

## Chapter VIII

# OVERVIEW OF STATE AND FEDERAL PREVAILING WAGE LAW

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### I. WHAT IS THE DAVIS-BACON ACT?

#### A. History and Purpose

The Davis-Bacon Act, 40 USC § 3141 et seq (formerly 40 USC § 276a et seq), was passed by Congress in 1931. Named for its sponsors, Representative Bacon of New York and Senator Davis of Pennsylvania, Davis-Bacon was enacted with two main purposes: (1) to give local laborers and contractors a fair opportunity to participate in building programs when federal funds are involved; and (2) to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the locality. LP Cavett Co v US Dep't of Labor, 101 F3d 1111 (6<sup>th</sup> Cir 1996). As a result, the Davis-Bacon Act requires the payment of prevailing wages and fringe benefits to laborers and mechanics employed on all federal public works projects in excess \$2,000.

The Davis-Bacon Act originated during the time of the Great Depression, an era in which labor surpluses made it possible for contractors from outside a particular community to transport their own low-wage labor into the community and win competitively bid federal construction projects away from local firms and workers by undercutting local labor rates.<sup>1</sup> Because federal law required acceptance of the lowest responsible bid, and materials costs were relatively fixed at that time, competition focused on wages and had the effect of depressing them.<sup>2</sup> This situation was aggravated by the fact that in the 1930's the only construction being done in many areas was that contracted by the federal government.<sup>3</sup> Therefore, by requiring every bidder to pay the "prevailing wage" for similar work, Congress hoped to eliminate wage competition on federal projects and to reduce the distortion of local wage rates that federal projects often caused.<sup>4</sup>

#### B. Michigan's Prevailing Wage Act (little Davis-Bacon Act)

Michigan, along with many other states, has its own statutory equivalent of the Davis-Bacon Act that mandates the payment of prevailing wages on *state*-funded construction projects. These state acts are commonly referred to as "little Davis-Bacon Acts." In Michigan, The Wages and Fringe Benefits on State Projects Act (the Prevailing Wage Act), MCL 408.551 et seq; MSA 17.256(1) et seq, was enacted in 1965 with essentially the same purpose as that of the federal Davis-Bacon Act. Similar to the Davis-Bacon Act, the Prevailing Wage Act requires the payment of prevailing wages and fringe benefits on state construction projects and it establishes the responsibilities of contracting agents and bidders.

In essence, the Prevailing Wage Act provides that a contract executed between a contracting agent and a successful bidder pursuant to an advertisement and invitation to bid on a state project must expressly state that wages payable to construction mechanics will be at the prevailing rate in the locality in which the work will be performed. MCLA 408.552. However, Michigan's Prevailing Wage Act does not apply if there is both federal and state funding on a single project. In those situations, the payment of wages under the federal Davis-Bacon Act is controlling. The Michigan Department of Consumer and Industry Services administers the Prevailing Wage Act while the U.S. Department of Labor administers the Davison-Bacon Act.

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<sup>1</sup> The Associated General Contractors of America, Inc., Davis-Bacon Manual on Labor Standards for Federal and Federally Assisted Construction, p. 1 (February 1986).

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

## **II. WHAT IS THE "PREVAILING WAGE?"**

Both the Davis-Bacon Act and the Prevailing Wage Act require that laborers and mechanics on public works construction projects be paid the "prevailing wage." Generally, prevailing wages are based on those paid to similarly situated local employees working on non-government projects, i.e. those of union laborers doing similar work in the area.

### **A. The "prevailing wage" under the Davis-Bacon Act**

For work covered under Davis-Bacon, the Secretary of Labor determines the prevailing wage based upon the wages received by "classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village or other civil subdivision of the state in which the work is to be performed." 40 USC § 3142(b). Additionally, federal regulations define the "prevailing wage" as:

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.

29 CFR § 1.2(a)(1).

#### **1. Wage Surveys and Wage Determinations**

In order to determine the prevailing wage for Davis-Bacon covered contracts, each state is surveyed every three years and all types of construction is reviewed. The Secretary of Labor compiles information from "the voluntary submission of wage data by contractors, contractor associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area." 29 CFR § 1.3. Information regarding the wages being paid is collected and tabulated on the basis of distinct job classifications and construction categories. The Secretary of Labor often requests data that includes the contractor's name and address, project description and location, value of the project, starting and completion dates, the peak number of workers employed in each classification (i.e. carpenters, drywall hangers, electricians, laborers, etc.), and the wage rates including bona fide fringes, paid each worker. Based on the data received from these and other sources, the Secretary issues wage determinations for each classification of laborer and mechanic that will likely be employed in federally funded or assisted construction.

A "wage determination" is the listing of wage rates and fringe benefit rates for each classification of laborers and mechanics, which the Secretary has determined to be prevailing in a given area for a particular type of construction (e.g., building, heavy, highway or residential). Wage determinations are issued in two types: general determinations (also called area determinations) or project determinations. A general wage determination reflects those rates determined to be prevailing in a specific geographic area for the type of construction described. A project wage determination is issued at the specific request of a contracting agency and is applicable to the named project only. A project wage determination expires 180 calendar days from the date of issuance unless an extension of the expiration date is requested by the contracting agency and approved by the Department of Labor. The wage rates and fringe benefits in the applicable wage determination represent the minimum that contractors and subcontractors must pay laborers and mechanics on the Davis-Bacon covered project.

The wage determinations for a given project are generally available from the contracting agency. In addition, contractors can access at no cost an electronic version of the most current Davis-Bacon wage determinations at [www.access.gpo.gov/davisbacon](http://www.access.gpo.gov/davisbacon).

If an applicable wage determination is believed to be inaccurate, it can be appealed. 29 CFR § 1.8. Any interested person, including contractors or contractor associations likely to seek work under a contract

containing a particular wage determination, can submit a written request for reconsideration accompanied by supporting data or other pertinent information to the Wage and Hour Division of the Department of Labor. Similarly, if following the award of the contract, the wage determination fails to include a rate for a particular class of laborers or mechanics who will be doing work on the project, a conformance action may be instituted to have a wage rate determined for that class of laborers originally omitted from the determination.

