SHEET METAL & AIR CONDITIONING
CONTRACTORS' NATIONAL ASSOCIATION

# Understanding Davis-Bacon Act Compliance: A Guide to Prevailing Wages and Benefits

2024 SMACNA Webinar

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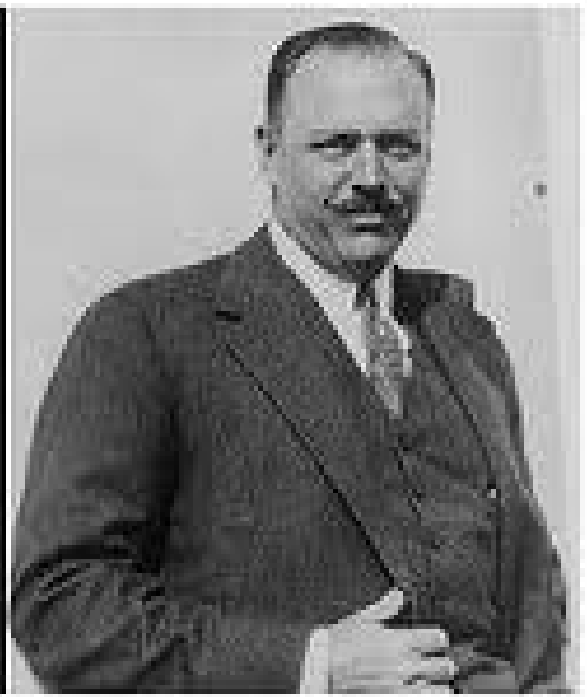
# THE DAVIS-BACON AND RELATED ACTS



Sen. James J. Davis and Rep. Robert L. Bacon

# The Davis-Bacon Act

- Passed in 1931, the DBA requires government contractors to pay locally prevailing wages to “laborers and mechanics” employed on certain federally-funded construction projects.
- Under the DBA, the DOL calculates prevailing wages by reviewing wages paid to corresponding classes of laborers and mechanics employed on projects of a similar character in the civil subdivision of the state in which the work is performed.
- The DBA defines “wages” to include not only a basic hourly rate of pay, but also amounts related to health, retirement, and other fringe benefits.

# DBA Coverage

- The DBA requires government contractors to pay locally prevailing wages when the following conditions exist:
  - (1) There is a contract in excess of $2,000;
  - (2) The U.S. or D.C. is a party to the contract; and
  - (3) The contract is for construction, alteration, or repair, including painting and decorating, of public buildings or public works of the U.S. or D.C. within the geographical limits of the U.S. or D.C.
- The government may terminate a contract if it discovers that a contractor has not paid the required prevailing wages

# DBRA Coverage

- Besides the DBA, there are numerous statutes that authorize federal financial assistance for construction projects through grants, loans, and other funding mechanisms to which Congress has added prevailing wage provisions.
    - These typically involve construction in areas such as transportation, housing, air and water pollution reduction, and health.
- The DBRA prevailing wage requirements apply when federal financial assistance is provided for construction but the federal government is not a contracting party or a public building or public work is not involved.

# DBA vs. DBRA

- Examples of **DBA** Projects:
  - VA hospital
  - Federal office building (GSA)
  - Military base housing (DOD)
  - National Park road (Dept. of Interior)

- Examples of **DBRA** Projects:
  - HUD - assisted housing construction project
  - EPA - assisted water treatment plant construction project

# DOL Handbook, Ch. 15, § 15b05

**15b05 Construction, prosecution, completion, or repair.**

29 CFR 5.2(j) defines the terms "construction, prosecution, completion, or repair" to mean all types of work done on a particular building or work at the site thereof (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:

**(a)** Altering, remodeling, and installation (where appropriate) on the site of the work of items fabricated off-site

**(b)** Painting and decorating

**(c)** The manufacturing or furnishing of material, articles, supplies or equipment on the site of the building or work

**(d)** Transportation between the site of the work (within the meaning of 29 CFR 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 CFR 5.2(l))

# DOL Handbook, Ch. 15, § 15d13

**15d13 Supply and installation contracts.**

**(a)** Installation work performed in conjunction with supply or service (*e.g.*, base support) contracts is covered by the DBRA where it involves more than an incidental amount of construction activity (*i.e.*, the contract contains specific requirements for substantial amounts of construction, reconstruction, alteration, or repair work) and such work is physically or functionally separate from and can be performed on a segregated basis from the other non-construction work called for by the contract (*see* 29 CFR 4.116(c)(2)). For example, DBA coverage has been extended to installing a security system or an intrusion detection system, installing permanent shelving which is attached to a structure, installing air-conditioning ducts, excavating outside cable trenches and laying cable, installing heavy generators, mounting radar antenna, and installing instrumentation grounding systems, where a substantial amount of construction work is involved.

