

DOL'S PROPOSED REVISIONS OF DAVIS BACON ACT RULES WILL HAVE SIGNIFICANT IMPACT ON FEDERAL CONSTRUCTION CONTRACTORS

Insights
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Federal wage and hour officials recently issued proposed rules that will make it easier for unions to have their hourly rates of pay established as the prevailing wage rates and will increase the Department of Labor's enforcement authority to punish and debar contractors, particularly for claims of retaliation – proposals that are being billed by the Department of Labor as "the most comprehensive review of Davis-Bacon Act regulations in 40 years." The DOL Wage and Hour Division's March 11 [Notice of Proposed Rulemaking](#) will apply to contracts and subcontracts who perform construction, alteration, or repair work that is covered by the Davis Bacon Act or any of the dozens of Davis Bacon-Related Acts. The timing of the proposed rules is not coincidental, as the federal government is turning the faucet of Davis Bacon Act spending on [full blast](#) under the trillion dollar Infrastructure Bill. What do contractors need to know about this monumental development?

5 Most Significant Revisions

The five most significant revisions included in the Department of Labor's proposals:

- Look for a return to the pre-1983 "**30% rule**" for setting **prevailing wage rates**. Currently, if a majority (i.e., more than 50%) of wage survey respondents report the same rate, the Department of Labor uses that rate as the prevailing wage. Under the newly proposed rule, the Department of Labor would be able to utilize a "predominant" rate if at least 30% of survey respondents reported using that rate.

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- The DOL will use several mechanisms to provide **more frequent updates to prevailing wages**. This, in turn, will reduce the need for conformances by adopting state or local wage determinations, updating non-collectively bargained prevailing wages in between surveys, and issuing supplemental rates for job classifications where there is no survey data. The Department of Labor asserts that these mechanisms will ensure that “prevailing wage rates keep up with actual wages, which over time would mean higher wages for workers.”
- We’ll see Davis Bacon Act contract clauses and wage determinations **effective by operation of law** – which will mean that contractors and subcontractors will be bound by contract clauses and wage determination requirements, even if those clauses or determinations were mistakenly left out of the contract.
- The revisions will add **anti-retaliation provisions** that will allow the Department of Labor to direct contractors and subcontractors to provide relief to employees who are retaliated against through job reinstatement, promotion, back pay with interest, and expungement of negative information from the employee’s personnel record. This is in addition to the Department of Labor’s existing ability to bring a debarment action against a contractor for a claim of retaliation.
- Moreover, the revisions will add to **contractor’s recordkeeping duties** by requiring contractors to maintain all contracts and subcontracts, as well as all bids, proposals, amendments, modifications, and extensions for those contracts and subcontracts. Notably, failure to comply with the proposed rule could result in the withholding of contract funds or debarment.

What’s Next?

The next step in the regulatory process is for affected stakeholders to submit comments on the proposed rules, which the Department of Labor must consider and address in its enactment of a final rule. Any contractors, trade associations, or other interested parties who wish to submit comments on the proposed rule changes to the Department of Labor must do so on or before May 17, 2022.

What Should You Do?

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Any stakeholders who want to be heard in the rulemaking process should prepare and submit written comments for the Department of Labor's consideration before adopting a final rule. Comments can present data, rules, or arguments in support of, or in opposition to, the proposed rule or any part of the proposed rule. By law, the agency is required to consider and respond to all relevant and significant comments in its final rulemaking.

It is also important to note that the Department of Labor's comprehensive proposed rulemaking, on the heels of the historic federal spending contained in the recent Infrastructure Investment and Jobs Act, signals its renewed focus on enforcing prevailing wage laws on federally-funded contracts. Contractors should be reviewing their payroll and recordkeeping programs to ensure that they are complying with all prevailing wage laws.

Conclusion

Fisher Phillips will continue to monitor these proposed rules and the potential enactment of a final rule. Please ensure you are subscribed to [Fisher Phillips' Insight system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Wage and Hour Practice Group](#).