U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

(April 2009)

Fact Sheet #66: The Davis-Bacon and Related Acts (DBRA)

This fact sheet provides general information concerning DBRA.

Coverage

DBRA requires payment of prevailing wages on federally funded or assisted construction projects. The Davis-Bacon Act applies to each federal government or District of Columbia contract in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works. Many federal laws that authorize federal assistance for construction through grants, loans, loan guarantees, and insurance are Davis-Bacon "related Acts." The "related Acts" include provisions that require Davis-Bacon labor standards apply to most federally assisted construction. Examples of "related Acts" include the Federal-Aid Highway Acts, the Housing and Community Development Act of 1974, and the Federal Water Pollution Control Act.

Basic Provisions/Requirements

Contractors and subcontractors must pay laborers and mechanics employed directly upon the site of the work at least the locally prevailing wages (including fringe benefits), listed in the Davis-Bacon wage determination in the contract, for the work performed. Davis-Bacon labor standards clauses must be included in covered contracts.

The Davis-Bacon "prevailing wage" is the combination of the basic hourly rate and any fringe benefits listed in a Davis-Bacon wage determination. The contractor's obligation to pay at least the prevailing wage listed in the contract wage determination can be met by paying each laborer and mechanic the applicable prevailing wage entirely as cash wages or by a combination of cash wages and employer-provided bona fide fringe benefits. Prevailing wages, including fringe benefits, must be paid on all hours worked on the site of the work.

Apprentices or trainees may be employed at less than the rates listed in the contract wage determination only when they are in an apprenticeship program registered with the Department of Labor or with a state apprenticeship agency recognized by the Department.

Contractors and subcontractors are required to pay covered workers weekly and submit weekly certified payroll records to the contracting agency. They are also required to post the applicable Davis-Bacon wage determination with the Davis-Bacon poster (WH-1321) on the job site in a prominent and accessible place where they can be easily seen by the workers.

Davis-Bacon Wage Determinations

Davis-Bacon wage determinations are published on the Wage Determinations On Line (WDOL) website for contracting agencies to incorporate them into covered contracts. The "prevailing wages" are determined based on wages paid to various classes of laborers and mechanics employed on specific types of construction projects in an area. Guidance on determining the type of construction is provided in All Agency Memoranda Nos. 130 and 131.

Penalties/Sanctions and Appeals

Contract payments may be withheld in sufficient amounts to satisfy liabilities for underpayment of wages and for liquidated damages for overtime violations under the Contract Work Hours and Safety Standards Act (CWHSSA). In addition, violations of the Davis-Bacon contract clauses may be grounds for contract termination, contractor liability for any resulting costs to the government and debarment from future contracts for a period up to three years.

Contractors and subcontractors may challenge determinations of violations and debarment before an Administrative Law Judge (ALJ). Interested parties may appeal ALJ decisions to the Department's Administrative Review Board. Final Board determinations on violations and debarment may be appealed to and are enforceable through the federal courts.

Typical Problems

(1) Misclassification of laborers and mechanics. (2) Failure to pay full prevailing wage, including fringe benefits, for all hours worked (including overtime hours). (3) Inadequate recordkeeping, such as not counting all hours worked or not recording hours worked by an individual in two or more classifications during a day. (4) Failure of to maintain a copy of bona fide apprenticeship program and individual registration documents for apprentices. (5) Failure to submit certified payrolls weekly. (6) Failure to post the Davis-Bacon poster and applicable wage determination.

Relation to State, Local, and Other Federal Laws

The Copeland "Anti-Kickback" Act prohibits contractors from in any way inducing an employee to give up any part of the compensation to which he or she is entitled under his or her contract of employment, and requires contractors to submit a weekly statement of the wages paid to each employee performing DBRA covered work.

Contractors on projects subject to DBRA labor standards may also be subject to additional prevailing wage and overtime pay requirements under State (and local) laws. Also, overtime work pay requirements under CWHSSA) and the Fair Labor Standards Act may apply.

Under Reorganization Plan No. 14 of 1950, (5 U.S.C.A. Appendix), the federal contracting or assistance-administering agencies have day-to-day responsibility for administration and enforcement of the Davis-Bacon labor standards provisions and, in order to promote consistent and effective enforcement, the Department of Labor has regulatory and oversight authority, including the authority to investigate compliance.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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DBA/DBRA

COMPLIANCE

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DBA/DBRA

Coverage and Compliance Principles

This section helps to provide the framework for answering questions such as the following:

- ➢ To whom do the Davis-Bacon prevailing wage requirements apply?
- ➢ Was each laborer and mechanic paid proper predetermined prevailing wage and fringe benefits for the classification of work performed?
- ➢ Did employees receive one and one-half their basic rates of pay for hours worked on the contract over 40 per week?
- ➢ Were laborers and mechanics employed on the site of the work correctly classified?
- ➢ Did the contractors use a disproportionate number of laborers and/or apprentices or trainees?
- ➢ Did the firm make contributions to bona fide fringe benefit plans that were creditable toward meeting the prevailing rate requirements?

LABORERS AND MECHANICS

Definition (29 CFR 5.2(m))

➢ The term **"laborer and mechanic"** includes 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 duties.

The term includes:

➢➢ Apprentices

➢➢ Trainees

➢➢ Helpers

For overtime coverage under CWHSSA, also:

➢➢ Watchmen and guards

Note: Although guards and watchmen are not considered laborers or mechanics under DBA/DBRA, they are so considered under CWHSSA by virtue of its express statutory language.

➢ The term laborer or mechanic does not include workers whose duties are primarily administrative, executive, or clerical, rather than manual.

➢ Categories of workers considered not to be laborers or mechanics when, in the course of their duties, they perform no manual or physical work on the construction project are:

➢➢ Architects and engineers

➢➢ Timekeepers

➢➢ Inspectors

Coverage of laborers and mechanics

➢ The DBA requires the payment of the applicable prevailing wage rates to all laborers and mechanics "regardless of any contractual relationship which may be alleged to exist."

- Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR 541 are not deemed to be laborers or mechanics.

- Non-exempt working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the exemption criteria of 29 CFR 541, are laborers and mechanics for the time so spent. The working foreman is due the rate listed in the contract wage determination for the hours spent as a laborer or mechanic.

- Owners of subcontractor firms who are themselves performing the work of laborers and mechanics are entitled to the applicable prevailing wage rate for the classification of work performed. If the subcontract price covers the applicable prevailing wage rate for the number of hours worked as a laborer or mechanic on the DBA/DBRA job, the Department of Labor (DOL) considers the owner/subcontractor to have been paid in compliance. The agency to which the certified payrolls are to be forwarded on any given project may provide more specific guidance concerning the proper reporting by owners of subcontractor firms on the certified payrolls.

SITE OF THE WORK

Definition (29 CFR 5.2(l))

➢ **5.2(l)(1)** – "Site of the work" is the physical place or places where the building or work called for in the contract will remain, and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.

For example:

➢➢ If a small office building is being erected, the "site of work" will normally include no more than the building itself and its grounds.

➢➢ In the case of larger contracts, such as for airports, highways, or dams, the "site of work" is necessarily more extensive and may include the whole area in which the construction activity will take place.

➢➢ Where a very large segment of the dam is constructed up-river and floated downstream to be affixed onto a support structure, the secondary construction site would be within the meaning of "site of the work" for Davis-Bacon purposes if it was established for and dedicated to the dam construction project.

➢ **5.2(l)(2)** - Except as provided in paragraph 5.2(l)(3), batch plants, borrow pits, job headquarters, tool yards, etc., are part of the "site", provided they are dedicated exclusively, or nearly so, to the contract or project, and are adjacent or virtually adjacent to the site of the work as defined in paragraph 5.2(l)(1).

➢ **5.2(l)(3)** - Not included in the "site of work" are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular federal or federally assisted project.

Also excluded from the "site of work" are fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph 5.2(l)(1), even where such operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

Labor standards applicability regarding of "site of work"

- DBA applies only to those laborers and mechanics employed by a contractor or subcontractor on the **"site of the work"**.

- In 2000, DOL revised the two related definitions in the regulations that set forth rules for the administration and enforcement of the Davis-Bacon prevailing wage requirements. Revisions in the regulatory definitions of "site of the work" and "construction, prosecution, completion, or repair" were made to clarify the regulatory requirements in view of three U.S. appellate court decisions, which had concluded that DOL's application of these related regulatory definitions was at odds with the language of the Davis-Bacon Act that limits coverage to workers employed "directly upon the site of the work," and to address situations that were not contemplated when the regulations then in effect had been promulgated.

