

TOP 10 THINGS EMPLOYERS NEED TO KNOW ABOUT THE DAVIS BACON ACT AS INFRASTRUCTURE FAUCET GETS TURNED ON FULL BLAST

Insights
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When President Biden signed the Infrastructure Investment and Jobs Act into law this past November, he not only committed a historic amount of funding for the nation's infrastructure, he kickstarted a process that will require many employers to comply with the complex prevailing wage, fringe benefits, and recordkeeping requirements of the Davis Bacon Act.

In the years 2022 to 2026, the federal government will spend \$944 billion on infrastructure projects and create over 800,000 new jobs – many of which will be for construction projects. If your business aims to have its hand in projects affecting highways, bridges, railways, airports, drinking water treatment, and the electrical grid, it is important to be mindful of the Davis Bacon Act's requirements, as mistakes can be costly.

As businesses line up to get contracts funded by the Infrastructure Investment and Jobs Act, here are the Top 10 things employers need to know about the Davis Bacon Act.

1. Only Certain Employers are Covered

The Davis Bacon Act applies to contracts in excess of \$2,000 issued by the federal government or the District of Columbia for the construction, alteration, or repair of public buildings or public works. The Act's requirements apply to any "laborers or mechanics" performing work on a covered project. The term "laborers and mechanics" is interpreted broadly to cover workers performing manual

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or physical laborer, including skilled trade workers and their apprentices.

Additionally, other federal statutes that provide federal assistance in the form of contributions, grants, loans, insurance, or guarantees for the construction of projects such as hospitals, public housing, water treatment facilities, and airports – known as “Davis Bacon Related Acts” – are also covered by the Davis Bacon Act’s requirements. Therefore, even if an employer is performing construction, alteration, or repair work on a contract that was not issued by a federal agency or the District of Columbia, it may still need to comply with the Davis Bacon Act.

2. The Act Requires Payment of Prevailing Wages and Fringe Benefits

The Davis Bacon Act requires the Secretary of Labor to determine the applicable prevailing wage and fringe benefits for each category or worker in each locality. Employers are required to pay, at a minimum, the hourly wage and fringe benefits that the Secretary determines are prevailing. All prime contracts and subcontracts should include a wage determination setting forth the prevailing wage rate and fringe benefits for each category of worker that might perform work on the contract or subcontract. If an employer will be employing a worker on the project that does match any of the categories contained in the wage determination, the employer should immediately seek a conformance of the wage determination.

3. Proper Classification in Wage Determination Job Category is Critical

A common pitfall for employers is the proper classification (and reclassification, where necessary) of employees in the correct wage determination category. Proper classification depends on the work that a worker performs, rather than the worker’s job title, training, written job description, or past experience. The determination of which work falls into which wage determination category is determined by local practice.

For example, if an employer has contracts across multiple states, or even in multiple counties within the same state, job categories could differ across projects for the same



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work. In addition, if a worker performs work in more than one job category, it is the employer's duty to maintain accurate records of the days and times that the worker performed work in each category, and to pay the corresponding wage and fringe benefits for each category of work. If the employer does not keep accurate records tracking the employee's time in each category, the employer may be made to pay the worker for the category with the highest wage rate and fringe benefits for all hours worked.

4. There are Strict Recordkeeping Requirements

The Davis Bacon Act requires all covered contractors and subcontractors to submit to the contracting agency certified payrolls that meet specific requirements along with a signed Statement of Compliance on a weekly basis. All contractors and subcontractors are also required to maintain records containing specific biographical information for each worker, each worker's wage determination classification(s), and rates of pay. These records must be preserved for a period of three years following the last date that workers performed work on the project. The Department of Labor or the contracting agency has the right to inspect these records upon request.

5. Overtime Pay Can be Complicated

Under the Davis Bacon Act, fringe benefits must be paid for both straight time and overtime hours worked. The Davis Bacon Act does not require the payment of a premium for overtime hours worked. However, in most situations, contractors are required to pay overtime for hours over 40 due to the application of the Fair Labor Standards Act or the Contract Work Hours and Safety Standards Act. In calculating half-time pay for overtime hours worked, however, fringe benefits are generally excluded from the employee's regular rate of pay.

6. Violations Can Lead to Debarment from Receiving Federal Contracts

Where an employer fails to pay any of its employees the required wages and fringe benefits, the ramifications can be much more significant than the payment of the unpaid wages and fringe benefits. An employer can also be debarred from receiving federal contracts for a period of

three years if the Department of Labor proves that the employer disregarded its Davis Bacon Act obligations to employees. Similarly, if the contract or subcontract at issue is funded by a Davis Bacon-Related Act statute, the employer faces debarment for a period up to three years if the Department of Labor proves that the employer committed an aggravated or willful violation of the Davis Bacon Act.

