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IN FOCUS

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The Davis-Bacon Act: 2022 Proposed Rule

Introduction

Beginning in the 1930s, Congress has enacted multiple statutes that establish minimum labor standards for various classes of workers. Some of these standards (e.g., the Fair Labor Standards Act and the National Labor Relations Act) apply broadly to most employers, while others apply more narrowly to private employers that enter into contracts with the federal government. This In Focus examines the federal law that prescribes labor standards for federal construction contracts—the Davis-Bacon Act (DBA)—and a recently proposed rule that would substantively amend DBA regulations for the first time since 1982.

The Davis-Bacon and Related Acts

The Davis-Bacon Act (DBA), 40 U.S.C. §§3141-3148, requires government contractors to pay locally prevailing wages to laborers and mechanics employed on certain federally funded construction projects. Enacted in 1931, the DBA reflects Congress's interest in giving the government "the power to require its contractors to pay their employees the prevailing wage scales in the vicinity of the building projects." (S. Rep. No. 71-1445, at 1-2 [1931]). Under the DBA, the Secretary of Labor 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 (40 U.S.C. §3142(b)). 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 (40 U.S.C. §3141(2)(A)-(B)).

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 United States or the District of Columbia 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 United States or the District of Columbia within the geographical limits of the United States or the District of Columbia (40 U.S.C. §3142(a)). Contractors are generally required to pay locally prevailing wages to laborers and mechanics when a construction project satisfies these three conditions. The government may terminate a contract if it discovers that a contractor has not paid the required prevailing wages (40 U.S.C. §3143). Following termination, the government may contract to complete the work and hold the original contractor liable for any excess costs incurred.

The Comptroller General of the United States must distribute to all federal agencies a list of individuals or firms that have failed to pay laborers and mechanics a prevailing wage under the DBA (40 U.S.C. §3144(b)(1)). The federal government may not award a contract to the persons or firms appearing on the list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years after the list's publication date (40 U.S.C. §3144(b)(2)).

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 laws, described as Davis-Bacon related acts (DBRA) because of their prevailing wage requirements, involve construction in areas such as transportation, housing, air and water pollution reduction, and health. The related acts' 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.

Proposed Changes to DBA Regulations

The U.S. Department of Labor's Wage and Hour Division (WHD), which administers the DBA, published a Notice of Proposed Rulemaking (NPRM) in March 2022 ("Updating the Davis-Bacon and Related Acts Regulations," 87 *Federal Register* 15698, March 18, 2022) to provide the "first comprehensive regulatory review" of DBA and DBRA regulations since 1982. The comment period for the NPRM closed on May 17, 2022.

Prevailing Wage Methodology

The DBA defines the minimum wages to be paid to laborers and mechanics as those that the Secretary of Labor determines to be prevailing for corresponding workers in the civil subdivision of the state in which the covered construction work is to occur. WHD surveys construction contractors and, since 1935, has used a selection among the following three methods to determine prevailing wage rates:

- the 50% rule—wage rate paid to the majority of workers;
- the 30% rule—wage rate paid to at least 30% of workers; and
- the weighted average rate.

The NPRM would amend the procedure that has been in use since a 1982 rulemaking changed the process that had been in effect since the enactment of the DBA in 1935.

As shown in **Table 1**, WHD used a three-step process for determining prevailing wages from 1935 until 1982. If a majority wage rate existed, that rate became the prevailing wage. If not, the wage rate paid to at least 30% of workers prevailed. If no single rate exceeded the 30% of workers threshold, the weighted average rate prevailed. The 1982 rulemaking eliminated the 30% rule, thus creating a two-step process for determining the prevailing rate: the wage

rate paid to the majority of workers; if none, then the weighted average rate.

The proposed rule would return the prevailing wage determination to the three-step process in use 1935 through 1982. In justifying a return to the three-step process, WHD explains that the original fallback method—weighted averages—has become the dominant wage determination method. WHD argues 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 (87 *Federal Register* 15700).