  For a full discussion of the revisions made to the regulatory definition of the "site of the work" in 2000, see the final rule published in the *Federal Register* on December 20, 2000, 65 FR 80268-80278. (See *Building and Construction Trades Department, AFL-CIO* v. *United States Department of Labor Wage Appeals Board*, 932 F.2d 985(D.C. Cir 1991) (*Midway*), *Ball, Ball and Brosamer* v. *Reich* (D.C. Cir. 1994), and *Cavett Company* v. *U.S. Department of Labor* 101 F.3d 1111 (6th Cir. 1996). The revised regulations took effect on January 19, 2001.

- Contracting agencies should consult the Wage and Hour Division (Wage and Hour) when confronted with "site of work" issues.

- CWHSSA has no site of work limitation. An employee performing part of the contract work under a construction contract at the job site who then continues contract work at a shop or other facility located elsewhere is subject to CWHSSA overtime pay for all the hours worked at both locations and travel time between them. (Different wage rates might be paid, as the Davis-Bacon prevailing wage requirements would apply only to activities performed on "the site of the work".)

TRUCK DRIVERS

Definition (29 CFR 5.2(j))

- The terms **"construction, prosecution, completion, or repair"** mean all types of work done on a particular building or work at the site thereof (including work at a facility deemed part of the "site of the work") by laborers and mechanics of a construction contractor or construction subcontractor including without limitation:
  - Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site.
  - Painting and decorating.
  - The manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work.
  - Transportation between the "site of the work" (within the meaning of 29 CFR 5.2(l)) and a facility which is dedicated to the construction of the building or work and deemed a part of the "site of the work" (within the meaning of 29 CFR 5.2(l)).

Coverage of truck drivers

- Truck drivers **are covered** by Davis-Bacon in the following circumstances:
  - Drivers of a contractor or subcontractor for time spent working on the site of the work.
  - Drivers of a contractor or subcontractor for time spent loading and/or unloading materials and supplies on the site of the work, if such time is not *de minimis*.
  - Truck drivers transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site.
  - Truck drivers transporting portion(s) of the building or work between a site established specifically for the performance of the contract or project where a significant portion of such building or work is constructed and the physical place(s) where the building or work called for in the contract(s) will remain.

- Truck drivers are **not covered** in the following instances:
  - Material delivery truck drivers while off "the site of the work".
  - Drivers of a contractor or subcontractor traveling between a Davis-Bacon job and a commercial supply facility while they are off the "site of the work."
  - Truck drivers whose time spent on the site of the work is *de minimis*, such as only a few minutes at a time merely to pick up or drop off materials or supplies.
- DOL has an **enforcement position** with respect to bona fide owner-operators of trucks who own and drive their own trucks. Certified payrolls including the names of such owner-operators do not need to show the hours worked or rates paid, only the notation "owner-operator". This position does not apply to owner-operators of other equipment such as bulldozers, backhoes, cranes, welding machines, etc.

Recent rulemaking regarding material delivery truck drivers

- Three U.S. appellate court decisions in the 1990's led DOL to reexamine and revise the regulatory definition of "construction, prosecution, completion, or repair" as it applies to transportation. In view of three appellate court decisions that had concluded that DOL's application of the related regulatory definitions was at odds with the language of the Davis-Bacon Act that limits coverage to workers employed "directly upon the site of the work," revisions to the regulatory definitions were issued in 2000 to clarify the regulatory requirements.
- The rulemaking in 2000 addressed the application of Davis-Bacon prevailing wage requirements to material delivery truck drivers.
  - The regulatory definition of "construction, … " has been changed to provide that the off-site transportation of materials supplies, tools, etc., is not covered unless such transportation occurs between the construction work site and a dedicated facility located "adjacent or virtually adjacent" to the work site.
  - Also, as indicated in the rulemaking, as a practical matter, since generally the great bulk of the time spent by material delivery truck drivers is off-site beyond the scope of Davis-Bacon coverage, while the time spent on-site is relatively brief, DOL chooses to use a rule of reason and will not apply the Act's prevailing wage requirements with respect to the amount of time spent on-site, unless it is more than "de minimis." Under this policy, the Department does not

assert coverage for material delivery truck drivers who come onto the site of the work for only a few minutes at a time merely to drop off construction materials.

➢➢ For a full discussion of the regulatory changes, see the final rule published in the *Federal Register* on December 20, 2000, 65 FR 80268-80278. A section focused on "Coverage of Transportation – § 5.2(j)" appears on pages 80275-6.)

APPRENTICES AND TRAINEES

Definition (29 CFR 5.2(n))

- **Apprentices** are those persons employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training (BAT), or with a state apprenticeship agency recognized by BAT, or persons in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the BAT or a state apprenticeship agency (where appropriate) to be eligible for probationary employment as an apprentice.

- **Trainees** are persons registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that administration.

- The Department of Housing and Urban Development has a type of apprenticeship program in housing authorities in large urban areas. The goal is to provide public housing tenants and others who have not had the opportunity to enter apprenticeship programs through the traditional track the advantages of job skills training. The program is called **Step-Up**. Apprentices enrolled in step-up programs must meet the same regulatory criteria as all other apprentices to receive less than the prevailing wage rate.

Coverage of apprentices and trainees

- Apprentices and trainees are two categories of laborers and mechanics on a DBA/DBRA project that are not listed on a wage determination. These classifications are permitted to work on DBA/DBRA covered projects only under very controlled circumstances, as follows.

- Apprentices and trainees may be used on DBA/DBRA covered projects and paid less than the specified journeyman rate for the work performed if:

  1. The apprentice or trainee is **individually registered** in an **approved** apprenticeship or trainee plan.

     - The **apprenticeship program** has to be approved by the Bureau of Apprenticeship and Training (BAT) or by a state apprenticeship agency recognized by BAT.

➢➢ The **training program** must be approved by federal BAT, not a state agency.

2. The apprentices/trainees must be paid **the percentage (%) of the basic hourly rate required and/or fringe benefits specified in the approved plan** and in accordance with their level of progression.

3. The contractor is limited in the number of apprentices/trainees permitted on the DBA/DBRA job site based on the **allowable ratio** of apprentices/ trainees to journeymen specified in the approved program.

   ➢➢ The ratio is determined on a daily, not weekly basis.

   ➢➢ Wage and Hour no longer allows the use of "fraction thereof" in computing apprenticeship ratios unless specified in the approved apprenticeship program.

4. **Fringe benefits** should be paid to apprentices/trainees in accordance with the provisions of the apprenticeship/trainee program. If the program is silent on the payment of fringes, the apprentices/trainees are to receive the full amount of the fringe benefits stipulated on the wage decision unless it is determined that a different practice prevails for the applicable apprentice/trainee classification.

5. For apprentices, the contractor may observe the provisions of his/her approved program outside the area where he/she has a contract – it is portable. On the other hand, trainee programs are not **portable**.

6. When the contractor has exceeded the allowable ratio of apprentices/ trainees, the legal apprentices/trainees are those who **first came to work** at the DBA/DBRA job site. Individuals who are employed in excess of the allowable ratio must be paid the full wage determination rate for the classification of work performed.

7. The registration requirements do not apply to apprentices and trainees performing on highway construction projects funded by the **Federal-Aid Highway Act** and enrolled in programs certified by the U.S. Department of Transportation.

HELPERS

Definition (29 CRR 5.2(n)(4))

- A distinct classification of "helper" will be issued in Davis-Bacon wage determinations only where all of the following conditions are met:
  - The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;
  - The use of such helpers is an established prevailing practice in the area; and
  - The helper is not employed as a trainee in an informal training program.

  A "helper" classification will be added to wage determinations pursuant to §5.5(a)(1)(ii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

Note: Helpers may be employed on a DBA/DBRA covered construction project only if the helper classification is listed in the Davis-Bacon wage determination in the contract or the classification is added with approval by DOL. Helper classes are issued or approved only where they are within the scope of the definition stated above.