## **2. Davis-Bacon covered contracts must specify the prevailing wage**

The Davis-Bacon Act requires that certain provisions and stipulations regarding the payment of prevailing wages be included in the actual advertised specifications for every Davis-Bacon contract and in the contract ultimately awarded to the successful bidder. If the contemplated construction work is deemed to be covered by the Act, the federal contracting agency must secure appropriate prevailing wage rates for the project so that they may be included in the contract.<sup>5</sup>

## **3. "Prevailing Wage" includes hourly rate and fringe benefits**

The Davis-Bacon wage determination includes an hourly rate and prevailing fringe benefits, if any. Contractors must make payments or incur costs in the amount specified in the applicable wage determination for each person performing covered contract work, except apprentices and trainees within the ratio of Bureau of Apprenticeship and Training (BAT) or Employment and Training Administration (ETA).<sup>6</sup> The Wage and Hour Division Field Operations Handbook lists the following rules applicable to the crediting of fringe benefits:

- A contractor may pay fringe benefits in cash or in kind or in any combination of the two. If the cash wages and the per hour cost equivalents for fringe benefits together do not equal the prevailing rate and fringe benefit amounts set forth in the wage determination, the balance due must be paid in cash.
- A contractor or subcontractor may discharge his Davis-Bacon wage obligation for both straight time and fringe benefits by paying cash, or making contributions to a "bona fide" fringe benefit plan approved by the U.S. Department of Labor
- Contributions must be made on a regular basis, and not less than quarterly
- Contributions made to a fringe benefit plan for government work may not be used to fund the plan for periods of non-government work.
- A contractor may take credit for contributions for any bona fide fringe benefits regardless of whether the particular benefit is listed on the applicable wage determination.
- A contractor cannot take credit for benefits required by law, such as social security contributions or worker's compensation.

For example, in **Cody Zielger, Inc.**, 1997-DBA-17 (ALJ April 7, 2000), an Administrative Law Judge (ALJ) held that the employer's contributions to employee pension plans could be credited towards its prevailing wage rate obligations even though the plan did not provide for immediate vesting. Citing **Mistick v Reich**, 54 F3d 900 (DC Cir 1995), the ALJ rejected the Department of Labor's argument that the pension plan contributions had to be annualized as the Department "presented no evidence that the Employer is funding its private pension fund contributions with Davis-Bacon Act work."

Also, in **William J. Lang Land Clearing, Inc.**, 1998-DBA-1 (ALJ Feb 22, 2001), the ALJ noted that, while the provisions of the Davis-Bacon Act provide for a number of fringe benefits which may be credited towards the prevailing wage rate (including pensions and health insurance), the provisions do not

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<sup>5</sup> The Associated General Contractors of America, Inc., Davis-Bacon Manual on Labor Standards for Federal and Federally Assisted Construction, at 8.

<sup>6</sup> Id.

specifically mention meals and lodging. However, the ALJ found that the Act did permit employers to take " 'other *bona fide* fringe benefits' not enumerated in the statute." As a result, the ALJ concluded that the Employer was permitted to take a fringe benefit credit for meals and lodging expenses "for employees on away jobs" which are permitted under the Davis-Bacon Act, or in the alternative, the expenses constitute a permissible deduction from wages under the Fair Labor Standards Act.

## **B. Determination of the "prevailing wage" in Michigan**

Under Michigan's Prevailing Wage Act, the prevailing wage and fringe benefit rates are set by the Commissioner of the State Department of Consumer and Industry Services. The rate set will be that which prevails on projects of a similar character in the specific locality under collective agreements or understandings between bona fide organizations of construction mechanics and their employers. However, those collective agreements cannot be controlled in any way by either an employee or employer organization. MCL 408.554. If prevailing rates cannot be determined because no collective bargaining agreements exist in the locale, the Commissioner will determine the rates for the same or most similar employment in the nearest and most similar neighborhood locality in which such agreements or understandings exist. Id.

## **III. WHAT CONTRACTS ARE COVERED BY THE ACTS?**

### **A. Contracts covered under Davis-Bacon**

The Davis-Bacon Act applies to every contract, competitively bid or negotiated, in excess of \$2,000, to which the United States or the District of Columbia is a party, for construction, alteration or repair, including painting and decorating, of public buildings or public works.<sup>7</sup> Even carpet laying is covered under the Act if it is an integral part of the construction.<sup>8</sup> Following is a more detailed examination of these requirements for coverage:

#### **1. The contract must be for an amount in excess of \$2,000.**

The Davis-Bacon Act is expressly inapplicable to government construction contracts under \$2,000.<sup>9</sup> The \$2,000 threshold is determined by the amount of the prime contract and not the amount of the individual subcontracts. Thus, if the prime contract exceeds \$2,000, then the entire project is covered by the Act.<sup>10</sup>

#### **2. The contract must be one for "construction, alteration or repair."**

The nature of the work performed is a significant factor in determining coverage under the Davis-Bacon Act. The Act applies if the contract is essentially or substantially one for "construction, alteration or repair, including painting and decorating." For purposes of the Act, the terms "construction, alteration or repair" are defined to include:

All types of work done on a particular building or work at the site thereof (or, under the United States Housing Act of 1937 and the Housing Act of 1949) all work done in the construction or development of the project, including without limitation, altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off site, painting and decorating...

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<sup>7</sup> 40 USC § 3142 (a).

<sup>8</sup> The Associated General Contractors of America, Inc., Davis-Bacon Manual on Labor Standards for Federal and Federally Assisted Construction, at 2.

<sup>9</sup> 18 Comp. Gen. 394 (1938).

<sup>10</sup> Wage and Hour Division Field Operations Handbook §15b00(e) (1987).

