIII. ANTI-RETALIATION

FAQ #28: What is the impact of the new anti-retaliation protections?

Under the Final Rule, it is prohibited to retaliate against workers or job applicants for engaging in protected activities such as notifying a contractor of a failure to comply with the DBA or DBRA, filing a complaint, or cooperating in a DOL investigation under the DBRA, including Contract Work Hours and Safety Standards Act (CWHSSA).[36]

Retaliation is defined to include "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."

The Final Rule adds remedies to make whole workers and job applicants who have been discriminated against in any manner for engaging in, or being perceived to have engaged in, certain protected activities. [37]

IX. RECORDKEEPING

FAQ #29: How does the Final Rule impact recordkeeping requirements under the DBRA?

Contractors and subcontractors on DBA-covered projects must keep records required under the DBA, including under the Copeland Act and the CWHSSA, as set forth in 29 C.F.R. parts 3 and 5.[38]

---

[35] 29 C.F.R. § 5.25(c)(3).

[36] 29 C.F.R. § (b)(5). The CWHSSA requires an overtime payment of one and one-half times the basic rate of pay for hours worked over 40 in a work week by laborers and mechanics, including watchpersons and guards, on federal contracts as well as certain federally assisted contracts. 40 U.S.C. 3701 et seq.

[37] 29 C.F.R. § 5.18.

[38] The Copeland Act requires that contractors working on Davis-Bacon projects submit weekly certified payrolls for work performed on the contract, 40 U.S.C. § 3145, and it also prohibits contractors from inducing any worker to give up any portion of the wages due to them on such projects. 18 U.S.C. § 874.

The Final Rule clarifies and supplements existing DBA recordkeeping requirements, including the following:

- The Final Rule provides that contractors and subcontractors maintain "regular payrolls and other basic records . . . for all laborers and mechanics working at the site of work . . . for a period of at least 3 years." [39]
    - The Final Rule adds a requirement that contractors and subcontractors maintain records of worker's last-known "*telephone numbers and email addresses*":
        - "Such records must contain the name; Social Security number; *last known address, telephone number, and email address of each such worker*; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof . . .); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid."[40]
- With respect to apprentices, the Final Rule provides that contractors and subcontractors should maintain the following records for a minimum of 3 years:
    - "Contractors with apprentices working under approved programs must maintain written evidence of the registration of apprenticeship programs, the registration of the apprentices, and the ratios and wage rates prescribed in the applicable programs."[41]
- The Final Rule clarifies the distinction between "regular payrolls" and "other basic records" that contractors must make and maintain, and the "certified payroll" documents and statements of compliance that contractors must submit weekly.[42]
    - The Final Rule makes clear that "full Social Security numbers and last known addresses, telephone numbers, and email addresses must not be included on weekly transmittals [of the certified payroll]. Instead, the certified payrolls need only include an individually identifying number for each worker (e.g., the last four digits of the worker's Social Security number). The required weekly certified

---

The regulations implementing the Copeland Act as it pertains to DBRA-covered contracts are set forth in 29 C.F.R. part 3. CWHSSA recordkeeping requirements are set forth in 29 C.F.R. § 5.5(c).

[39] 29 C.F.R. § 5.5(a)(3)(ii); see also 29 C.F.R. §5.5(c).

[40] 29 C.F.R. § 5.5(a)(3)(ii).

[41] 29 C.F.R. §§ 5.5(a)(3)(i)(D).

[42] 29 C.F.R. §§ 5.5(a)(3)(i) and (ii); 29 C.F.R. § 3.4.

payroll information may be submitted using Optional Form WH–347 or in any other format desired. Optional Form WH–347 is available for this purpose from the Wage and Hour Division website at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347/.pdf or its successor website."[43]

  - Nevertheless, the Final Rule also makes clear that "[i]t is not a violation of this section for a prime contractor to require a subcontractor to provide full Social Security numbers and last known addresses, telephone numbers, and email addresses to the prime contractor for its own records, without weekly submission by the subcontractor to the sponsoring government agency (or the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records)."

- The Final Rule provides that a "statement of compliance" must be submitted by the federal contractor or subcontractor including the following certifications:

  - "(1) That the certified payroll for the payroll period contains the information required to be provided under [29 C.F.R. § 5.5(a)(3)(ii)], the appropriate information and basic records are being maintained under [29 C.F.R. § 5.5(a)(3)(i)], and such information and records are correct and complete;

  - "(2) That each laborer or mechanic (including each helper and apprentice) working on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in 29 CFR part 3; and

  - "(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification(s) of work actually performed, as specified in the applicable wage determination incorporated into the contract."