Recent rulemaking regarding "helpers" on DBA/DBRA covered work

- On November 20, 2000, DOL amended regulatory provisions concerning helpers that had been suspended since 1993, issuing revised regulations with respect to the use of helpers on DBA/DBRA covered projects. (See the *Federal Register* Notice published on November 20, 2000, 65 FR 69674-69693.)
- DOL regulations that were in effect during early 1991 and much of 1992 and 1993, had defined **"helpers"** as semi-skilled workers who worked under the direction of and assisted journeymen who, under the journeymen's supervision and direction, could perform a variety of duties including those requiring them to use the tools of the trade, and whose duties could vary according to area practice. Effective on October 21, 1993, the regulations implementing that definition of helpers were formally suspended. (See the *Federal Register* Notices published on November 5, 1993 and December 30, 1996.)
- The regulatory changes issued on November 20, 2000 amended the regulations to incorporate Wage and Hour's longstanding policy of recognizing helper

classifications and wage rates only where certain specified conditions are met. (This final rulemaking superseded the previous rulemaking regarding helpers, concluding consideration of the previously suspended regulations.)

- ➢➢ The definition of a "helper" in 29 CFR 5.2(n)(4) that had been suspended since 1993 was revised to set forth the circumstances in which helpers are recognized on Davis-Bacon wage determinations and additional classification (conformance) requests, and

- ➢➢ The Davis-Bacon contract clause that states the criteria for approval of conformance requests were revised by deleting references to helpers that had been suspended since 1993.

➢ In issuing the final rule published on November 20, 2000, the Department pointed out that:

- ➢➢ It is not intended that a helper classification never be issued on a Davis-Bacon wage determination simply because some workers in another classification occasionally perform the work in question,

- ➢➢ The Department intends to issue helper classifications where the duties in question are not routinely performed by another classification on the wage determination and it is the prevailing practice in the area for helpers/tenders to perform the work in question, provided the other criteria of the regulation are met.

- ➢➢ However, consistent with the Department's practice on approval of additional classifications under the conformance procedures at 29 CFR 5.5(a)(1)(ii)(A), the Department will not approve an additional classification of helper if the helper performs any tasks that are performed by other classifications on the wage determination.

AREA PRACTICE

To determine the proper classification for work performed on a Davis-Bacon covered project, it may be necessary to examine local **area practice**.

➢ Under the DBA, there are not standard classification definitions. (This differs from SCA classifications, which are defined in the SCA Directory of Classifications.)

Note: While the Dictionary of Occupational Titles, published by the Department's Employment and Training Administration, may be used as reference material, it cannot be relied on for making employee classification determinations.

➢ The Wage Appeals Board ruled in *Fry Brothers Corp*. (WAB Case No. 76-6, 6/14/77) that the proper classification of work performed by laborers and mechanics is that classification used by firms whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination.

➢ Questions as to the proper classification for the work performed by a laborer or mechanic are resolved by making an area practice survey.

Basic Principles/Preliminary Steps for Conducting Surveys to Determine Prevailing Local Area Practice

➢ Refer to the wage determination in the DB/DBRA covered contract.

➢ Determine what classifications may perform the work duties in question.

➢ Examine the "identifiers" for each classification to determine whether the rates in the wage determination for each such classification reflect union negotiated or non-union wages.

➢➢ Non-union rates in a Davis-Bacon wage determination are normally listed in a wage rate block that has an "SU" identifier, and appear in alphabetical order in the list of classifications in the wage determination. See the Wage Determinations tab for further information.

➢➢ Union rates are listed under identifiers that refer to the union whose rates are reflected in a given wage rate block in the Davis-Bacon wage determination. A list of identifiers used to designate various craft unions appears in the "Wage Determinations" section of this book; usually the local union number follows that designation.

- In accord with Fry Brothers Corp., information to be considered in the area practice survey is from firms whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination.
  - If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are non-union rates, the dispute will be resolved by examining the practice(s) of non-union contractors in classifying workers performing the duties in question in the area.
  - If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are union rates, the dispute will be resolved by examining the practice(s) of union contractors in classifying workers performing the duties in question in the area.
  - If a combination of union and non-union rates are listed in the wage determination for classifications that may have performed the work in the area, the dispute will be resolved based on the combined information from
    - union contractors for the classification(s) for which union rate(s) are listed

      and
    - non-union contractors for the classification(s) for which non-union rate(s) are listed.
- Proper classification of the laborers or mechanics performing the work in question will be resolved by examining the classification practice(s) of contractors who performed the work in question on
  - similar construction projects (building construction, residential construction, highway construction, heavy construction)
  - in progress in the same area (normally the same county)
  - during the year preceding the contract in question (as discussed below).

Thus, the local area practice survey examines how workers who performed the duties in question were classified when they worked on similar construction projects in the same area as the project in question during the survey timeframe.

➢ The extent of the information required for making area practice determinations will depend on the facts in each case.

For example:

➢ If, in gathering preliminary data, all of the parties agree as to the proper classification, the area practice is thus established (i.e., a **"limited"** area practice survey).

➢ However, if all parties do not agree (i.e., jurisdictional dispute between two unions, or management does not agree with the union, or where non-union rate(s) in the wage determination may apply and the practice among non-union contractors in the area varies), it will be necessary to determine by a **"full"** area practice survey which classification actually performed the work in question.

➢ The survey will collect information on how workers performing the work in question were classified on similar projects underway in the same locality (normally the county), during the year prior to contract award of the DBA/DBRA contract in question (or, in the case of contracts entered into pursuant to competitive bidding procedures -- as contrasted with negotiation procedures, the year prior to bid opening; in the case of projects assisted under the National Housing Act, beginning of construction or the date the mortgage was initially endorsed, whichever occurred first; or, in the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, beginning of construction or the date the agreement to enter a housing assistance payments contract was executed, whichever was first.)

How to conduct a limited area practice survey to determine the proper classification of work

1. Determine whether the applicable wage determination contains union negotiated or non-union rates, for each classification. (Non-union rates in a Davis-Bacon wage determination are normally listed in a wage rate block that has an "SU" identifier. See the Wage Determinations tab for further information.)

If the applicable wage determination reflects union rates for the classifications involved:

2. Contact the unions that may have jurisdiction over the work in question to determine whether the union workers performed the work on similar projects in the county in the year prior to the wage determination lock-in date (contract award date, or other date, as described above) for the project at issue.

➢ **Note the following criteria for usable data:**

a. **Similar projects** (same type of construction).

b. In the **same county** as the project in question.

c. Usable time frame is **one year prior to the wage determination lock-in date** for the contract in question, as established by 29 CFR 1.6(c).

If union contractors performed the work, each union should be asked how the individuals who performed the work in question were classified.

If no union workers performed any of the work in question in the county during the survey timeframe, Wage and Hour should be contacted for further guidance.

3. The information provided by the unions should be confirmed with collective bargaining representatives of management, *i.e.*, the contractor representatives.

➢ These would include contractors' associations such as:

Local chapters of the Associated General Contractors of America (AGC)

The National Electrical Contractors Association (NECA)

Local contractor associations that bargain with the unions

If all parties agree as to the proper classification for the work in question, the area practice is established.

If a contracting agency encounters a situation where two unions are engaged in a jurisdictional dispute over a specific type of work and both have performed the work in question during the applicable time period, the contracting officer should contact Wage and Hour for further guidance.

If the applicable wage determination reflects non-union rates for the classifications involved:

2. Contact open shop contractors (many are members of the Associated Builders and Contractors of America (ABC)) and ask whether they performed the work in question on similar projects underway in the county during the survey timeframe.

➢ If so, these contractors should be asked how the employees who performed this work were classified.

➢ If all contractors agree, or if a clear majority of the contractors agree, the area practice is established.

➢ If no open shop contractor performed the work at issue in the county during the survey timeframe, contact Wage and Hour for further guidance.

If the applicable wage determination reflects a mix of union and non-union rates for the classifications involved:

2. Contact the unions, and contact union and open shop contractors (and/or their associations) to determine who performed the work at issue on similar projects during the survey timeframe.

➢ If all parties agree, or if a clear majority of the parties agree on the classification, the area practice is established.

➢ Wage and Hour should be contacted if no work of the type at issue was performed in the county during the applicable time frame discussed above.

For any type of wage determination (whether based on union rates, non-union rates, or a mixed schedule):

➢ If the parties contacted in the limited area practice survey **do not** agree (i.e., jurisdictional dispute between the unions, management does not agree with union, or disagreement between the open shop contractors), or if there is no clear majority in agreement, then it is necessary to conduct a **full area practice survey**. When a full area practice survey is needed, the contracting agency should contact the Wage and Hour Regional Wage Specialist for assistance, guidance and coordination in the conduct of the survey.