**(b)** Whether installation work involves more than an incidental amount of construction activity depends upon the specific circumstances of each particular case and no fixed rules can be established which would address every fact situation. Factors requiring consideration include the nature of the prime contract work, the type of work performed by the employees installing the equipment on the project site (*i.e.*, the techniques, materials, and equipment used and the skills called for in its performance), the extent to which structural modifications to buildings are needed to accommodate the equipment (*i.e.*, widening entrances, relocating walls, or installing wiring), and the cost of the installation work, either in terms of absolute amount or in relation to the cost of the equipment and the total project cost.

**(c)** DBRA does not apply to construction work which is incidental to the furnishing of supplies or equipment, if the construction work is so merged with non-construction work or so fragmented in terms of the locations or time spans of its performance that the construction work is not capable of being segregated as a separate contractual requirement.

# DOL's <u>Final</u> Davis-Bacon Rule

- On March 18, 2022, the DOL proposed significant amendments to the DBA regulations.
  - DOL received more than 40,000 comments
- SMACNA submitted comments in support of the proposed rule.
- On August 23, 2023, the DOL published the Final Rule amending the DBA regulations.
  - DBA Rule was effective ***<u>October 23, 2023</u>***.

# SMACNA DBA Resources

- On October 19, 2023, SMACNA published Answers to a list of Frequently Asked Questions (FAQs) regarding the DBA and the DBA Rule.
  - Available here: https://www.smacna.org/getattachment/0136e993-2be6-486d-9548-85820d14ba50/SMACNA-FAQs-re-Davis-Bacon-Final-Rule-(rev-10-19-23)-60.pdf?lang=en-US&_zs=oO4Cl1&_zl=H5xG9.
- SMACNA has resources to help contractors complete the prevailing wage surveys (WD-10).

# Effective Date

- 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 apply to ***new contracts*** awarded ***on or after*** October 23, 2023.
- For 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.

# Legal Challenges

- On November 7, 2023, two trade groups – ABC and AGC – filed lawsuits in Texas federal court seeking to invalidate portions of the DBA Rule.
- ABC's lawsuit is broad
  - It seeks to invalidate the entire DBA Rule on numerous different legal grounds.
- AGC's lawsuit is more narrow
  - It seeks to invalidate Sections 5.2 and 5.5(e) of the DBA Rule, which relate to "off-site construction" and the "operation of law" provision

# AGC v. DOL, 2024 WL 3635540 (June 24, 2024)

- Enjoined DOL from implementing and enforcing:
  - § 5.2 (specifically the definition of “Construction, prosecution, completion, or repair” set forth at subsection (iv)(D) and which provides [“Covered Transportation,” defined as any of the following activities:] “Onsite activities essential or incidental to offsite transportation,” defined as activities conducted by a truck driver or truck driver's assistant on the site of the work that are essential or incidental to the transportation of materials or supplies to or from the site of the work, such as loading, unloading, or waiting for materials to be loaded or unloaded, but only where the driver or driver's assistant's time spent on the site of the work is not de minimis.”[])

# AGC v. DOL (CONT.)

- Enjoined DOL from implementing and enforcing:
  - § 5.2 (specifically the definition of “Material supplier” set forth at subsection (2) which provides “If an entity, in addition to being engaged in the activities specified in paragraph (1)(i) of this definition, also engages in other construction, prosecution, completion, or repair work at the site of the work, it is not a material supplier.”4)

# AGC v. DOL (CONT.)

- Enjoined DOL from implementing and enforcing:
  - § 5.5(e), (which provides “Incorporation by operation of law. The contract clauses set forth in this section (or their equivalent under the Federal Acquisition Regulation), along with the correct wage determinations, will be considered to be a part of every prime contract required by the applicable statutes referenced by § 5.1 to include such clauses, and will be effective by operation of law, whether or not they are included or incorporated by reference into such contract, unless the Administrator grants a variance, tolerance, or exemption from the application of this paragraph. Where the clauses and applicable wage determinations are effective by operation of law under this paragraph, the prime contractor must be compensated for any resulting increase in wages in accordance with applicable law.”)