29 CFR § 5.2(j). Work that is typically covered the Davis-Bacon Act includes:

- Traditional building construction trade work
- Exploratory drilling and excavating
- Landscape contracting performed in conjunction with new construction
- Sewer repair service
- Steam and sandblast cleaning
- Shipbuilding and repair of non-naval vessels
- Painting of public mailboxes<sup>11</sup>
- Installation of a security system or intrusion detection system
- Installation of air-conditioning ducts and/or heavy generators
- Carpet laying and drapery installation performed as an integral part of, or in conjunction with, new construction, alteration or reconstruction.<sup>12</sup>

**3. The construction work must be performed on "public buildings or public works of the Government or the District of Columbia."**

This requirement of Davis-Bacon Act coverage mandates that the construction-type work be performed on a "public building or public work." Federal regulations define these terms as any:

[B]uilding or work, the construction, prosecution, completion or repair of which...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.

29 CFR §5.2(k). Additionally, lease-purchase agreements may also be subject to the Davis-Bacon Act, where the federal government bears related construction costs. The Act also applies to lease options or lease term agreements involving substantial construction activity in connection with a public building or public work.<sup>13</sup>

Also, contracts for work on moveable property are covered by the Act, provided that the property falls within the definition of "public building or public work" and the worksite is determinable prior to the bidding process, such as the construction, alteration or repair of aircraft, nuclear reactors, Coast Guard vessels, airports and highways.

**4. Finally, the contract must require or involve the employment of "laborers or mechanics" directly upon the site of the work.**

For a construction contract to be covered under the Davis-Bacon Act, it must also employ "laborers" or "mechanics" who are employed "directly upon the site of the work." A variety of employees are considered laborers or mechanics for purposes of the Act. These employees are discussed in more detail below. For those employees to be covered under the Act, however, they must perform their tasks directly upon the site of the work. This concept is also discussed in greater detail below.

**B. Geographic limitations on coverage**

The Davis-Bacon Act applies only to construction projects done in the "United States" which the statute defines as the 50 states plus the District of Columbia. Grants to U.S. territories such as Puerto Rico, the Virgin Islands, Guam, and Trust Territories of the Pacific also maybe covered by the Davis Bacon-Act depending on the language of the legislation creating the grant. Work done in foreign countries for U. S.

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<sup>11</sup> See, e.g., Opinion of the Secy. of Lab., 2 Lab.L. Rptr, Wage-Hour (CCH) ¶ 30,647.

<sup>12</sup> Wage and Hour Division Field Operations Handbook §§15d00 and 15d10 (1987).

<sup>13</sup> Wage and Hour Division Field Operations Handbook §15b06 (1987).

agencies is not covered even if American workers are hired in the United States for employment on the project and the materials for it come from the U.S.<sup>14</sup>

### C. Federally funded *and assisted* contracts are covered

The Davis-Bacon Act also applies to federal-aid construction contracts of \$2,000 or more whenever the Act is incorporated by reference in the federal-aid statute.

In addition, where a construction project is funded or assisted under a number of federal statutes, the Davis-Bacon Act applies to the entire project if any one of the statutes authorizing financial assistance requires the payment of Davis-Bacon wages.<sup>15</sup>

### D. Subcontracts also covered under the Act

Subcontractors under a prime or general contract for construction covered by the Davis-Bacon Act are also covered, and must include a Davis-Bacon provision to this effect in each subcontract.<sup>16</sup> The same rule applies to all lower-tier subcontracts. It is particularly important for general contractors to require their subcontractors to comply with the Act, since general contractors are ultimately responsible for compliance with the Act for all work done on the project. Even if the Davis-Bacon labor standards clause is omitted from the subcontract, the subcontractors employees are still entitled to the Davis-Bacon prevailing wage, and the prime contractor ultimately will be held responsible for paying the prevailing wages.

### E. Contracts generally not covered under the Act

Services, manufacturing or material supply are not normally covered by the Act. If the Davis-Bacon provisions are erroneously omitted from the contracts for such work, there is no Davis-Bacon obligation, as that obligation only arises by force of contract. But contracts subject to the Davis-Bacon Act which fail to include the required Davis-Bacon provisions are invalid. As such, employees of materialmen and suppliers are excluded from Davis-Bacon coverage.

### F. Contracts covered under the Prevailing Wage Act in Michigan

Michigan's Prevailing Wage Act, MCL 408.551 et seq; MSA 17.256(1) et seq, specifically covers:

**Every contract** executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project **which requires or involves the employment of construction mechanics**, other than those subject to the jurisdiction of the state civil service commission, **and which is sponsored or financed in whole or in part by the state...**

MCL 408.552; MSA 17.256(2) (emphasis added). Unlike the Davis-Bacon Act, the Prevailing Wage Act does not include a monetary threshold that must be met. Therefore, the Prevailing Wage Act applies to all state-funded projects regardless of size or cost. Under the Act, a "state project" refers to the "new construction, alteration, repair, installation, painting, decorating, completion, demolition, conditioning, reconditioning or improvement of public buildings, schools, works, bridges, highways, or roads authorized by a contracting agent." MCL 408.551(B).

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<sup>14</sup> See 29 CFR 5.15(b)(3).

<sup>15</sup> Wage and Hour Division Field Operations Handbook § 15b00(b)

<sup>16</sup> The Associated General Contractors of America, Inc., Davis-Bacon Manual on Labor Standards for Federal and Federally Assisted Construction, p. 5 (August 1991).