Table 1. DBA Prevailing Wage Methodology

Period	First Step	Second Step	Third Step
1935–1982	50% rule	30% rule	Average
1983–present	50% rule	Average	n/a
NPRM	50% rule	30% rule	Average

Source: CRS review of U.S. Department of Labor, Wage and Hour Division, "Updating the Davis-Bacon and Related Acts Regulations," 87 *Federal Register* 15698, March 18, 2022.

Notes: Under the DBA, *average* wages are calculated as the weighted average of wage rates for each employee in each occupational classification.

Use of State and Local Data

Under current regulations, WHD may "consider" wage rates calculated for public construction projects by states or localities as part of the determination process. The proposed rule would clarify that WHD may adopt state or local prevailing rates, even if the state or local definition of *prevailing* differs from the WHD definition. To adopt these rates, WHD would have to determine that the prevailing wage rate methodology used by states or localities meets certain criteria, including a survey process that encompasses all relevant stakeholders, an occupational classification system recognized within the construction industry, and a wage methodology "substantially similar" to that used by WHD. By adopting this proposed change, WHD argues the timeliness and currency of prevailing wage rates would improve.

Geographic Scope

The DBA specifies that the geographic area for which prevailing wages should be determined is the "civil subdivision of the State in which the work is to be performed" (40 U.S.C. §3142(b)). In practice, WHD has used the county as the default area for wage determinations. If data at the county level are not sufficient to determine prevailing wages for corresponding classes of laborers and mechanics, WHD progressively expands the geographic scope of data collection to a group of surrounding counties, then to supergroups of counties, and finally to the state as a whole. The 1982 regulations barred the mixing of "rural" and "metropolitan" county wage data for determining prevailing wages based on the rationale that importing higher wages from metropolitan counties would disrupt rural labor markets. In some cases, this bar meant that WHD would mix wage data from a metropolitan county in one part of the state with data from another nonadjacent metropolitan county. The NPRM proposes two changes in the geographic scope for wage data:

- Removing the ban on allowing WHD to mix wage data between rural and metropolitan counties when the geographic scope is expanded beyond a single county. WHD argues that this rural-metropolitan distinction does not capture actual construction labor markets, which tend to be geographically large and are not aligned with county borders.

- Clarifying the definition of *surrounding counties* to reduce ambiguity about which counties may be part of a multi-county grouping for prevailing wage determinations.

Periodic Adjustments

As noted in the NPRM, under the current 50% rule for determining prevailing wage, majority wage rates for DBA classifications are typically rates from collective bargaining agreements (CBAs). WHD updates the CBA-determined prevailing rates based on periodic wage and benefit increases in the CBA. If, however, a prevailing wage rate is based on a weighted average or the majority rate is from non-CBA rates, there is no mechanism to adjust these rates without updated construction wage surveys. Although WHD has a goal of conducting wage surveys in each area every three years, in practice this does not happen, and many area wage determinations are more than three years old. In some cases, the determinations may be more than 10 years old. Thus, out-of-date wage surveys may lead to wage determinations that are lower than the current prevailing construction wages in a local area.

To address out-of-date, non-CBA-determined prevailing wage rates, WHD proposes in the NPRM to update this class of rates by adjusting them with the Bureau of Labor Statistics Employment Cost Index (ECI) data, which tracks data on wages and benefits. Specifically, WHD would use ECI data to update existing non-CBA rates from the date the rate was published to their present value. Going forward, non-CBA rates or weighted average rates would be adjusted in accordance with ECI data if WHD has not updated these rates within three years after publication.

Anti-retaliation

Currently, WHD can debar contractors and seek back wages for laborers and mechanics who have been retaliated against for cooperating with WHD investigations or reporting potential violations of the DBA. The NPRM proposes to broaden the scope of protected activities for workers and authorize "make-whole relief" and other remedial actions, including reinstatement, promotion, and the expungement of reprimands that are unavailable under current law.

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