  - The Final Rule makes clear that "falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under 18 U.S.C. 1001 and 31 U.S.C. 3729."

- The Final Rule codifies the DOL's longstanding position that certified payrolls may be requested—and federal agencies must produce, or ensure production of, such certified payrolls—regardless of whether or not the DOL has initiated an investigation or other compliance action.

- The Final Rule also codifies longstanding DOL policy that certified payrolls may be signed and submitted electronically, and clarifies that access to such electronic records

[43] 29 C.F.R. §§ 5.5(a)(3)(ii).

must be ensured for at least 3 years after all the work on the prime contract is completed.[44]

- The Final Rule provides that a contractor's failure to submit required records upon request may, in addition to providing grounds for the suspension of contract payments and debarment, preclude the contractor from introducing such records as evidence in an administrative proceeding.[45]

X. APPRENTICES

FAQ #30: What are the rates of pay and benefits for apprentices?

On a federal project covered by the DBA, the default rule is that workers performing "covered work" must be paid at the rate no less than the wage and fringe benefit amounts set forth in the DOL's wage determination.

There are exceptions, but they are very narrow. One exception is for "apprentices" and the Final Rule sets forth the rate of pay that may be paid to "apprentices":

> Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship (OA), or with a State Apprenticeship Agency recognized by the OA. A person who is not individually registered in the program, but who has been certified by the OA or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice, will be permitted to work at less than the predetermined rate for the work they perform in the first 90 days of probationary employment as an apprentice in such a program. In the event the OA or a State Apprenticeship Agency recognized by the OA withdraws approval of an apprenticeship program, the contractor will no longer be permitted to use apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.[46]

With respect to fringe benefits, the Final Rule provides:

> Apprentices must be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator

[44] 29 C.F.R. § 5.5(a)(3); 29 C.F.R. § 3.3(b).

[45] 29 C.F.R. § 5.5(a)(3)(iv)(B).

[46] 29 C.F.R. § 5.5(a)(4)(i).

> determines that a different practice prevails for the applicable apprentice classification, fringe benefits must be paid in accordance with that determination.

FAQ #31: What are the allowable ratios for apprentices to journeyworkers?

The Final Rule provides that allowable ratio of apprentices to journeyworkers on the job site is governed by the apprenticeship program:

> 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 [29 C.F.R. § 5.5(a)(4)(i)(D)]. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in [29 C.F.R. § 5.5(a)(4)(i)(A)], must be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under this section must be paid not less than the applicable wage rate on the wage determination for the work actually performed.[47]

FAQ #32: If a federal contractor or subcontractor is performing work in another jurisdiction, does the apprenticeship program in the contractor's home area apply?

It depends. The Final Rule requires contractors and subcontractors to adhere to the apprentice wage rate and ratio standards of the project locality, even if the contractor's apprenticeship program is registered in a different locality:

> Where a contractor is performing construction on a project in a locality other than the locality in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyworker's hourly rate) applicable within the locality in which the construction is being performed must be observed.[48]

The Final Rule also clarifies that where there is no registered program in the locality of the project establishing applicable apprentice wage rates and ratios, the rates and ratios under the contractor's registered program apply:

> If there is no applicable ratio or wage rate for the locality of the project, the ratio and wage rate specified in the contractor's registered program must be observed.

FAQ #33: Does the Final Rule affect "trainees"?

The Final Rule removes the outdated references to trainees and training programs from parts 1 and 5 of the regulations, except that the Final Rule retains the text currently found in § 5.2(n)(3),

---

[47] 29 C.F.R. § 5.5(a)(4)(i).

[48] 29 C.F.R. § 5.5(a)(4)(i)(D).

which states that the regulatory provisions do not apply to trainees employed on projects subject to 23 U.S.C. § 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. § 113(c).

FAQ #34: Does the Final Rule affect "pre-apprentices"?

No, the Final Rule does not address "pre-apprentices."