## 1. Proposed legislation regarding school projects in Michigan

Under the Prevailing Wage Act, a contract for construction or remodeling of a school building authorized by a public school pursuant to bid, sponsored or financed in whole or in part by state funds, and using construction mechanics must provide for the payment of prevailing wages. Mich Atty Gen Op 7057 (July 19, 2000). However, new amendments to the Act, House Bills 4161 and 4162, have been proposed recently in the Michigan Legislature that would eliminate coverage of the Act on public works projects involving schools. House Bill 4161 would amend the Prevailing Wage Act to exclude construction public school projects from definition of "state project." As a result, construction mechanics on public school projects would not have to be paid the prevailing wage. In addition, House Bill 4162 would eliminate provisions requiring charter schools and strict discipline academies (alternative schools for students who have problems adjusting in ordinary schools) from having to comply with the Prevailing Wage Act as well.

## IV. WHAT EMPLOYEES ARE COVERED BY THE ACTS?

### A. Employees covered under Davis-Bacon

The Davis-Bacon Act only applies to "laborers and mechanics" employed on federal public works projects. Under the Act, the terms "laborer" and "mechanic" are defined to include:

[A]t least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial.... The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual.

29 CFR § 5.2(m). A variety of employees are considered laborers or mechanics for Davis-Bacon purposes, including traditional construction laborers, dredge workers, flaggers and traffic directors on construction crews, helicopter pilots, and machinists and mechanics.<sup>17</sup>

All of these positions have in common the fact that they focus on manual or physical labor, whether or not it is typically characterized as "trade" work. The laborers or mechanics must be employed by a federal contractor or subcontractor in construction-type activity for the Act to apply.

### 1. Employees must be employed directly upon the site of the work

Significantly, the laborers or mechanics employed on a Davis-Bacon construction project must perform their tasks **directly upon the site of the work** in order to be covered by the Act. 40 USC § 3142(c)(1). Employees of contractors and subcontractors who perform work off the job site are not covered under the Act. To determine whether particular laborers or mechanics are engaged directly upon the "site of the work" the underlying contractual language is important. More specifically, the "site of the work" is limited to the physical place where the construction called for in the contract will remain when the work is completed, and other adjacent property used by the contractor or subcontractor in such construction.<sup>18</sup>

The "site of the work" inquiry has become quite a gray area for determining if an employee is indeed covered under the Act. In the famous **Midway**<sup>19</sup> decision, a federal court determined that truck drivers

<sup>17</sup> 29 CFR § 5.2(m); Field Operations Handbook §§ 15e08-09, 15e11 (1987).

<sup>18</sup> See Wage and Hour Division Field Operations Handbook § 15b04(b)(1) (1987). Where a subcontractor fabricated modular sections of a 300-foot mobile service tower to be erected at an air force base 1000 miles away, that work was held to be off-site and not covered by the Davis-Bacon Act based on the distance between the base and the fabrication facility. See *In re Titan IV Mobile Serv. Tower*, 30 WH 913 (US DOL 1991).

<sup>19</sup> *Building and Const Trades Dep't, AFL-CIO v U.S. Dep't of Labor, Wage Appeals Board (Midway Excavators, Inc.)*, 932 F2d 985 (DC Cir 1991).

who merely delivered materials to the site of a Davis-Bacon contract were not covered by the act and thus, need not be paid Davis-Bacon rates. The **Midway** case involved truck drivers employed by government contractors to transport materials to the site of a federally funded construction project. The delivery truck drivers in **Midway** were employees of the contractor who worked off-site most of the time and only came on-site to drop off deliveries. The issue was whether these delivery drivers were "mechanics and laborers employed directly upon the site of the work" for purposes of the Davis-Bacon Act. The court held that the Act's requirement that employees must be working "directly on the site of the work" in order to be covered was unambiguous. As such, the court held that material delivery truck drivers who come onto the site of the work merely to drop off construction materials are not covered by the Act even if they are employed by the government contractor.

Similarly, in **Ball, Ball & Brosamer, Inc. v Reich**, 24 F3d 1447 (DC Cir 1994), a contractor entered into a federal construction contract to build a thirteen mile aqueduct between Phoenix and Tucson, Arizona. The contractor subcontracted with Red Rock Products, an Arizona based company, for the concrete and gravel it needed for the project. Red Rock obtained raw materials from a local sand and gravel pit and set up a portable batch plant for mixing concrete. The borrow pit and batch plant were located two miles from the nearest point of the construction site. The issue in the case was whether the batch plant could be considered as part of the site of the work under the Davis-Bacon Act. The District of Columbia Circuit Court held that the provisions of the Davis-Bacon Act were clearly and unambiguously intended to apply only to workers on the actual physical site of the public work under construction and not at batch plants two miles away. The Court noted however, in dicta, that offsite facilities in "actual or virtual adjacency" to the construction site as opposed to facilities two miles away might satisfy the "site of the work" requirement of the Davis-Bacon Act.

Likewise, in **LP Cavett Company v US Dep't of Labor**, 101 F3d 1111 (6<sup>th</sup> Cir 1996), the U.S. Court of Appeals for the Sixth Circuit held that the Davis-Bacon Act prevailing wage requirements were not intended to apply to truck drivers hauling asphalt from a temporary batch plant to a highway construction project three miles away. The Court, following **Midway** and **Ball**, determined that there was no ambiguity in the Act's requirement that laborers and mechanics be employed directly on "the site of the work." As such, the Court held that only employees working directly on the physical site of the public work under construction must be paid prevailing wages.

In **Les Calkins Trucking**, 1990-DBA-65 (ALJ July 13, 1995), the ALJ cited the **Ball** case and held that the statutory phrase "employed directly upon the site of the work," means "employed directly upon the site of the work." **Ball, supra** at 1452-53. Consequently, the court noted, that laborers who fit that description are covered by the statute. On the other hand, those workers who are not employed directly upon the site of the work are not covered by the Davis-Bacon Act. *Id.* at 1543. Based on the facts before him, the ALJ concluded that employees engaged in the transporting of materials from a dedicated borrow pit to the actual construction site were not entitled to the prevailing wage rate under the Davis-Bacon Act.

