4 Key Points for Construction Contractors as DOL Hikes Wages and Enhances Enforcement

Insights
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The Department of Labor released new Davis-Bacon Act regulations on August 8 that significantly alter the methodology for setting prevailing wage rates for contractors and subcontractors working on federally funded construction projects. The new rules also significantly enhance the DOL's enforcement capabilities under the act, giving the Department more tools to punish employers it believes violated the statute or its related regulations. What are the four key points construction contractors and subcontractors need to know about these significant revisions?

1. DOL Has More Latitude in Setting Prevailing Wages

- The Labor Department is returning to its old **"30% rule" for setting prevailing wage rates**. Currently, if a majority — more than 50% — of wage survey respondents report the same rate, the Department uses that rate as the prevailing wage. Once the new rule goes into effect, the DOL will use a "predominant" wage rate if at least 30% of survey respondents reported using that rate.
- The Department will now be permitted to use wage data from metropolitan areas to supplement the wage data used to set prevailing wages in surrounding rural areas.
- The Department can now adopt state or local prevailing wages in place of issuing its own rates.
- For wage determinations that have not been updated in three years or more, the Department can increase the wage rates using the U.S Bureau of Labor Statistics Employment Cost Index (ECI).

2. Broader Scope of Covered Projects

- The new rules specifically state that the installation of solar panels, broadband, wind turbines, and electric car charging stations are covered "building" or "work" under the Davis-Bacon Act.
- The rules expand the "site" of covered Davis-Bacon work to include off-site locations dedicated to a single Davis-Bacon project for a period of time where a portion or module of the construction project is built.
- The rules dial back the longstanding *de minimis* exception for truck drivers who deliver materials to the site. The Department will now consider all small amounts of time on site during a day or workweek in aggregate in determining whether the truck drivers' contacts with the worksite are *de minimis*.

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3. Increased Contractor Compliance Obligations

- The rules enhance contractors' recordkeeping obligations. In addition to the traditional certified payrolls, contractors must now maintain the contract and related documents, and employee telephone numbers and email addresses for a period of three years following completion of the work on the prime contract.
- The rules clarify that both prime contractors and upper-tier subcontractors can be held liable for the violations of their lower-tier subcontractors. They also state that prime contractors can be held liable for subcontractor violations **without regard to the prime contractor's intent.**
- The contracting agency is no longer required to include the full Davis-Bacon contract clauses in the contract. Instead, the agency can incorporate these requirements into the contract by reference.
- The rules now state that wage determinations are effective by operation of law, even if they had not been attached to the contract.

4. Enhanced Enforcement Mechanisms

- The rules add anti-retaliation penalties. The Department can now seek what it refers to as "make whole" relief such as job reinstatement, back pay and benefits, interest on back pay, and other compensatory or equitable relief when it alleges retaliation for employees engaging in protected activity.
- The rules specifically incorporate the assessment of interest — at the IRS rate and compounded daily — for back pay owed as a result of any violations.
- Previously, the debarment standard differed in many key respects for violations of the Davis-Bacon Act versus violations of the Davis-Bacon Related Acts. The new rules are doing away with the more lenient "aggravated or willful standard" for debarment under the Related Acts. Instead, the Department will now apply the more punitive "disregard of obligations" standard for all violations.
- The rules increase the debarment period for Related Acts violations to a mandatory three years and eliminate the ability for contractors to petition for early removal from the debarment list.
- When the DOL alleges that a contractor owes employees money, the rules will now permit the Department to direct other agencies — not just the agency that issued the contract — to withhold funds from the contractor. The rules also permit the Department to order withholding from other legal entities that are "related" to the contractor under investigation.

Conclusion

The new rules were issued on August 8 and will take effect 60 days after they are published in the Federal Register. In light of the significantly enhanced enforcement mechanisms, contractors and subcontractors should immediately review your policies and procedures to ensure they are in compliance with the act and its regulations.

If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Construction Industry Team or Wage and Hour Practice Group. Please ensure you are subscribed to Fisher Phillips' Insight System to gather the most up-to-date information.

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