"Pre-apprentices" (also called "unregistered apprentices") are not recognized under the DBA and cannot be paid a lesser wage than what is specified in the wage determination for the work that the pre-apprentice "actually performed":

> Unregistered apprentices
>
> 29 CFR 5.5(a)(4)(i) provides that any employee listed on a payroll at an apprentice wage rate who is not a bona fide registered or probationary apprentice must be paid the wage rate for the classification of work actually performed. However, the fact that a worker is listed on the payrolls as an apprentice in a particular craft and paid an apprentice wage rate for that craft does not, in itself, mean that person performed only the work of, or used only the tools of, the craft in which the person is an unregistered apprentice, and it does not mean that the worker must be compensated only at the contract rate for that craft classification. Such an employee may actually be performing work as a laborer or in another craft classification, and must receive at least the rate applicable for the classification(s) of work actually performed.[49]

The definition of "apprentice," however, does include "probationary apprentices" who are (a) in the first 90 days of probationary employment and (b) have been "certified by OA or a state apprenticeship agency (as appropriate) to be eligible for probationary employment as an apprentice":

> An apprentice (see 29 CFR 5.2(n)(1)) is (1) any person employed under a bona fide apprenticeship program registered with a state apprenticeship agency which is recognized by the DOL Employment and Training Administration (ETA), Office of Apprenticeship Training, Employer and Labor Services (OA), or if no such recognized agency exists in a state, under a program registered with the OA itself; or (2) a person in the first 90 days of probationary employment as an apprentice in such an approved apprenticeship program who is not individually registered in the program, but who has been certified by OA or a state apprenticeship agency (as appropriate) to be eligible for probationary employment as an apprentice. All apprentices other than probationary apprentices must be individually registered in the approved program. Consistent with the level of training in the program, an apprentice will perform for the appropriate period of

[49] DOL Handbook § 15e01(e) (available at https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15).

time all levels of work, from the lowest unskilled laborer's work to the highest skilled or craft work of the finished mechanic, under the supervision of the journeyworker.[50]

FAQ #35: What if a contractor uses "pre-apprentices" on a project covered by DBA?

Although not addressed by the Final Rule, in the event employees reported as "apprentices" or "trainees" on a covered project have not been properly registered within the meaning of the DOL regulations and the contract stipulations, or are utilized at the job site in excess of the ratio to journeymen permitted under the approved program, they must be paid the applicable wage rates for laborers and mechanics employed on the project performing in the classification of work they actually performed. This applies regardless of work classifications which may be listed on the submitted payrolls and regardless of their level of skill.

XI. ENFORCEMENT

FAQ #36: How does the "operation of law" provision impact federal contractors?

The Final Rule emphasizes that the federal agency has the initial responsibility to determine whether a contract is covered by the DBA and, if so, which wage determination(s) must be included in the prime contract.[51] Any question related to the applicability of the DBA or the appropriate wage determination must be referred to the DOL for an appropriate ruling or interpretation.

The Final Rule provides that the labor standards contract clauses and appropriate wage determinations are effective "by operation of law" and considered to be incorporated even when they have been wrongly omitted from a covered contract. The provision requires that prime contractors be compensated for any difference in labor costs resulting from the incorporation.[52]

FAQ #37: How does "mandatory flow-down" provision impact federal contractors and subcontractors?

Under the existing regulations, prime contractors and upper-tier subcontractors were required to flow-down the required contract clauses into their contracts with lower-tier subcontractors, including a clause stating that prime contractors were "responsible for the compliance by any subcontractor or lower tier subcontractor." The DOL has interpreted this to mean that prime contractors are jointly and severally liable for any back wages owed by subcontractors, but this is not expressly explained in the regulation.

[50] DOL Handbook § 15e01(e) (available at https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15).

[51] DOL Handbook § 15e01(a) (available at https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15).

[52] 29 C.F.R. § 5.5(e).

The Final Rule clarifies that prime contractors are strictly liable for back wages owed to employees of any subcontractor on the project. The Final Rule also clarifies that upper-tier subcontractors (in addition to prime contractors) may be responsible for violations by lower-tier subcontractors and therefore responsible for the payment of back wages resulting from such violations. [53]

FAQ #38: Are upper-tier subcontractors strictly liable for DBA violations of lower-tier subcontractors?

No. In promulgating its final rule, the DOL made clear that "strict liability" applies only to prime contractors (and not to upper-tier subcontractors):

> The *strict liability* for covering unpaid back wages *only* applies to *prime contractors* . . . . The new contract language in [29 C.F.R. § 5.5(a)(6)] will only impose back wage liability on upper-tier subcontractors to the extent they are "responsible" for the violations of their lower-tier subcontractors. As the Department stated in the NPRM, this language should not be read to place the same strict liability responsibility on all upper-tier subcontractors that the existing language already places on prime contractors.[54]

The DOL did make clear, however, that there may be circumstances in which an upper-tier subcontractor may be held liability for DBA violations by a lower-tier subcontractor:

> [T]he new language clarifies that, *in appropriate circumstances* . . . upper-tier subcontractors may be held responsible for paying back wages jointly and severally with the prime contractor and the lower-tier subcontractor that directly failed to pay the prevailing wages. This standard is intended to provide the potential for back wage liability for an upper-tier subcontractor that, for example, *repeatedly or in a grossly negligent manner fails to flow down the required contract clause, or has knowledge of violations by lower-tier subcontractors and does not seek to remedy them, or is otherwise purposefully inattentive to Davis-Bacon labor standards obligations of lower-tier subcontractors*.[55]

FAQ #39: What is "withholding" and "cross-withholding"?