However, in **Bechtel Constructors, Corp.**, ARB Case No. 95-045A (ARB July 15, 1996), respondents were engaged in a massive construction project consisting of 330 miles of aqueduct and pumping plants. Batch plants were constructed near each of the pumping stations under construction. The issue was whether employees at the temporary batch plants were employed on the "site of the work" and consequently covered by the Davis-Bacon Act. The Department of Labor's Administrative Review Board interpreted the D. C. Circuit's decision in **Ball** to permit coverage of workers working at "temporary batch plants on land integrated into the work area adjacent to the pumping plants." The Board also held that in work of the kind involved in the case before it, where the project consisted of miles of narrow aqueduct, "work performed in actual or virtual adjacency to one portion of the long continuous project is to be considered adjacent to the entire project." The Board thereby rejected an interpretation that the **Ball** decision requires that the statutory phrase "directly upon the site of the work" limits the wage standards of the Davis-Bacon Act to the "physical space defined by contours of the permanent structures that will remain at the close of the work." The Board noted that one Respondent argued that because "it supplied concrete to more than one contractor on the project, its temporary batch plants were not dedicated exclusively to one contract and therefore did not satisfy the functional test the Wage and Appeals Board

applied in determining whether work was performed on site." **United Construction Co.**, WAB Case No. 82-10 (Jan 14, 1983)." The Board found, however, that "the applicable section of regulations, 29 CFR Section 5.2(l)(1), does not explicitly contain a functional test" and that "to the extent that a functional test is read into Section 5.2(l)(1), the Board refuses to draw an artificial distinction between one portion of the project that is let under one contract and another portion of the same project that is let under a separate contract." **See also Wenzler Excavating Co.**, 1987-DBA-3 (ALJ Feb 17, 1988), *aff'd*, WAB Case No. 91-02 (WAB, Feb 23, 1993) (a borrow pit located 12 miles from the sewer construction site was covered.)

In **Aetna Bridge Holding Co v Coletta's Downtown Auto Services, Inc.**, 1996 WL 635740 (DOL Adm Rev Bd), the Administrative Review Board held that tow truck drivers who assist motorists and tow disabled vehicles from travel lanes on a bridge undergoing repair are not "laborers" or "mechanics" performing "construction" work within the meaning of the Davis-Bacon Act. In **Aetna**, the State of Rhode Island contracted with Aetna for the repair of a bridge on I-95. The contract required that Aetna provide two tow trucks for towing services to maintain the flow of traffic in the construction zone while the traffic patterns on the bridge were shifted due to the construction. Aetna contracted with Coletta's, a local towing company, to provide the services. Tow truck drivers were then stationed off the road approximately six-tenths of a mile from either end of the bridge. After, an ALJ determined that the tow truck drivers were covered under the Davis-Bacon Act and entitled to prevailing wages, the Board reversed the decision stating that "there is no dispute that the tow truck drivers did not perform any physical or manual work on the construction project itself or that they were not part of the construction crew." Furthermore, the Board found that the tow truck operators performed no construction work that facilitated the completion of the bridge and under those facts the tow truck operators were too removed and too weakly connected to the actual construction work to be considered "laborers" or "mechanics" under the Davis-Bacon Act.

In **Superior Paving & Materials, Inc.**, 1998-DBA-11 (ALJ Feb 19, 1999), the ALJ held that off-duty police officers, who directed traffic around a federal highway construction site, were entitled to the prevailing wage rate as flaggers. The company argued that police officers were independent contractors. Citing **NBA Enterprises, Ltd.**, CCH Lab Cas Admin Rulings p 32,086 (WAB 1991), the ALJ held that "if a person works on a job site covered by the Davis-Bacon Act, that person is an employee within the meaning of the Act regardless of the contractor. Congress clearly intended covering such workers regardless of the attempts of the contractor to distance itself from Davis-Bacon obligations." In affirming the ALJ's decision, the Administrative Review Board noted that the police officers "performed the manual and physical work of 'flaggers'" and they were therefore, "laborers" under the Act.

As the case law indicates, in order to determine whether a laborer or mechanic is covered by the Act, there must be an fact intensive inquiry into both the *function* and the *location* of the work being performed.

### **B. Employees not covered by the Act**

Some classes of employees involved in covered projects are exempt from the Davis-Bacon Act because they are not deemed to be laborers and mechanics doing construction work.<sup>20</sup> These classes of employees include:<sup>21</sup>

- executives
- supervisors
- salaried (or hourly) employees, such as field engineers, not performing craft work
- timekeepers

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<sup>20</sup> The Associated General Contractors of America, Inc., Davis-Bacon Manual on Labor Standards for Federal and Federally Assisted Construction, at 3.

<sup>21</sup> Id.

- tug boat crews (as long as they perform services related to the operation of the vessel as a means of transportation)
- office staff of the contractor
- equipment service provided from time to time by a dealer or lessor (but watch out, major repairs and service workers stationed on site may be covered)
- preconstruction survey and drilling crew (but they will be covered if their work is part of the construction process)
- architects
- engineers
- those doing force account work (a governmental entity performing public construction work with its own regular crews)
- utility extending its service lines
- guards
- technicians

As a general rule, non-labor or non-mechanic employees, such as those listed above, working on a Davis-Bacon project are not covered *unless* they perform actual construction work for more than 20 percent of their time on the job. For example, a tugboat crewman on a dredging project who is connecting, extending or installing pipe for more than 20 percent of this time would be covered by the Davis-Bacon Act. Furthermore, those employees who do not work directly upon the site of the work, as discussed above, are also not covered by the Act. Lastly, note that relatives of the contractor or owner who are doing laborer or mechanic work on the site are covered by the Act.

## **V. WHAT ARE CONTRACTORS AND/OR SUB CONTRACTORS OBLIGATIONS UNDER THE ACT**

### **A. Administrative And Recordkeeping Requirements**

The Davis-Bacon Act is governed by an extensive set of regulations. The regulations govern various administrative and recordkeeping requirements applicable to government contractors covered by the Davis-Bacon Act. Government contractors working on projects covered by the Davis-Bacon Act need to be familiar with these requirements.