# Update re Legal Challenges

- AGC Lawsuit
  - DOL has appealed the temporary restraining order to the 5th Circuit Court of Appeals.
- ABC Lawsuit
  - ABC filed for summary judgment on November 1, 2024.

# 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.

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

# WHAT IS A WAGE DETERMINATION? (CONT.)

- 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.
- 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.

# Sample Wage Determinations

**Davis-Bacon Act WD #: MN20240019**

DBA Wage Determination

State
**Minnesota**

Counties
**Hennepin**

Modification Number
**4**

Construction Types
**Residential**

Published Date
**Sep 19, 2024**

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**Davis-Bacon Act WD #: MN20240160**

DBA Wage Determination

State
**Minnesota**

Counties
**Hennepin**

Modification Number
**0**

Construction Types
**Building**

Published Date
**Jun 6, 2024**

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**Davis-Bacon Act WD #: MN20240229**

DBA Wage Determination

State
**Minnesota**

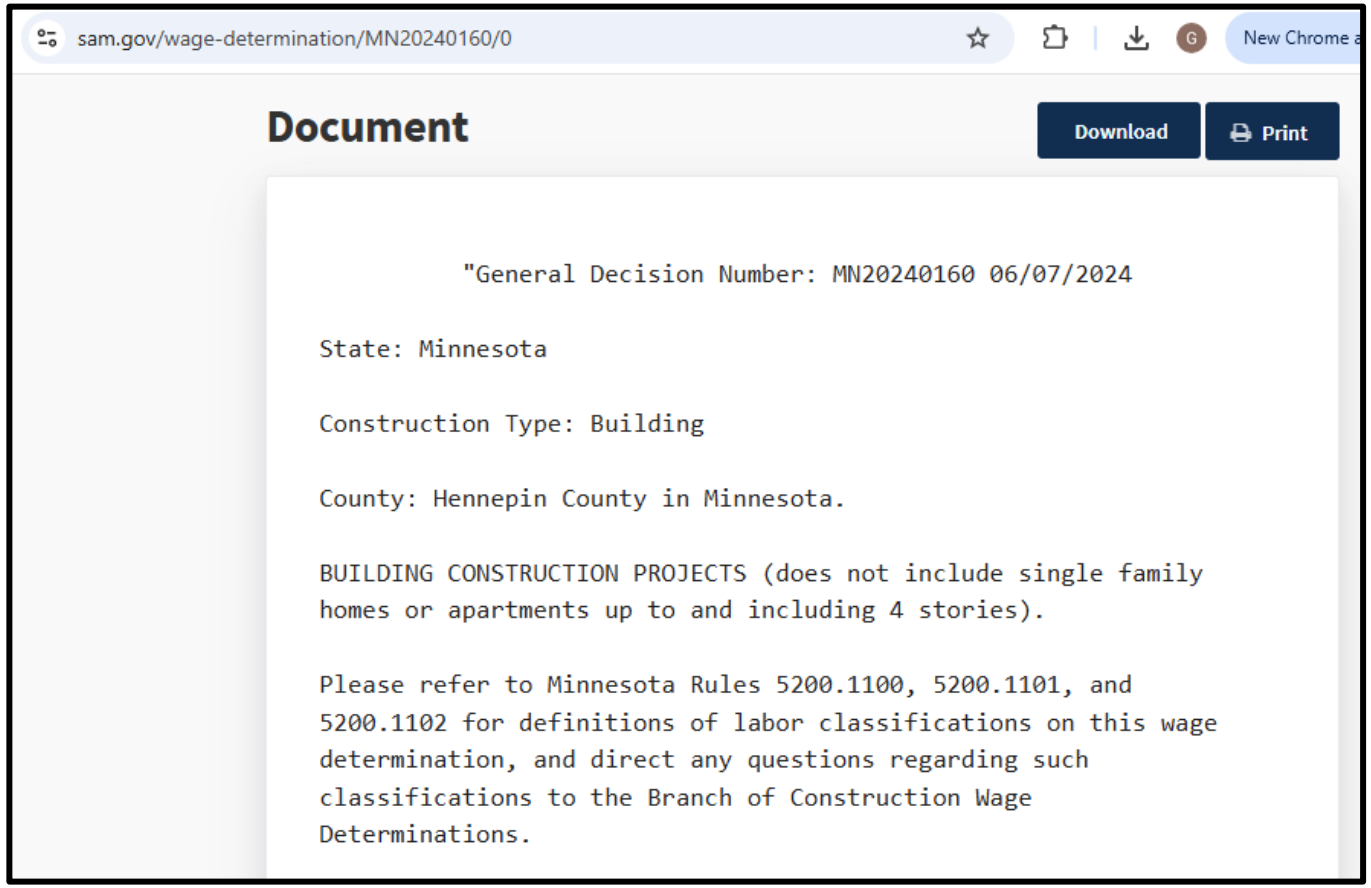
Counties
**Anoka, Carver, Chisago, Dakota, Hennepin, Ramsey, Scott, Washington**