How to conduct a full area practice survey to determine the proper classification of work

1. Identify similar projects in the same geographical area as the project under investigation (usually the county) which were in progress during the period one year prior to the wage determination lock-in date of the contract involved in the dispute/investigation.

➢ If no similar projects were built in the area during that time frame, contact Wage and Hour for advice in expanding the survey's geographic scope and/or its time frame.

2. Identify firms that performed the work in question on these projects and determine those from which data should be collected – according to whether the relevant classifications in question in the wage determination are either non-union rates, union rates, or both. (For example, only non-union wage rates in the wage determination are involved, information from union contractors is not relevant; if only union rates are involved, information from open shop contractors is not relevant.)

3. For each project, obtain data from the week in which the greatest number of employees performed the work in question, and record how many performed such work on each project and how such employees were classified and paid.

4. Compile all relevant information received and total the number of employees who performed the work in question in each classification reported.

   - **The classification which has the clear majority of employees performing the work in question is the proper classification.**

   - If the data does not show that at least 60% of the workers who performed the duties in question were classified in the same classification, contact Wage and Hour for further guidance.

FRINGE BENEFITS

Definition (29 CFR 5.2(p)):

The term **"wages"** means:

- ➢ The basic hourly rate of pay.
- ➢ Any contribution irrevocably made by a contractor or subcontractor to a trustee or third party pursuant to a bona fide fringe benefit fund, plan or program.
- ➢ The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated to the employees in writing.

The statutory language regarding fringe benefits is in section 1(b)(2)(b) of the Davis Bacon Act, and is reiterated at 29 CFR 5.23.

In practice:

The Davis-Bacon "prevailing wage" is made up of two interchangeable components – a basic hourly wage and fringe benefits. Along with the basic hourly rate listed on the wage determination, a fringe benefit will be listed for any classification for which fringe benefits were found prevailing . The total, including any fringe benefits listed, comprises the "prevailing wage" requirement.

- ➢ This obligation may be met by any combination of cash wages and creditable "bona fide" fringe benefits provided by the employer:
  - ➢➢ The total, including any fringe benefits listed for the classification, may be paid entirely as cash wages;
  - ➢➢ Payments made or costs incurred by the contractor for "bona fide" fringe benefits may be creditable towards fulfilling the requirement; or
  - ➢➢ A combination of cash wages paid and "bona fide" fringe benefits may be used together to meet the total required prevailing wage.

Example

A Davis-Bacon wage determination requires:

Basic hourly rate	$10.00
Fringe benefit	1.00
Total prevailing rate	$11.00

The contractor can comply by paying:

1. $11.00 in cash wages;

2. $10.00 plus $1.00 in pension contributions or other "bona fide" fringe benefits; or

3. $9.00 plus $2.00 in pension contributions or any combination of "bona fide" fringe benefits. In this case, **overtime must be paid at one and one half times the basic hourly rate of $10.00.**

Note: Under DBA/DBRA (unlike SCA) monetary wages paid in excess of the basic hourly rate may be used as an offset or credit to satisfy fringe benefit obligations, and vice versa. (If fringe benefit contributions are credited towards fulfilling the basic hourly rate requirement in the wage determination, at least the basic hourly rate listed in the contract wage determination must be used in computing overtime pay obligations.)

Application to all hours worked

Under Davis-Bacon, fringe benefits must be paid for **all** hours worked, including the overtime hours. However, the fringe benefit amounts may be excluded from the half-time premium due as overtime compensation.

For example:

An employee worked 44 hours as an electrician. The wage determination rate was $12.00 (basic hourly rate) plus $2.50 in fringe benefits. He would be due:

44 hours x $14.50	=	$638.00 - (straight time pay)
4 hours x ½($12.00)	=	24.00 - (overtime pay)
		$662.00

Crediting fringe benefit contributions to meet DBA/DBRA requirements:

The Davis-Bacon Act (and 29 CFR 5.23), list fringe benefits to be considered.

Examples:

- Life insurance
- Health insurance
- Pension
- Vacation
- Holidays
- Sick leave

The use of a truck is not a fringe benefit; a Thanksgiving turkey or Christmas bonus is not a fringe benefit. (See *Cody-Zeigler, Inc.*, WAB Case No. 89-19, April 30. 1991.)

No credit may be taken for any benefit required by federal, state or local law, such as:

- Workers compensation
- Unemployment compensation
- Social security contributions
- Health benefits required under Hawaii state law

Funded fringe benefit plans

- The contractor's fringe benefit contributions made irrevocably to a trustee or third party pursuant to a fund, plan or program, can be credited toward meeting the prevailing wage requirement, without prior DOL approval. For example:
  - Contractor pays for health insurance monthly premiums without employee contributions. (Where payroll deductions for employee contributions are involved, additional rules apply).
  - Contractor makes quarterly contributions to retirement plan trust.

➢ The amount of contributions for fringe benefits must be paid **irrevocably** to the trustee or third party.

➢ Contributions to fringe benefit plans must be made regularly, not less often than quarterly. (This requirement is specified in the standard Davis-Bacon contract clauses at 29 CFR 5.5(a)(1)(i)).

➢➢ Annual contributions into a plan do not meet this requirement. While profit sharing plans are bona fide within the meaning of the Act, profits are not determined until the end of the year. Therefore, the DOL requires contractors to escrow money at least quarterly on the basis of what the profit is expected to be.

➢ The contractor must make payments or incur costs in the amount specified by the applicable wage decision **with respect to <u>each</u> individual laborer or mechanic**. Thus, the amount contributed for each employee must be determined separately, and credit can be taken accordingly towards the prevailing wage requirement for each individual. (It is not permissible to take credit based on the average premium paid or average contribution made per employee.)

➢ Credit may not be taken for fringe benefit contributions made on behalf of employees who are not eligible to participate in the plan (e.g., those excluded due to age or part-time employment).

➢➢ Some plans provide that contributions and allocations under the plan will only be made on behalf of participants who are employed on the last day of the plan year. No credit is permitted for such participants for whom no contribution is made or for contributions made for employees whose accounts receive no allocation solely because they are not employed on the last day of the plan year.

➢➢ On the other hand, it is not required that all employees <u>participating</u> in a fringe benefit plan be entitled to receive benefits from the plan at all times. For example, an employee who is eligible to participate in an insurance plan may be prohibited from receiving benefits from the plan during a 30-day waiting period. Contributions made on behalf of these employees would be creditable against the contractor's fringe benefit obligations.

➢ A pension plan that meets the Employment Retirement Income Security Act (ERISA) requirements may be considered "bona fide" for DBA/DBRA purposes.

➢ Some pension plans contain "vesting" requirements. Where an employer contributes to the plan, employees may be required to complete a certain length

of service before they have a nonforfeitable right to benefits based on the employer's contributions to the plan. Thus, an employee who leaves employment before completing the specified length of service may forfeit all or part of the accrued benefit. Such forfeitures are permitted, provided the plan is a bona fide plan that meets applicable requirements under ERISA, including minimum vesting requirements. Forfeited Davis-Bacon contributions may not revert to the employer, but should be distributed among the remaining plan participants.

Unfunded plans

- A fringe benefit plan or program under which the cost a contractor may reasonably anticipate in providing benefits that will be paid from the general assets of the contractor (rather than funded by payments to a trustee or third party) is generally referred to as an **unfunded plan**. These generally include:
  - Holiday plans
  - Vacation plans
  - Sick pay plans
- No type of fringe benefit is eligible for consideration as an unfunded plan unless it meets the following criteria:
  1. It can be reasonably anticipated to provide benefits described in the Davis-Bacon Act;
  2. It represents a commitment that can be legally enforced;
  3. It is carried out under a financially responsible plan or program; and
  4. The plan or program has been communicated in writing to the laborers and mechanics affected.
- To insure that such plans are not used to avoid compliance with the Act, the Secretary of Labor directs the contractor to set aside, in an account, sufficient assets to meet the future obligation of the plan.

Annualization

➢ Davis-Bacon credit for contributions made to fringe benefit plans are allowed based on the effective annual rate of contributions for all hours worked during the year by an employee.