In addition, if a person is an owner or officer of the employer and had responsibility for, or knowledge of, the company's Davis Bacon Act violations, they can personally be debarred from receiving federal contracts.

7. Prime Contractors Can Be Liable for Subcontractor Violations

The prime contractor is responsible for ensuring that all workers on the project are paid the appropriate wages and fringe benefits. As part of this responsibility, the prime contractor must ensure that each subcontract contains the required "flow down" contract clauses and the correct wage determinations. If any subcontractors fail to properly pay its employees the required hourly wages and/or fringe benefits, the prime contractor may be held jointly and severally liable with the subcontractor for the unpaid wages and/or fringe benefits.

8. The Government Can Withhold Payment for Violations

Another significant difference from a typical wage and hour dispute is the government's ability to preemptively withhold payment from the contractor, before liability is found. For instance, if the contracting agency or the Department of Labor comes to believe that an employer did not pay the proper wages or fringes benefits, they can withhold contract payments for the amount in dispute. While an employer can contest the government's claim of unpaid wages or fringe benefits, the government will likely continue to hold the funds at issue until the matter is fully resolved.

9. Liquidated Damages Can Significantly Increase an Employer's Exposure

In addition to ordering the payment of unpaid wages and fringe benefits, the government may be able to assess liquidated damages under the Contract Work Hours and

Safety Standards Act for unpaid overtime wages if the prime contract for the project is worth more than \$100,000. Currently, liquidated damages can be assessed at a rate up to \$29 per day for each affected employee.

10. Employers Can Use Fringe Benefit Dollars to Purchase Benefits

Employers can choose to pay fringe benefits due to their employees in cash, or can use the fringe benefit dollars to purchase benefits for its employees. Permissible benefits include medical insurance, pensions, life insurance, disability insurance, accident insurance, and vacation or holiday pay.

Employers cannot, however, take a credit against their fringe benefits obligations for any benefit that it is required to be provided to employees under Federal, State, or local law (such as social security, workers compensation insurance, or unemployment compensation insurance). An important distinction, however, is that an employer who is an "Applicable Large Employer" offering health coverage to its full-time employees under the Affordable Care Act can take credit for the employer's contributions to the health plan against its Davis Bacon Act fringe benefits obligations.

An employer's establishment of a benefit plan can give rise to compliance requirements under the Employee Retirement Income Security Act of 1974 (ERISA). If an employer contributes fringe benefit dollars to an ERISA-covered plan, the employer may owe fiduciary duties to the plan and its participants. As a result, an employer that contributes fringe dollars to an ERISA-covered plan can also be audited by the Department of Labor's Employee Benefits Security Administration (EBSA), which has enforcement authority under ERISA.

What Should Employers Do?

Clearly, the liabilities that can arise from running afoul of the Davis Bacon Act requirements are significant. Not only can you incur significant financial liability, but you can also lose your federal contract revenue stream for up to three years. The Department of Labor's Wage and Hour Division recently announced its intention to hire an additional 100 investigators, who no doubt will be ready to pounce on

employers' mistakes. With the Infrastructure Bill and prevailing wages being priorities for the Biden Administration, you should expect robust Davis Bacon Act enforcement. It is therefore in the best interests of any employer looking to win Davis Bacon Act-covered contracts or subcontracts to start thinking now about compliance.

- You should review any contract that you plan to bid on to determine if it is covered by the Davis Bacon Act. You should make sure you have the correct wage determination for the project and account in your bid for the required wages and fringe benefits. Classifying each worker into the correct wage determination category is critical at this stage.
- You should also have a program set up in advance to monitor whether employees are performing work in their designated job categories. You need to be proactive about enforcing job assignments and restricting employees to their assigned category of work. If you anticipate workers will perform work in multiple job categories, it is critical to have a program set up in advance to record all hours worked in each category.
- If you delegate any part of your contract to subcontractors, you must ensure that the subcontractors are aware of their obligations, and that the subcontract contains the required Davis Bacon Act clauses and the correct wage determinations.
- If you establish a benefit plan to satisfy your fringe benefits obligation, you will want to ensure that you are complying with ERISA. If it is an ERISA-covered plan, you need to make sure that you understand whether you have any fiduciary duties to the plan and its participants, and establish a program to ensure that you carry out those duties.
- You should prepare in advance for a Department of Labor Wage and Hour Division audit. It is best to have an audit response team with defined roles established in advance. You should have a plan for who will be present at the opening conference, who will be present for any on-site visits by the Department of Labor, and who will oversee responses to the Department of Labor's document requests. You should also be proactive and perform your own periodic internal audits to ensure you are complying with the requirements of the Davis Bacon

Act. When doing such audits, it is a best practice to have legal counsel (either in-house or external) direct the audit.

- You may also be subject to the full equal employment opportunity and affirmative action compliance requirements imposed by Executive Order 11246, the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and their implementing regulations. These requirements are enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

Conclusion

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