Modification Number
**0**

Construction Types
**Heavy, Highway**

Published Date
**Jun 6, 2024**

# Sample Wage Determination in MN



# Sample Wage Determination in MN

| Modification Number | Publication Date |
|---|---|
| 0 | 06/07/2024 |

SAMN2023-027 12/26/2023

| | Rates | Fringes |
|---|---|---|
| ARTICULATED HAULER | $ 46.99 | 25.20 |
| ASBESTOS ABATEMENT WORKER | $ 39.86 | 24.11 |
| BLASTER | $ 35.11 | 19.64 |
| BOILERMAKER | $ 46.00 | 31.93 |

State Adopted Rate Identifiers

Classifications listed under the ""SA"" identifier indicate that the prevailing wage rate set by a state (or local) government was adopted under 29 C.F.R  ◆1.3(g)-(h).  Example: SAME2023-007 01/03/2024. SA reflects that the rates are state adopted. ME refers to the State of Maine. 2023 is the year during which the state completed the survey on which the listed classifications and rates are based. The next number, 007 in the example, is an internal number used in producing the wage determination. 01/03/2024 reflects the date on which the classifications and rates under the ?SA? identifier took effect under state law in the state from which the rates were adopted.

# Wage Determination Classifications

Survey Rate Identifiers

Classifications listed under the ""SU"" identifier indicate that no one rate prevailed for this classification in the survey and the published rate is derived by computing a weighted average rate based on all the rates reported in the survey for that classification. As this weighted average rate includes all rates reported in the survey, it may include both union and non-union rates. Example: SULA2012-007 5/13/2014. SU indicates the rates are survey rates based on a weighted average calculation of rates and are not majority rates. LA indicates the State of Louisiana. 2012 is the year of survey on which these classifications and rates are based. The next number, 007 in the example, is an internal number used in producing the wage determination. 5/13/2014 indicates the survey completion date for the classifications and rates under that identifier.

Survey wage rates are not updated and remain in effect until a new survey is conducted.

Those that begin with “SU” denote a prevailing wage that is not based exclusively on union wage rates.

**Example:** For identifier **SULA2018-007 05/13/2018**

- SU = the prevailing wage rate is based on a weighted average of survey data
- LA = the state, in this example, Louisiana
- 2018 = the year of the survey
- 007 = internal number used for producing the wage determination
- 05/13/2018 = the survey completion date for the labor classifications and rates under that identifier

# CLASSIFICATIONS (CONT.)

Union Average Rate Identifiers

Classification(s) listed under the UAVG identifier indicate that no single majority rate prevailed for those classifications; however, 100% of the data reported for the classifications was union data. EXAMPLE: UAVG-OH-0010 08/29/2014. UAVG indicates that the rate is a weighted union average rate. OH indicates the state. The next number, 0010 in the example, is an internal number used in producing the wage determination. 08/29/2014 indicates the survey completion date for the classifications and rates under that identifier.

A UAVG rate will be updated once a year, usually in January of each year, to reflect a weighted average of the current negotiated/CBA rate of the union locals from which the rate is based.