➢ Examples:

➢ For a defined benefit pension plan, or for a defined contribution pension plan which does not provide for immediate or essentially immediate vesting, if a contractor wishes to receive $2.00 per hour credit for a pension contribution, the contractor must contribute at this same rate for all hours worked during the year. If this is not done, the credit for Davis-Bacon purposes would have to be revised accordingly.

➢ If the firm's contribution for the pension benefit was computed to be $2,000 a year for a particular employee, the employee worked 1,500 hours of the year on a Davis-Bacon covered project and 500 hours of the year on other jobs not covered by the Davis-Bacon provisions, only $1,500 or $1.00 per hour would be creditable towards meeting the firm's obligation to pay the prevailing wage on the Davis-Bacon project. (Annual contribution – $2,000, divided by total hours worked – 1,500+500 = 2000; i.e. $2,000/2000hours = $1.00 per hour.)

➢ For contributions made to defined contribution pension plans which provide for immediate participation and immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), and also certain supplemental unemployment benefit plans, a contractor may take Davis-Bacon credit at the hourly rate specified by the plan. Under such plans, contributions are irrevocably made by the contractor, most, if not all, of the workers will become fully vested in the plan, and the higher contributions made during Davis-Bacon work result in an increase in the value of the individual employee's account. The amount of contributions to such plans should be in conformance with any limitations imposed by the Internal Revenue Code.)

➢ Example: An employee works as an electrician where the wage determination rate is $12.00 (basic hourly rate) plus $2.50 in fringe benefits.

➢➢ Where the employer provides the electrician with medical insurance in the amount of $200 per month ($2,400 per year), the employer would divide the total annual cost of the benefit by 2,080 hours (40 hours x 52 weeks) to arrive at the allowable fringe benefit credit.

($200 x 12 months) divided by 2080 hours = $1.15 per hour.

If the employee in this example receives no other "bona fide" fringe benefits, then for each hour worked on a covered contract the individual is

due $12.00 (basic hourly rate) plus $1.35 paid as cash (the difference between the $2.50 per hour fringe benefit required under the applicable wage determination and the credit allowed for the provision of medical insurance.) Thus,

Basic hourly rate	$12.00	
Medical insurance benefit	1.15	
Additional cash due	1.35	
Total due per hour	$14.50	($12.00+$2.50)

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

DEC 9 1992

MEMORANDUM NO. 157

TO: ALL GOVERNMENT CONTRACTING AGENCIES OF THE FEDERAL GOVERNMENT AND THE DISTRICT OF COLUMBIA

FROM: KAREN R. KEESLING
Acting Administrator

SUBJECT: Application of Davis-Bacon Wage Determinations to Contracts with Option Clauses

This memorandum clarifies the application of Davis-Bacon wage determinations to federally-funded and assisted construction contracts that contain option clauses, and to federal service contracts which have a substantial and segregable amount of construction work that require the application of the Davis-Bacon Act and which also contain option clauses. Some contracting agencies have not been incorporating a new or current Davis-Bacon wage determination in these contracts at the time an option is exercised. To ensure consistency, we are providing the following guidance on this subject.

The Davis-Bacon Act applies to "every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for the construction, alteration, and/or repair, including painting and decorating, of public buildings or public works." (Emphasis added.)

Multi-year construction contracts that contain option provisions by which a contracting agency may unilaterally extend the term of the contract require inclusion of a current wage determination at the time the option is exercised. This requirement is consistent with the purpose of the Davis-Bacon Act to ensure that employees be paid prevailing wages, and the McNamara-O'Hara Service Contract Act (SCA) regulations governing option periods under that statute. As explained in section 4.145(a) of Regulations, 29 CFR Part 4, the exercise of such an option requires a contractor to perform work for a period of time for which it would not have been obligated -- and for which the government would not have been required to pay -- under the terms of the original contract if the option had not been exercised. Thus, once the option on a contract is exercised, the additional period of performance becomes a new contract.

Accordingly, every federally-funded or assisted multi-year construction contract in excess of $2,000 that contains a provision to extend an existing contract -- pursuant to an option clause or otherwise -- so that the construction is performed over an extended period of time (as opposed to situations where a contractor is given additional time to complete its original contract commitment), must include a current Davis-Bacon wage determination. Similarly, just as a current SCA wage determination must be incorporated at the exercise of an option in an SCA contract, if an option in the SCA contract calls for substantial and segregable construction work, then a current Davis-Bacon wage determination must also be incorporated at the exercise of the option.

INVESTIGATIVE PROCEDURES

UNDER

DBRA/CWHSSA

REORGANIZATION PLAN NO. 14 OF 1950

DAVIS-BACON LABOR STANDARDS/ CONTRACT STIPULATIONS

SPECIFIC STEPS IN CONDUCTING DBRA/CWHSSA INVESTIGATIONS

CONCLUSION OF INVESTIGATION

REPORT WRITING

THE HEARING PROCESS

REORGANIZATION PLAN NO. 14 OF 1950

Purpose

➢ To promote responsibility for uniform and effective DBRA enforcement among federal procuring agencies under Department of Labor (DOL) coordination.

DOL Functions/Responsibilities

➢ Secretary of Labor – and, by delegation, the Wage and Hour Division (Wage and Hour) – is responsible for:

1. Determining prevailing wages.

2. Issuing regulations and standards to be observed by contracting agencies.

➢ DOL performs an oversight function and has authority to conduct independent investigations.

Contracting Agency Functions/Responsibilities

➢ Federal agencies that award contracts and provide federal assistance have **day-to-day** enforcement responsibilities. The federal agency responsibilities include activities such as:

1. Ensuring the incorporation of Davis-Bacon contract stipulations and appropriate wage determinations in Davis-Bacon and related Act (DBRA) covered contracts (and appropriate guidance concerning the application of multiple wage schedules) in accordance with 29 CFR 1.6(b) and 29 CFR 5.6.

2. Ensuring that the Davis-Bacon poster (WH 1321) and the applicable wage determination(s) and approved conformances are posted at the site of the work. 29 CFR 6.6(a)(1)(i).

3. Reviewing certified payrolls in a timely manner. 29 CFR 5.6(a)(3)

4. Conducting employee interviews. 29 CFR 5.6(a)(3)

5. Conducting investigations, as appropriate, and forwarding refusal to pay and/or debarment consideration cases to Wage and Hour for

appropriate action. 29 CFR 5.6 and All Agency Memorandum No. 182.

6. Submitting enforcement reports and semi-annual enforcement reports to the DOL. 29 CFR 5.7 and All Agency Memorandum No. 189.

➢ Contracting agencies cannot contract out responsibility for the enforcement of the DBRA requirements.

➢ Federal contacting agencies are responsible for ensuring that grant recipients who have contracting responsibilities properly apply and enforce DBRA.

DAVIS-BACON LABOR STANDARDS CONTRACT STIPULATIONS

(29 CFR 5.5, also reiterated at 48 CFR 52.222-6 through 52.222-15)

Definition 29 CFR 5.2(f)

The term **"labor standards"** means the requirements of:

- The Davis-Bacon Act
- The Contract Work Hours and Safety Standards Act
- The Copeland Act
- The prevailing wage provisions of the Davis-Bacon related Acts
- Regulations, 29 CFR 1, 3 and 5, which govern the administration and enforcement of the DBA and DBRA

29 CFR 5 requires contracting agencies to include in any DBA/DBRA covered construction contract the specified labor standards requirements. Normally these requirements are found in the contract under the heading **"Davis-Bacon Act"** or **"labor standards"** or **"prevailing wage requirements"** or **"federal requirements"** and include:

1. **Minimum wages -** All laborers and mechanics employed or working upon the **site of work** must be paid at least the applicable prevailing wage rate for the classification of work performed as listed in the applicable wage determination or a rate approved in accordance with the "conformance process" set forth at 29 CFR 5.5(a)(1). The laborers and mechanics working on the site of work must be **paid weekly**.

2. **Withholding** - The federal agency or the loan or grant recipient shall upon its own action or upon written request of an authorized representative of the DOL withhold or cause to be withheld from the contractor under this contract or any other federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay the full amount of wages required by the contract. (The processing of monies so withheld is discussed further in the "Withholding" section of this book.)

3(a) **Maintaining basic payroll records** - The contractor must maintain basic payroll records during the course of the work and preserve them for three years. Such records shall contain:

- Name of each worker
- Address
- Social security number
- His or her correct classification
- Hourly rates of wages paid
- Daily and weekly number of hours worked
- Deductions made and actual wages paid
- Contractors employing apprentices or trainees under approved programs must have written evidence of the registration of the apprenticeship program and certification of the trainee program, copies of the individual registration forms of the apprentices and trainees, and written evidence of the applicable ratios and wage rates.