"Withholding" is a procedure through which agencies withhold contract payments from a contractor to ensure that funds are available to compensate workers for wage underpayments. Funds typically are withheld on the contract on which the DBRA violations occurred.

---

[53] 29 C.F.R. § 5.5(a)(6).

[54] 88 Fed. Reg. at 57640.

[55] 88 Fed. Reg. at 57640.

"Cross-withholding" is a mechanism under which agencies withhold contract monies due a prime contractor from contracts other than the contract under which the alleged violations occurred.

Consistent with the DBA's directive that the DOL pay withheld monies "directly to laborers and mechanics," 40 U.S.C. § 3144(a)(1), the withholding contracting agency may eventually transfer the withheld funds to the DOL in its capacity as the enforcement agency for distribution directly to workers to whom the contractor owes DBRA back wages.

FAQ #40: How does the Final Rule affect "withholding" and "cross-withholding?

The Final Rule clarifies and strengthens the withholding remedy in several ways, including:

- The Final Rule clarifies that cross-withholding can be from any contract held by the same prime contractor, even if the contract was awarded or assisted by a different agency than the agency that awarded or assisted the contract on which violations necessitating the withholding occurred.[56]

- The Final Rule establishes the ability to cross-withhold from entities other than the entity that directly entered into the contract with the contracting agency. Under the Final Rule, when a prime contractor uses a single-purpose entity, joint venture, or other similar vehicle to secure DBRA-covered contracts, the DOL may pursue cross-withholding on any other contract held by one of the related entities.[57]

- The Final Rule adds a provision explaining that withholding for workers' back wages has priority over various other competing claims.[58]

FAQ #41: What is "debarment"?

Debarment means that a company and its responsible officers are not permitted to work on covered contracts. The period of ineligibility is 3 years for DBA and up to 3 years for DBRA.

The standards for debarment under the DBA and the DBRA are different. Under the DBA, the standard is mere "disregard" and the DBRA standard is "aggravated or willful." The DBA standard mandates a 3-year period of debarment whereas the DBRA debarment may be for a period not exceeding 3 years.

FAQ #42: How does the Final Rule impact the "debarment" under the DBA and DBRA?

[56] 29 C.F.R §§ 5.5(a)(2)(i), 5.5(b)(3)(i), 5.9(b).

[57] 29 C.F.R. §§ 5.2 (new definition of "prime contractor"), 5.5(a)(2)(i), 5.5(b)(3)(i), 5.9(b) and (c).

[58] 29 C.F.R. §§ 5.5(a)(2)(ii), 5.5(b)(3)(ii).

The Final Rule revises the debarment provisions in 29 C.F.R. part 5 to harmonize the debarment procedures under the DBA and the DBRA.

First, the Final Rule applies the longstanding DBA debarment standard—disregard of obligations to employees or subcontractors—to the DBRA as well as the DBA, thus, eliminating the heightened DBRA regulatory "aggravated or willful" debarment standard.[59]

Second, the Final Rule makes various other changes to the debarment regulations so that the DBRA debarment provisions are the same as the current provisions governing DBA debarment. Specifically, the Final Rule sets forth a 3-year period for all debarments, eliminates the rarely used process for early removal from the debarment list for contractors debarred under a DBRA, and clarifies that "responsible officers" and entities in which debarred entities or individuals have an "interest" may be debarred under the DBRA as well as under the DBA.[60]

FAQ #43: Are back pay and monetary relief available under the DBA?

Yes, the Final Rule adds interest on back wages and monetary relief as a remedy for DBRA violations.[61]

[59] 29 C.F.R. § 5.12; 29 C.F.R. §§ 5.6(b)(4), 5.7(a).

[60] 29 C.F.R. § 5.12.

[61] 29 C.F.R. §§ 5.5(a)(1)(vi), (a)(2)(i), (a)(6), (b)(3)(i), (b)(4); 5.9(a); and 5.10(a).