# CLASSIFICATIONS (CONT.)

Union Rate Identifiers

A four letter classification abbreviation identifier enclosed in dotted lines beginning with characters other than ""SU"" or ""UAVG"" denotes that the union classification and rate were prevailing for that classification in the survey. Example: PLUM0198-005 07/01/2014. PLUM is an abbreviation identifier of the union which prevailed in the survey for this classification, which in this example would be Plumbers. 0198 indicates the local union number or district council number where applicable, i.e., Plumbers Local 0198. The next number, 005 in the example, is an internal number used in processing the wage determination. 07/01/2014 is the effective date of the most current negotiated rate, which in this example is July 1, 2014.

Union prevailing wage rates are updated to reflect all rate changes in the collective bargaining agreement (CBA) governing this classification and rate.

Those that begin with anything other than “SU” or “UAVG” indicate that a CBA-based rate prevailed.

**Example:** For identifier **PLUM0198-005 07/01/2020**

- PLUM = the prevailing wage rate is based on a Plumbers union collective bargaining agreement.
- 0198 = the local union (or district council where applicable)
- 005 = internal number used in producing the wage determination
- 07/01/2020 = the effective date of the most current negotiated (CBA) rate

# Sample Wage Determination in MN

| Modification Number | Publication Date |
|---|---|
| 0 | 06/07/2024 |

SAMN2023-027 12/26/2023

| | Rates | Fringes |
|---|---|---|
| ARTICULATED HAULER | $ 46.99 | 25.20 |
| ASBESTOS ABATEMENT WORKER | $ 39.86 | 24.11 |
| BLASTER | $ 35.11 | 19.64 |
| BOILERMAKER | $ 46.00 | 31.93 |
| ROOFER | $ 46.65 | 21.89 |
| SHEET METAL WORKER | $ 50.46 | 33.32 |
| SIGN ERECTOR | $ 34.12 | 19.40 |
| SPRINKLER FITTER | $ 51.26 | 34.10 |

# Calculation of Prevailing Wage

- For nearly 50 years, “prevailing wage” was defined by 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.”
  - 29 C.F.R. § 1.2(a) (1935)

# Calculation of Prevailing Wage (cont.)

- Prior to 1983, the DOL used a three-step process:
  - (1) Any wage rate paid to >50% 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% of workers, and, if there was none, then (3) the weighted average rate
- In 1982, the DOL removed the second step:
  - Two steps: (1) identifying if there was a single wage rate paid to >50% of workers, and then (2) if no wage rate is >50% of workers, relying on a weighted average of all the wage rates paid.

# "Prevailing Wage" under the Final DBA Rule

- Final DBA Rule reinstates the "**30%-Rule**" (i.e., pre-1983 process)
  - DOL noted that current practice has resulted in an "overuse" of average rates that are "artificial," as they are not "actually paid" to workers for whom prevailing wages are calculated.
  - Under the old rule, if union wage rates were less than 50%, several low-wage, non-union contractors could easily drive down prevailing wage rates.
- Under the Final DBA Rule, union wage rates are "prevailing" if they represent 30% or more of the wage survey results

# FINAL DBA RULE (CONT.)

| Time Period | Step #1 | Step #2 | Step #3 |
|---|---|---|---|
| 1935-1982 | 50% or more? | 30% or more? | weighted average |
| 1983-2023 | 50% or more? | weighted average | n/a |
| 2023 to present | 50% or more? | 30% or more? | weighted average |

# DEFINITION OF "BUILDING OR WORK"

- The DBA generally covers "***construction activities of all types***" but does ***not*** cover "***manufacturing, furnishing of materials, or servicing and maintenance work***."
- Final DBA Rule clarifies that covered "construction activities" includes modern construction activities such as "solar panels, wind turbines, broadband installation, and installation of electric car chargers."

# "BUILDING OR WORK" (CONT.)

- Final DBA Rule also clarifies that covered activities include "construction activity" involving a ***portion of a building or the installation of equipment or components into a building***.
- The DOL noted it has "ruled on numerous occasions that repair or alteration of boilers, generators, furnaces, etc. constitutes [work covered by the DBA]."