(b) **Submission of certified payroll records** - The contractor must submit **weekly** a copy of all payrolls to the contracting agency. The payrolls submitted must set out accurately and completely all of the basic payroll information listed above.

- The payroll information may be submitted in any form desired. Optional payroll form WH-347 is available (from the Government Printing Office, (202) 512-1800, and at 48 CFR 53.303-WH-347). The payroll information also is available on Wage and Hour website at:

  http://www.dol.gov/esa/forms/whd/index.htm

- The prime contractor is responsible for the submission of the certified payrolls to the contracting agency (including for all subcontractors on the project).
- Each payroll submitted must be accompanied by a "Statement of Compliance" as required by the Copeland Act and 29 CFR

Part 3. (A form for this purpose is available on the reverse of Optional form WH-347.)

- ➢ The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution. Thus, the contractor is put on notice in the contract itself that criminal prosecution could result if falsified payrolls are submitted to the government.

- ➢ The contractor or subcontractor must make the payroll records available for inspection, copying, or transcription by authorized representatives of the contracting agency or the DOL, and must permit such representatives to interview employees during working hours on the job.

- ➢ If the contractor or subcontractor fails to submit the required records or to make them available, the federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds.

- ➢ Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action.

4(a) **Apprentices** - Apprentices are permitted to work at less than the predetermined rate **only** when **all** of the following conditions are met:

- ➢ Employed pursuant to and **individually registered** in a bona fide apprenticeship program registered with the U.S. DOL, Bureau of Apprenticeship and Training (BAT), or with a state apprenticeship agency recognized by BAT. **(Note - the program itself must be registered and the apprentice must be individually registered in the program).**

- ➢ The allowable **ratio** of apprentices to journeymen **on the job site** in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program.

- ➢ Labor standards for apprentices also have requirements for how to pay fringe benefits and provide for portability of apprenticeship programs.

- ➢ The labor standards specify that if a contractor violates any of the provisions, then the person considered to be an apprentice must receive the full amount of the applicable prevailing wage rate for the classification of work performed.

(b) **Trainees** - Trainees are permitted to work at less than the predetermined rate only when all of the following conditions are met.

- ➢ Employed pursuant to and **individually registered** in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training (BAT). **(Note: State agency approval of trainee programs is not recognized for DBRA purposes.)**

- ➢ The **ratio** of trainees to journeymen **on the job site** shall not be greater than permitted under the plan approved by the Employment and Training Administration.

- ➢ Labor standards for trainees also have requirements for how to pay fringe benefits.

- ➢ There is no portability of a trainee program from one locality to another.

5. **Copeland requirements** - All contractors must comply with the Copeland Act requirements and the requirements in 29 CFR Part 3, which prohibits kick-backs and sets forth rules concerning deductions from employees' wages.

6. **Subcontracts** - The labor standards provisions require the contractor to insert the labor standards clauses in any subcontract. This clause further stipulates that the prime contractor shall be responsible for compliance by any subcontractor with the labor standards requirements in the contract. In effect, the prime contractor is ultimately responsible for the payment of the back wages.

   Note: A definition for subcontractor is not found in the regulations. A subcontractor is any person (other than an employee) or firm who has agreed, either verbally or in writing, to perform any of the work required under the contract.

7. **Contract termination and debarment** - Debarment means that a firm and its responsible officers, and firms in which they have an interest (or substantial interest for related Act cases) are not

permitted to work on covered contracts for three years. If a contractor violates any of the labor standards requirements, the contractor may be terminated from the contract and/or debarred.

8. All **rulings and interpretations** of the DBRA issued in 29 CFR Parts 1, 3 & 5 are incorporated by reference in the contract.

9. **Disputes** under the contract relating to the Davis-Bacon labor standards requirements must be submitted to the DOL for resolution pursuant to the Secretary of Labor's authority under Reorganization Plan No. 14 of 1950, and 29 CFR Parts 5, 6 and 7.

10. **Certification of eligibility** - By entering into the contract, the contractor certifies that no person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded government contracts, i.e., not debarred.

    - ➢ This labor standards clause further stipulates that no part of the contract shall be subcontracted to any person or firm debarred.

    - ➢ The penalty for making false statements about eligibility for government contract work can be criminal prosecution.

SPECIFIC STEPS IN CONDUCTING DBRA/CWHSSA INVESTIGATIONS

The following guidance is intended to list the various steps that are typically undertaken by contracting agencies and Wage and Hour in conducting a DBRA/CWHSSA investigation.

Preliminary Steps

➢ Obtain the following information:

1. Copy of the labor standards clauses in the contract

2. Copy of the Davis-Bacon wage decision(s) included in the contract, and in the case of multiple schedules, any instructions concerning their application.

3. Copies of the certified payrolls submitted by the employer under investigation.

4. Employer identification number.

Initial Employer Contact

➢ A responsible official of the firm must be contacted at the start of the investigation.

➢ When investigating a subcontractor, find out what information on labor standards and wage determinations have been provided by the prime contractor to the subcontractor. Ask the subcontractor for a copy of the subcontract, if one exists.

➢ When a subcontractor is being investigated, the prime contractor must be notified at the beginning of the investigation.

➢➢ The prime contractor can provide information on the subcontractor's performance and may have records relating to the number of employees the subcontractor had on the project, the hours they worked, and the period of time they were on the project. The prime contractor should be asked to provide a copy of the subcontract, if it exists.

➢➢ The prime contractor has responsibility for compliance on the contract and is liable for back wages not paid by the subcontractor,

and may decide to withhold final payment from the subcontractor until the back wage issues are resolved.

➢ Inform the employer that the purpose is to make an investigation to determine compliance with the pertinent statutes and regulations and outline in general terms the scope of the investigation, including the examination of pertinent records, employee interviews and physical inspection of the project.

➢ Obtain the exact legal name of the firm and any trade names, the full address, full names of owners or officers and their titles; number of persons employed, name and address of any subcontractors, and such similar information as may be necessary to make and complete the investigation.

Examination of Certified Payrolls

➢ An examination of the contractor's certified payrolls should be made for accuracy, completeness, and true representation of the facts. The examination should cover the current or most recent payrolls as well as those for selected periods which reflect the practice of the contractor or subcontractor during the life of the contract.

1. Check for completeness and accuracy of the payrolls as to the names, addresses, job classifications, hourly wage rates, daily and weekly hours worked during the payroll period, gross weekly wages earned, deductions made from wages, and net weekly wages paid the employee. Notice if there are distinctions made among the various classifications.

2. If the Contract Work Hours and Safety Standards Act is applicable and an employee worked in excess of forty hours in any workweek, determine whether time and a half the employee's regular rate was paid.

3. Certified payrolls should be examined for discrepancies such as a disproportionate number of laborers, apprentices or helpers on the project.

4. The wage rates should be compared against those listed on the wage determination. If workers perform work in more than one classification, the payroll records should accurately reflect the time spent working in each. Unlisted classifications should be identified and additional classification procedures initiated, if applicable.

5. Check for contributions to fringe benefit plans.

Examination of Records

➢ Examine the current or most recent payroll as well as those for selected periods which reflect the practice of the contractor or subcontractor during the life of the contract. The examination should include a review of a the basic time cards, time sheets, or other work or personnel records of a representative number of employees in each classification. These records should be checked against the certified payrolls in order to disclose any possible discrepancies, or to give reasonable assurance that none exist.

➢ Examine documents which indicate that the firm has made contributions (or incurred costs) to fringe benefit plans. These documents might include: portions of the pension plan; documentation from the Internal Revenue Service that indicate the plan has been approved by the IRS; and records of contributions made.

Check for Compliance with Apprenticeship/Trainee Requirements

➢ Apprenticeship/trainee program information should be obtained and examined to verify that the program has been approved by the appropriate authority. If the contractor's evidence is not sufficient, contact the Bureau of Apprenticeship and Training and/or the state apprenticeship council for verification.

➢ Contracting officers must obtain copies of the individual employees' apprentice/training registration forms for the file, as well as copies of the approved apprenticeship/training program itself.

➢ The ratio of apprentices to journeyman on the project should not exceed the ratio provided for in the apprenticeship/training plan. The ratio is determined on a daily basis, not weekly.