The primary administrative and recordkeeping requirements applicable to Davis-Bacon covered contractors are found in 29 CFR § 5.5 et seq. They include mandatory contract clauses that must appear in a Davis-Bacon covered prime contract (a government contract in excess of \$2,000 for the actual construction, alteration and/or repair of a public building or public work etc.). Subcontractors should not simply ignore these requirements, because 29 CFR § 5.5(a)(6) requires "The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR § 5.5(a)(1) through (10)..." Of course, "The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5."

The mandatory contract clauses identified in 29 CFR § 5.5 (1) through (10) generally cover: (1) A statement addressing the minimum wages to be paid to laborers and mechanics; (2) A statement that the federal agency or an authorized representative of the Department of Labor may withhold and/or suspend payments from the contractor; (3) A statement identifying a contractors recordkeeping requirements; (4) A statement addressing obligations with respect to Apprentices and Trainees; (5) A statement assuring compliance with the Copeland Act requirements; (6) A statement requiring that these clauses appear in all subcontracts; (7) A statement indicating that violations of any of the clauses may lead to contract termination and/or debarment; (8) A statement promising compliance with all Davis-Bacon Act requirements as spelled out in 29 CFR parts 1, 3 and 5; (9) A statement indicating that disputes involving labor standards must be resolved according to the Department of Labors procedures; and (10) A statement certifying contractor eligibility.

The exact provisions of 29 CFR § 5.5 (1) through (10) are detailed and should be consulted to ensure compliance, however, some general statements regarding certain of these regulatory provisions are helpful to ensure Davis-Bacon compliance.

#### 29 CFR § 5.5(1) Minimum Wage

- Requires payment no less often than once a week.
- Requires payment of wages and bona fide fringe benefits (or cash equivalents) at rates not less than those in the Department of Labor's wage determination/classification.
- The payment of wages are "regardless of any contractual relationship" (i.e. collective bargaining agreement) that may otherwise exist between a contractor and a laborer or mechanic.
- Laborers and mechanics may be paid in more than one wage classification for time actually worked in each classification. (Payroll records, however, must accurately set forth the time set forth in each classification, otherwise a contractor may face an argument that all time should be paid at the higher of the two classifications).
- The prime contractor and subcontractors must have posted at the site of work the Davis-Bacon poster (WH-1321).
- Laborers and Mechanics that are not listed in the wage determination/classification shall be classified.

#### 29 CFR § 5.5(a)(3) Payroll and basic records

- Payroll and other records must be maintained for all laborers and mechanics during the contract and for a period of three years after the contract ends.
- Records should contain at a minimum the name, address, social security number, the classification (pursuant to the Department of Labor's Determination), hourly rate of wage (including rates of contributions for bona fide fringe benefits or cash equivalents), daily and weekly hours worked, and deductions made from wages.
- If wages include costs reasonably anticipated in providing benefits to laborers and mechanics, records demonstrating that a benefits plan is enforceable, financially responsible, communicated to workers, and the cost of providing the plan must be maintained.
- Contractors employing apprentices or trainees must keep records demonstrating registration of apprenticeship programs and certification of trainee programs. Ratios of wage rates for apprentices and trainees must also be maintained.
- The prime contractor (and therefore subcontractors under the prime contractor) is required to weekly submit a copy of the payroll to the government agency administering the contract or other appropriate designee for submission to the agency. The weekly payroll must set forth the name, address, social security number, classification, hourly rate, daily and weekly hours worked and deductions. The Department of Labor provides an optional form (WH-347). The payroll submitted also must contain a "statement of compliance" which is found on the reverse side of WH-347.
- Contractors must make available records related to the categories of information discussed for inspection or copying either to a representative of the federal agency administering the project or the Department of Labor.

- Contractors must permit either a representative of the federal agency administering the project or the Department of Labor to interview employees during working hours on the job.
- The failure to submit or provide required records may result in the suspension of further payment and may also be considered grounds for debarment.

29 CFR § 5.5(a)(4) Apprentices and trainees

- Apprentices and trainees under specified circumstances may be paid less than the determined wage rates if employed under a bona fide apprenticeship program that is properly registered

**B. Penalties and Sanctions**

Individual contractors or subcontractors who have been found to have disregarded their obligations to employees, or to have committed aggravated or willful violations while performing work on Davis-Bacon covered projects, may be subject to contract termination and debarment from future contracts for up to three years. In addition, contract payments may be withheld in sufficient amounts to satisfy liabilities for unpaid wages and liquidated damages that result from overtime violations of the Contract Work Hours and Safety Standards Act (CWHSSA).

For example, in **Arliss D. Merrell, Inc.**, 1994-DBA-41 (ALJ Oct 26, 1995), an ALJ observed that it was well-settled that a prime contractor is responsible for the back wages due employees of its subcontractor under the Davis-Bacon Act, and is responsible for insuring that all persons engaged in performing the duties of a laborer or mechanic on the construction site receive the appropriate prevailing wage rate, irrespective of any contractual relationship alleged to exist or not to exist between the contractor and such persons. 29 CFR §§ 5.2(o), 5.2(i), 5.5(a)(6); **Superior Paving and Materials, Inc.**, ARB Case No. 99-065, 1998-DBA-11 (ARB June 12, 2002); **Tap Electrical Contracting, Inc.**, WAB Case No. 84-1 (WAB March 4, 1985) (the prime contractor is not relieved of its obligations under the Davis-Bacon Act and the CWHSSA merely because it did not know about the violations of the subcontractor until after they occurred).