# Adopting State and Local Wage Determinations

- Final DBA Rule expressly allows the DOL to adopt state and local wage determinations, with or without modification, if doing so would be consistent with the purpose of the DBA.
- 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.

# Adopting State and Local Wage Determinations (cont.)

- 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

# Adopting State and Local Wage Determinations (cont.)

- (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).

# Rural vs. Metropolitan Rates

- Previously, the DOL was prohibited from considering any data from “metropolitan” counties in making wage determinations for “rural” counties.
- Final DBA 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)

# CONFORMANCES

- Under the old rules, 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 DBA regulations.
    - Each year, the DOL receives thousands of conformance requests.
- The Final DBA 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.

# Mandatory Flowdowns

- Under the old rules, 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.

# **MANDATORY FLOWDOWNS** (CONT.)

- The Final DBA Rule clarifies that prime contractors are ***strictly liable*** for back wages owed to employees of any subcontractor on the project.
  - The DOL made clear that "strict liability" applies ***only*** to prime contractors (and not to upper-tier subcontractors)
- There may be circumstances, however, in which an upper-tier subcontractor may be held liable for DBA violations by a lower-tier subcontractor.
  - Rule references "gross negligence" or "purposefully inattentive" to DBA obligations of lower-tier subcontractor

# OPERATION OF LAW (*ON HOLD*)

- Currently, contractors are not responsible for DBA compliance if they were not notified of DBA's application via contract clauses.
- The Final DBA Rule provides that the labor standards contract clauses and appropriate wage determinations are effective "***by operation of law***" and are considered to be incorporated even when they have been wrongly omitted from a covered contract.
- The Rule makes clear that the contractor must be compensated for any increases in wages resulting from incorporation of a missing wage determination.

# "SECONDARY CONSTRUCTION SITE"

- Under the DBA Final Rule, a "***secondary construction site***" is covered by the DBA if ***each*** of the following is met:

  (1) A "***significant portion***" of the building or work is constructed

  - "Significant portion" means "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."
  - Does ***not*** include "materials or prefabricated component parts such as prefabricated housing components."

# "SECONDARY CONSTRUCTION SITE" (CONT.)

(2) 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"; ***and***

(3) 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."

- The Final DBA Rule 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.

# 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.

# DEBARMENT (CONT.)

- The Final DBA Rule harmonizes the debarment procedures under the DBA and the DBRA.
- 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.

# ANTI-RETALIATION

- Under the Final DBA 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).
- 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.”

# DBA Compliance Issue:
# Pre- or Unregistered 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"
- "**Helpers**" is a classification that is recognized in some localities, but the DOL rules make clear that the classification must be listed in the wage determination
- Also, the definition of "**apprentice**" includes "***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"

# DOL Handbook, Ch. 15, § 15e01(e)

(e) 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.

# DOL Handbook, Ch. 15, § 15e01(e)

**15e05 Helpers.**

The term helper is defined in 29 CFR 5.2(n)(4). Helpers are permitted on a DBRA contract only if the helper classifications are specified in the applicable wage determination or conformed rates are approved pursuant to 29 CFR 5.5(a)(1)(ii). Helper classifications will be issued or approved only where the helper classification in question constitutes a separate and distinct class of worker whose use is prevailing in the area, and whose scope of duties does not overlap those of another classification (journeyworker or laborer). A helper may not be used as an informal apprentice or trainee, and it is not permissible for helpers to use tools of the trade in assisting a journeyworker. *See* 65 FR 69674, November 20, 2000.

# DBA Compliance Issue: 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***.
  - Exceptions are narrowly construed
- 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."

# DOL Handbook, Ch. 15, § 15e01(a)

**15e01 Apprentices.**

**(a)** 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 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. To be employed in compliance with the regulations the following guidelines must be observed:

# APPRENTICES (CONT.)

- Apprentices must be paid ***wages*** and ***fringe benefits*** in accordance with the ***provisions of the apprenticeship program***.