Determine if a Conformance is Necessary

➢ Determine if the wage determination contains classifications and wage rates for all the types of work performed on the contract.

1. If the applicable wage determination does not contain a classification for the work performed, the conformance procedure in 29 CFR 5 must be followed. Contracting agencies cannot arbitrarily determine a rate.

2. Questions as to whether or not a rate has been conformed should be coordinated with Wage and Hour.

Employee Interviews

- Employee interviews are essential to the completeness of the investigation.
  - They should be sufficient in number to establish the degree of adequacy and accuracy of the records and the nature and extent of any violations.
  - They should also be representative of all classifications of employees on the project under investigation.
  - In doubtful compliance situations interviews with former employees may be appropriate.
  - In cases involving alleged misclassification and/or falsification of payroll records, it is important to account, through the interview process, for as many employees as possible who worked on the contract.
  - Employees should be questioned regarding other employees they worked with and the duties performed by those employees.
- Each employee should be informed that the information given is confidential, and that his/her identity will not be disclosed to the employer without the employee's written permission. (See 29 CFR 5.6(a)(5))
- Place of interview
  - Employees currently employed may be interviewed during working hours on the job, in accordance with 29 CFR 5.5(a)(3)(ii), provided the interview can be properly and privately conducted on the premises.
  - In cases of falsification of records, fear of reprisals or intimidation, it may be more advisable to conduct the interview elsewhere, such as in the employee's home, at the agency's office, or other suitable place where it may be arranged.
  - Employees should not be interviewed in the presence of the employer, another employee, or any other person.
- Telephone Interviews
  - Ordinarily, an interview should be made by telephone only if a personal interview is impracticable. When a telephone interview is used, it is suggested that the contracting officer send the employee

the statement together with a request that the employee read the statement, make and initial any changes, sign and date it and return the statement to the contracting officer. It is suggested that the contracting officer keep a copy of the statement until the original is returned.

➢ Mail interviews

➢➢ Ordinarily, an interview should be made by mail only if a personal interview is impracticable.

➢ Preparation of interview statements

➢➢ When a written statement is taken, it should be recorded in the manner stated by the employee; it should be read by him/her, and contain a statement that it has been read and that it is correct. The contracting officer may restate or summarize the employee's remarks, but should do so in the first person and should phrase it in the employee's manner of speaking.

➢➢ The statement should be signed by the employee and the signature, except in mail interviews, should be witnessed by the responsible agency official. In government contract cases, it is preferred that all interviews be signed. Where the statement is not signed, the contracting officer should give, either in the statement or his/her report, the employee's reason for not signing. Any changes in a signed employee statement should be initialed by the employee.

➢➢ Each interview statement should contain the following information:

1. Place and date of interview.
2. Name of employer (firm).
3. Name and permanent address of employee being interviewed.
4. Employment status (whether present or former employee).
5. Period(s) of employment
6. If an apprentice, the age, date of birth, and information concerning his status.
7. The statement should include specific information regarding:
   - ➢ rate(s) of pay and wages received
   - ➢ hour for starting/stopping work and daily/weekly hours worked
   - ➢ manner in which time and work are recorded
   - ➢ job classification(s) and exact work performed
   - ➢ In cases alleging misclassification, the interview statement must specifically address the various types of duties performed. It is not sufficient for an employee to

only state he/she was a carpenter. The interview must state the specific carpentry duties, and the tools and materials used. If an employee worked in more than one classification, the employee must be asked how much time he/she spent in each classification.

8. When possible, the interview statement should corroborate statements given by other employees. For example, the employee should be asked to identify other workers who performed the same work.
9. The interview should cover all the allegations of violations (particularly those in a complaint).
10. The interview should also cover any other details necessary to indicate accuracy of the employer's records, statements, or certifications.

➢➢ ***All interview statements must be legible.***

Disclosure of information to employees

➢➢ The contracting officer should never give his/her opinion as to whether back wages are due. The contracting officer should never tell any employee the amount of back wages computed.

Case Record

➢➢ Transcriptions of records and computations of back wages must be made when violations are found.

Discharging DBRA Minimum Wage and Fringe Benefit Obligations

➢ "Prevailing wage" is made up of two interchangeable components -- basic hourly wages and fringe benefits.

1. Both may be paid in cash;

2. Payments can be made or costs incurred for "bona fide" fringe benefits; or

3. Any combination thereof.

➢ Monetary wages paid in excess of the DBRA minimum wage may be used as an offset or credit to satisfy fringe benefit obligations, and vice versa. (This differs from SCA.)

Example

The Davis-Bacon wage determination requires:

Basic hourly rate	$10.00
Fringe benefit	1.00
Total prevailing rate	$11.00

The contractor can comply by paying:

1. $11.00 in cash wages;

2. $10.00 plus $1.00 in pension contributions or other "bona fide" fringe benefits; or

3. $9.00 plus $2.00 in pension contributions or any combination of "bona fide" fringe benefits.

➢ Fringe benefits for DBRA must be paid for all hours worked -- both straight time and overtime hours.

➢ Excess payments for overtime may not be offset/credited towards minimum wages due.

➢ Excess wages paid for work in one classification may not be offset/credited towards wage deficiencies in another classification. Under DBRA, each classification stands alone.

Determining Compliance with CWHSSA

- CWHSSA applies to **laborers, mechanics, guards and watchmen** for the time spent on covered contract work only (i.e., total up all time each employee spent working **on covered contracts** - exclude all commercial, non-government work).

- CWHSSA requires the payment of time and one-half the basic rate of pay for all hours worked in excess of 40 hours in a week. (The daily overtime requirement under CWHSSA was repealed in 1986.)

- The basic rate of pay under CWHSSA is the straight time hourly rate and can not be less than the basic hourly rate required in an applicable wage determination. Both contributions to bona fide benefit plans and cash payments made to meet wage determination fringe benefits requirements are excluded in computing overtime obligations under CWHSSA.

- If an employee worked in more than one classification and at different rates on covered contracts during a workweek, overtime pay may be computed based on the rate in effect during the hours worked over 40 in the workweek. Overtime may also be computed based on the weekly average rate (or "regular rate") paid for hours worked over 40. 29 CFR 778.6; 778.115 and 778.415-419.

- CWHSSA does not have a site of work limitation on coverage. All hours worked on covered contracts (even at a fabrication shop away from the site) are combined for determining CWHSSA compliance. (For example: if an employee starts the day performing covered work at the fabrication shop and then travels to the work site, the time at the fabrication shop and the **travel time** between the fabrication shop and the work site is hours worked covered by CWHSSA.)

- The following examples reflect the correct computations under DBRA and CWHSSA for an employee who worked 44 hours on a covered contract as an electrician, where the wage determination rate for an electrician is $12.00 (basic hourly rate) plus $2.50 in fringe benefits.

  - If the employer paid $12.00 in cash wages and $2.50 in fringe benefits, the electrician would receive

44 hours	x	$ 2.50	=	$110.00 in fringe benefits
44 hours	x	$12.00	=	$528.00 for prevailing wages
4 hours x ½	x	$12.00	=	$ 24.00 for CWHSSA earnings
				$662.00

➢➢ If the employer paid $10.00 in cash wages and $4.50 in fringe benefits:

44 hours x $ 4.50 = $198.00 in fringe benefits
44 hours x $10.00 = $440.00 in prevailing wages
4 hours x ½ x $12.00 = $ 24.00 in CWHSSA earnings
$662.00

➢➢ If the employer paid $14.00 in cash wages and $0.50 in fringe benefits:

44 hours x $ 0.50 = $ 22.00 in fringe benefits
44 hours x $14.00 = $616.00 in prevailing wages
4 hours x ½ x $12.00 = $ 24.00 in CWHSSA earnings
$662.00

➢ The following examples provide two methods for the computation of overtime premium pay required under CWHSSA and/or FLSA for an employee who worked in different job classifications and at different rates of pay in the same work week.

An employee is hired to perform work on a covered construction contract in two job classifications: painter and electrician. The wage determination rate for an electrician is $12.00 (basic hourly rate) plus $2.50 in fringe benefits. The wage determination rate for a painter is $10.00 (basic hourly rate) plus $3.00 in fringe benefits. The payroll shows that the worker performed painting and electrical duties as follows:

	S	M	T	W	T	F	S
Painter hours		8	8	8			
Electrician hours					8	8	4

Method 1: Computation of the overtime premium based on the "rate in effect" when the overtime hours were worked.