Also, in **KP&L Electrical Contractors, Inc.**, 1996-DBA-34 (ALJ Dec 31, 1998), *aff'd* in part, ARB Case No. 99-039 (ARB May 31, 2000), an ALJ found that the employer violated the Davis-Bacon Act based upon the testimony of four employees who stated that employer requested that they cash checks received for back wages owed and return the money to him. As a result, the ALJ directed the employer to repay the back wages to the employees as they were entitled to these monies. The ALJ described the employer's conduct as "a blatant attempt to undermine the administration and enforcement of the Federal employment laws."

Contractors and subcontractors may challenge determinations of violations and debarment before an administrative law judge (ALJ). Contractors and subcontractors may appeal decisions by administrative law judges with the Department of Labor's Administrative Review Board. Final Board determinations on violations may be appealed to and are enforceable through the federal courts.

Falsification of certified payroll records or the required kickback of wages may subject a contractor or subcontractor to civil or criminal prosecution, the penalty for which may be fines and/or imprisonment.

**CURRENT DEVELOPMENTS IN PREVAILING WAGE LAW**

**I. ENFORCEMENT TRENDS**

**A. Enforcement under Davis-Bacon**

Under the provisions of the Davis-Bacon Act, contractors who fail to properly pay employees on covered federal construction projects run the risks of being forced to repay the underpaid employees, debarment from bidding for future federal contracts and even prison sentences. Though most Davis-Bacon and Wage-Hour investigations that lead to a determination that the contractor improperly paid wages and

fringes to its employees require only that the contractor repay those shortages, knowing violators of the Act take a chance on facing criminal prosecution by the federal government. For instance, a 1991 article in *Crain's Detroit Business* details how two local businessmen were sentenced to a maximum of 19 months in prison and 14 months in prison respectively, for failing to pay Davis-Bacon wages and submitting false payroll records on a HUD financed housing development project.

## **B. Enforcement under the Prevailing Wage Act in Michigan**

(3) ... violated any other state or federal law...including but not limited to...  
1965 PA 166 (law relating to prevailing wages on state projects), MCL  
408.551 to 408.558; 1978 PA 390 (law relating to payment of wages and  
fringe benefits), MCL 408.471 to MCL 408.1094.

Furthermore, if a vendor receives a notice from the Department that grounds for debarment exist, the contractor will have 20 days to request a hearing on the matter. If the vendor does not respond with a written request for a hearing within 20 calendar days, the Department will issue the debarment without a hearing. According to the executive order, the debarment period may be of any length, up to eight (8) years. After the expiration of the debarment period, the vendor may reapply for inclusion on bidder lists through the regular application process.

Note that the state debarment period may last up to 5 years longer than the 3 year debarment period authorized under the federal Davis-Bacon Act.

## **II. HANDLING A DAVIS-BACON ACT AUDIT**

Contractors should keep in mind that in the first instance it is the federal agency that is administering the project that is primarily responsible for enforcement activity. Thus, the federal agency must make sure that the contract provisions required by 29 CFR § 5.5 are made a part of the contracts. The federal agency is also required to maintain weekly payroll documents and statements of compliance from contractors for a period of three years. These records are also required to be produced to the Department of Labor upon request. Id.

Due to the responsibility placed on the federal agency administering the contract, such agencies have investigative or audit authority ("The federal agency shall cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by Sec 5.5..." 29 CFR § 5.6(a)(3)). The regulations provide that investigations:

...shall be made of all contracts with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees, which shall be taken in confidence, and examinations of payroll data and evidence of registration and certification with respect to apprenticeship and training plans. In making such examinations, particular care shall be taken to determine the correctness of classifications and to determine whether there is a disproportionate employment of laborers and of apprentices or trainees registered in approved programs. Such investigations shall also include evidence of fringe benefit plans and payments thereunder. Complaints of alleged violations shall be given priority.

29 CFR § 5.6(a)(3). Many times it will be to a contractor's advantage to deal directly with the federal agency on any disputes and avoid the involvement of the Department of Labor. This is because it is more likely that quick resolutions short of formal administrative action can be accomplished with the federal agency representatives rather than a Department of Labor investigator.

The Department of Labor, however, may also conduct its own investigations, and if formal action is taken at the administrative agency level, the Department is tasked with affirming or rejecting recommendations from the agency with respect to labor standards compliance. 29 CFR § 5.6(a)(5)(b). In this later capacity,

findings of a federal agency may not be altered, or in the case of amounts found due to laborers and mechanics may not be reduced, except with the approval of the Department of Labor.

In the Department of Labor's capacity as investigator, contractors are required by regulation to cooperate with any authorized representative of the Department of Labor, which usually means a Department of Labor representative. Primarily, a contractor's obligations toward a Department of Labor investigator is to cooperate in the

- inspection of required records;
- interviews with employees; and,
- all other aspects of investigations

29 CFR § 5.6(b). Contractors want to keep in mind that if they are being investigated by the Department of Labor, the Department has concurrent jurisdiction under its various divisions for violations that may arise under other labor laws including:

- The Fair Labor Standard Act (FLSA);
- The Family and Medical Leave Act (FLMA);
- The Occupational Safety and Health Act (OSHA); and,
- Immigration Reform and Control Act, I-9 compliance

Audits are usually the product of employee complaints filed with the Department of Labor. The best method for surviving the audit process is (1) plan ahead, and (2) be educated about the audit process.

Sometimes after receiving a complaint, the Department of Labor will telephone or send a letter requesting certain information of the company. When such a request is received, it is usually a good idea to contact labor counsel. In these circumstances, the Department is usually seeking to have the company perform a self-audit and then submit applicable information by mail. In other circumstances, however, (that tend to be more serious) the Department may conduct a random audit or perform an on site audit by first showing up at the worksite. Note: on site audits may not be preceded by notice from the Department of Labor.

Supervisors in charge of work sites should be made aware of both the seriousness of the audit process (findings of non-compliance can result in debarment) and steps that can be taken to effectively deal with an audit. A number of practical steps can be taken to effectively and efficiently address any audit situation.

(1) If you have been advised that a Department of Labor investigator is coming, designate a "point person" within the company to interact with the auditor on all aspects of the audit.