# DOL Handbook, Ch. 15, § 15e01(g)

(g) Wage computations for apprentices

In some instances, bona fide apprenticeship programs contain percentages which are applied to a stipulated wage rate (i.e., stated in the approved apprenticeship program or set forth in a collective bargaining agreement), the product of which results in the wage rate paid to the apprentice. While such a computation is acceptable on construction projects *not* subject to the DBRA, the contractor on covered projects is bound by any *higher* wage rates in the wage determination and the percentages should be computed against the journeyworker's basic rate found in the wage determination. Some apprenticeship agreements may specify dollar amounts, rather than percentages of the journeyworker's rate, for various levels of progress. For this type of apprenticeship training program, in order to determine whether the apprentice is properly paid it is necessary to convert the dollar amounts to a percentage of the journeyworker's basic rate in the training program. This is then applied to the rate specified in the wage determination. For example, where the journeyworker's rate contained in the apprenticeship training program for a particular craft is $16.00 per hour and the apprentices are to receive $8.00, $10.00, $12.00, or $14.00, depending on their level of progress, the percentages to be applied against the journeyworker's rate in the wage determination should be 50 percent, 63 percent, 75 percent, and 88 percent, respectively. In addition, the apprentices are also entitled to receive fringe benefits in accordance with the provisions of the apprenticeship program. If the approved program is silent as to fringe benefits, apprentices must be paid the full amount of fringe benefits listed in the wage determination for their classification, unless the Administrator of the WHD (Administrator) determines that a different practice prevails in the locality of the construction project for that particular apprentice classification.

# DBA Compliance Issue: Ratios

- The 2023 Final DBA Rule notes 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"
- According to DOL guidance, the ratio is calculated on a "***daily basis***."

# DOL Handbook, Ch. 15, § 15E01(b)

(b) Allowable ratio: apprentices to journeyworkers

(1) The allowable ratio of apprentices to journeyworkers employed on the contract work in any craft classification will not be greater than the ratio permitted the contractor as to the entire work force under the registered program. *See* 29 CFR 5.5(a)(4)(i). The allowable ratio is to be applied on a daily basis. If a contractor has both an apprentice and a trainee program, the trainees must be counted together with the apprentices in determining compliance with the allowable ratio (*i.e.*, the journeyworkers may not be counted twice).

(2) For the purpose of illustration only, assume that a contractor is allowed a ratio of one apprentice to every three journeyworkers under the terms of the approved plan. This same ratio would apply on DBRA covered jobs. Thus, in this example, the allowable number of apprentices is illustrated by the following chart:

| Journeyworkers | Allowable Apprentices |
|---|---|
| 0-2 | 0 |
| 3-5 | 1 |
| 6-8 | 2 |

# DOL Handbook, Ch. 15, § 15e01(b)

(3) Recognizing that the DBRA work may be performed in a location other than the place where the program registration was initially made, the allowable ratio is the ratio specified in the contractor's or subcontractor's registered program (*see* 29 CFR 5.5(a)(4)(i)).

(4) A working supervisor or owner may be counted as a journeyworker for ratio purposes provided such a worker spends the majority of his or her time in the craft, at the site.

(5) In determining the proper ratios, bootstrapping is not allowed. For example, if an employer has employees who are misclassified and determined to be entitled to the journeyworker's rate or has utilized an excessive number of apprentices who are also entitled to the journeyworker's rate, such employees cannot then be counted as journeyworker for ratio purposes.

# DOL Handbook, Ch. 15, § 15e01(c)

(c) Registered apprentice ratio exceeded

If a contractor or subcontractor employs apprentices in such a number that the permissible ratio is exceeded, all apprentices employed in excess of the ratio are considered to have been improperly employed and will be entitled to the rate for the classification of work which they are performing. For example, if an employer is permitted to employ three apprentices under an approved plan and it is disclosed that the employer is employing five apprentices on the project, the first three apprentices employed on the project will be considered within the quota; the last two employed will be considered improperly employed and must be paid the full prevailing wage rate for the work performed. As a practical matter, if it is impossible to determine which apprentices were first employed on the project, any equitable formula for allocating the time due at the applicable prevailing wage rate will be acceptable. For example, in the preceding situation, it would be permissible and equitable to rotate three of the five apprentices each week as a solution to the problem of which of these employees were first employed on the project. The remaining two employees would then be allocated the full prevailing wage rate in a manner which distributes the time improperly employed as equally as possible.

# APPRENTICES (CONT.)

- Out-of-Town Contractors
  - The 2023 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
  - The 2023 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

# THANK YOU!