In this example the four overtime hours occurred on a Saturday.

The overtime **premium** could be computed as follows:

½($12.00) x 4 = $24

Method 2: Computation of the overtime **premium** based on the "regular rate" for the work week.

Step 1: Determine the straight time wages due; excluding fringe benefits

24 hours at the painter's rate of $10.00	= $240.00
20 hours at the electrician's rate of $12.00	= 240.00
Total straight time wages	= $480.00

Step 2: Calculate the "regular rate"

($480.00 / 44 hours worked)= $10.91 "regular rate"

Step 3: Compute the overtime premium due

½($10.91) x 4 overtime hours worked = $21.82

➢ Note: In some cases, a question arises over whether a cash payment made to a laborer or mechanic is paid in lieu of a fringe benefit contribution or whether it is simply part of the individual's normal straight time wages. In the latter situation, the cash payment is not excludable in computing the overtime pay obligation.

CWHSSA Liquidated Damages

➢ Liquidated damages are computed at $10.00 per day per employee for CWHSSA violations.

➢ Although the contracting officer is required in all violation cases to compute liquidated damages, the decision on whether to assess the damages is made by the federal agency. (Liquidated damages in excess of $500 may be waived or adjusted only with the concurrence of Wage and Hour.) As a matter of administrative policy, liquidated damages are not computed for employees whose CWHSSA back wages are less than $20.

➢➢ The contractor should be advised of the potential liquidated damages, and that they will be advised of the contracting agency's determination concerning the assessment of liquidated damages.

➢ Example:

	M	**T**	**W**	**T**	**F**	**S**	**S**	**TOTAL**
REGULAR TIME	10	12	13	9	8	3	0	55

In the above example, no overtime premium was paid. The 15 weekly overtime hours were worked on three calendar days, Thursday, Friday and Saturday. Thus, $30.00 in CWHSSA liquidated damages would be computed.

Overtime requirements under the Fair Labor Standards Act, as amended

- Laborers and mechanics performing work subject to the predetermined minimum wages may be subject to overtime compensation provisions of other laws which may apply concurrently to them, including the Fair Labor Standards Act. 29 CFR 778.6.

- As a general standard, Section 7(a) of the Fair Labor Standards Act, as amended, provides that an employer shall not employ any employee to work in excess of 40 hours in a workweek unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which her or she is employed. 29 CFR 778.101.

  Unless specifically exempted, an employee who performs work on both federally funded/federally financed projects and commercial work in the same workweek must receive an overtime premium for hours worked in excess of 40 in the workweek. 29 CFR 5.32 and in 29 CFR 778.

  CWHSSA requires the payment of an overtime premium only if the laborer or mechanic works in excess of 40 hours in a work week on covered contract(s). Overtime hours worked, which are not subject to CHWSSA, would be subject to the FLSA, unless otherwise exempted. The distinction is relevant in the assessment of liquidated damages as the FLSA does not provided for the assessment of liquidated damages.

- Where questions arise concerning overtime pay obligations under the FLSA, consultation with the local Wage and Hour office is appropriate.

CONCLUSION OF INVESTIGATION

Final Conference Procedure

- Inform the contractor generally of the investigation findings, and indicate that these findings are based solely on the facts and information disclosed by the investigation.

- Detail specifically what must be done to eliminate the violations, if any, and provide any available informational material such as copies of 29 CFR 3 and/or 5.

- Be willing to consider additional evidence from the contractor which may impact on the findings. For example, unresolved conformance request, evidence of fringe benefit plan, inspection reports.

- Request for payment of back wages:

  - The Davis-Bacon Act contains no injunctive action procedures. Therefore, a demand for the payment of the back wages must always be made even if the employer refuses to comply.

  - Contracting officers should accept partial back wage restitution for undisputed issues.

  - Contracting officers should attempt to collect back wages even though the case meets the debarment criteria.

  - If the employer is a subcontractor and refuses to make restitution, the prime contractor must then be requested to make restitution. The prime contractor is ultimately responsible for the payment of the back wages.

- Notify the subcontractor and/or prime contractor of the potential for the assessment of liquidated damages ($10.00 per day per violation) under CWHSSA, but payment of liquidated damages is **not** requested from the contractor by the contracting officer. The firm(s) should be advised that the contracting agency will make a decision on the assessment of liquidated damages at a later date.

- If there is no agreement to pay back wages, the file must be forwarded to Wage and Hour pursuant to 29 CFR 5.7 for review, collection of back wages, and debarment consideration (see All Agency Memorandum No. 182).

Withholding

- ➢ In refusal-to-pay cases under both DBRA and CWHSSA, the contracting agency shall withhold contract funds to cover the back wages due.

- ➢ The contracting agency can withhold funds from other contracts subject to DBRA/CWHSSA or any other federal contract held by the same prime contractor where funds remaining on the contract under which the violations occurred are insufficient to cover the back wages due – "cross-withholding".

- ➢ Contracting officers should immediately notify Wage and Hour if they become aware that the prime contractor may be filing bankruptcy.

- ➢ In situations where Wage and Hour has instituted withholding actions, the prime contractor will be sent a letter describing the nature of the alleged violations and back wages found due. The prime contractor will be given 15 days to provide written views on the alleged violations. Withholding procedures are discussed further in the "Withholding" section of this reference book.

Debarment

- ➢ Debarment occurs when a contractor or subcontractor is declared ineligible (debarred) from receiving federal or federally assisted contracts for **up to 3 years** because it was "in aggravated or willful violation of the labor standards provisions" of any of the related acts, or declared ineligible **for 3 years** because violations of the Davis-Bacon Act were a disregard of the contractor's "obligations to employees and subcontractors".

- ➢ At the conclusion of the investigation the contracting officer may advise the contractor of the potential for debarment where appropriate, **but make no statement** to the contractor about any recommendation concerning debarment.

- ➢ In no event should a contractor be left with the impression that payment of back wages eliminates the possibility of debarment.

Debarment Criteria

- ➢ Practically, debarment is considered in those cases where the contractor has:

    - ➢➢ Submitted falsified certified payroll records

➢➢ Required kickbacks of wages or back wages

➢➢ Committed repeat DBRA violations

Contracting Agency

➢ Investigations which appear to meet the debarment criteria – even in situations where the back wages have been paid – should be forwarded to Wage and Hour pursuant to All Agency Memorandum No. 182.

REPORT WRITING

This is one of the most important aspects of the investigation.

- ➢ The report is reviewed at many levels, both inside and outside the contracting agency. For example:
  - ➢➢ Wage and Hour
  - ➢➢ DOL's Office of the Solicitor
  - ➢➢ The contracting agency
  - ➢➢ The Comptroller General.
- ➢ Plan the report.
- ➢ In the report, refer to exhibits included in the case file -- do not repeat interviews in the reports.
- ➢ Avoid the use of abbreviations which may not be understood by other agencies.
- ➢ Except under CWHSSA, in most jurisdictions there is no right of individual employee action in government contract statutes. The government acts on the employee's behalf to recover back wages. Refusal-to-pay cases are usually resolved administratively by a hearing before a DOL Administrative Law Judge (ALJ). The ALJ process is time consuming and there is a delay before cases can be scheduled for hearings.

THE HEARING PROCESS

- ➢ Refusal-to-pay cases are resolved pursuant to 29 CFR 5.11.
  - ➢➢ If factual issues are in dispute, Wage and Hour notifies the contractors (both prime and sub) in writing of the investigation finding and offers the opportunity to request a hearing before an administrative law judge.
  - ➢➢ If only issues of law are in dispute, Wage and Hour offers the contractors the opportunity to appeal a Wage and Hour ruling before the Department's Administrative Review Board (the Board).
- ➢ In both agreement-to-pay and refusal-to-pay cases where the debarment criteria are met, the contractors are offered a hearing before an administrative law judge (ALJ) pursuant to 29 CFR 5.12 on the issue of debarment.
- ➢ ALJ decisions may be appealed to the Board.
- ➢ The Board hears all appeals of ALJ cases. The Board, which acts on behalf of the Secretary of Labor, consists of three members, who serve at the pleasure of the Secretary. Appeals may be in the form of oral hearings in Washington, D.C., before the Board, or the Board may review the record in a closed session. The Board also acts on petitions for review of rulings issued by the Administrator on coverage, interpretations, and wage determination matters.