(2) If possible, open a line of communication with the investigator and attempt to narrow the issues presented by the audit by asking the investigator to identify the objective of the audit, how long the investigator may be on site, ask what support might be needed from the contractor. You may be able to identify certain employees that may aide to an understanding of the situation and direct the investigator to discuss issues with them.

(3) If possible, prior to the investigator arriving, review the applicable contract documents to determine if the legally required contract clauses are in place. If you are caught by surprise by an audit or a random investigator, you may ask if you can have a reasonable amount of time to compile the information requested. In this vein, express your willingness to cooperate, but inform the investigator that you believe such a step will actually make the process much more efficient for all the parties.

(4) In reviewing documentation and records, determine that the regulations information requirements have been met. For example, is the required poster posted at the site of work and do you have weekly payroll sheets for your employees. Also, review the wage determination applicable to the project. Locate and have available other required records such as fringe benefits information and information relating to

any apprentices or trainees. In reviewing the required weekly payroll documents that have been previously submitted, double check them against other internal payroll documents, both with respect to hours worked, wages paid and job classification. This kind of "self audit" may indicate any problem areas early.

(5) Segregate documents that are responsive to any Davis-Bacon Act issues. Privileged, confidential and proprietary documents should be identified. Given the Department of Labor's concurrent jurisdiction, contractors should never hand over entire employee personnel files to an investigator. Also, an investigator should never be allowed to leaf through company documents to find documents that he or she is looking for. The preferred procedure is to have the investigator request the document and have the company "point person" identify and produce that document.

(6) If and when an investigator arrives at the work site, request that all official communications be conducted through the designated company "point person."

(7) While the investigator is at the site of work, provide him or her with a segregated place to work that is functional for the investigator, but not too far from the place where applicable records are being maintained. This will help any audit to proceed smoothly and efficiently.

(8) The investigator has the right to see the records that the Act's regulations require an employer to maintain. The investigator may want to copy records and contractors should anticipate such a request. If the records are not provided upon request, the investigator may request them via a subpoena. The contractor should make duplicates of any records copied by the investigator.

(9) Note: the investigator is not supposed to ask the company to reformat or recalculate data that is part of records. Also, if information is requested that the company does not think is necessarily within the scope of the audit, politely request that the investigator put such a request in writing.

(10) The investigator has the right to interview employees. Company representatives are not allowed in those interviews. Occasionally, however, if you ask, an investigator may allow a company representative to sit in on an interview. Be aware that the Department of Labor has a specific policy that it will protect the identity of its confidential sources of information. 29 CFR § 5.6(a)(5) For contractors this means that many times it will be impossible to determine which employees, if any, have filed or contributed to a complaint. **Retaliation against an employee for making a complaint or for otherwise exercising federally protected rights may lead to allegations of retaliation if adverse action is later taken against a complainant employee.**

(11) The contractor's employees should be as cooperative as possible. Being uncooperative usually will only prolong the audit process and make it increasingly adversarial. Reasonable attempts should be made to resolve any differences with an investigator. In cases where an investigator is perceived as being overly aggressive or adversarial it may make sense to include counsel in conversations. Another way to sometimes deal with overzealous investigators is to contact management personnel at the Department of Labor and request assistance. Your labor counsel may know of such a contact and be able to facilitate that process.

### **III. MINIMIZING EXPOSURE FOR NON-COMPLIANCE**

The Davis-Bacon Act being a multifaceted and many times confusing piece of legislation requires close attention from contractors so they do not run afoul of its regulatory requirements. At the outer edges of issues that may arise such as an audit situation that is not going well, or complex coverage issues, or disputes about Department of Labor wage determinations the best bet is to contact experienced labor counsel. To generally minimize exposure, however, contractors can take several practical and important steps. Such steps should include:

- (1) Identifying company contracts to which the Act's requirements apply.

- (2) Identifying company employees to which the Act's requirements apply.
- (3) Reviewing the wage determination for any covered contract and correctly classifying all covered employees by the actual type of work that they perform on the project.
- (4) Identifying special classes of employees that may not be subject to Davis-Bacon requirements such as bona fide apprentices, trainees, material men, some delivery truck drivers etc.
- (5) If you have apprentices and trainees that you are not going to pay Davis-Bacon wages, confirm that they are part of a recognized and bona fide apprentice or trainee program.
- (6) Identifying any employees that may have split classifications or duties on a given project, keeping accurate records on hours worked for such employees in each classification.
- (7) Identifying project situations involving employees that implicate the Act's "site of work" provisions and determine coverage issues.
- (8) Confirming that employees are being paid the applicable overtime requirement, time and one-half for hours worked in excess of forty in a workweek on the site of work.
- (9) Determining if fringe benefits may be counted toward the "prevailing wage." Generally, health insurance, retirement, life insurance, vacation and some contributions to training funds may be counted. If the value of any fringe benefits provided is less than the fringe benefit rate on the wage determination, the difference must be made up in an additional payment to the employee.
- (10) Reviewing deductions made from employees paychecks. Deductions, other than those required by law, must be authorized in writing by the employee.
- (11) Maintaining and submitting required weekly payroll reports and internal records, fringe benefits records and other required records. If wage and hour form WH-347 is not being used, make sure that the format of the records being used and submitted contains all the required information.
- (12) Proactively preparing for an audit situation by training supervisors about the importance of audits and the process and appropriate steps for handling an audit.

## **HOW TO ENSURE YOUR SUBCONTRACTORS ARE IN COMPLIANCE**

General contractors should make sure that all of their subcontracts contain a requirement that subcontractors obey Davis-Bacon labor standards. Furthermore, all subcontracts should contain a provision stating that the general contractor reserves the right to inspect the subcontractors wage and hour records, and that the data can and will be verified by talking to the subcontractors employees; then do so. It is important to remember that general contractors are responsible for their subcontractors meeting the Davis-Bacon requirements.