

Labor and Employment Corner

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Nailing the Prevailing Wage

In the midst of one of our country's most challenging economic times, Congress passed the American Recovery and Reinvestment Act of 2009 (the Recovery Act) at the urging of President Obama, who signed it into law four days later. Two immediate goals of the Recovery Act were to create new jobs and spur economic activity. To accomplish these objectives, approximately \$275 billion became available through federal contracts, grants, and loans. A significant portion of these recovery funds

were earmarked for construction projects such as the development and repair of roads and bridges, as well as the weatherizing of federal buildings and more than one million private homes around the United States. One direct economic result of the Recovery Act funds has been an increase in publicly funded building and highway construction projects. Publicly funded projects are attractive to contractors and subcontractors because the government typically pays its bills on time. However, it is important for contractors and subcontractors to be aware of the strings attached to government funds.

Publicly funded construction projects are governed by the federal Davis-Bacon Act or an equivalent state or local statute or ordinance. The Davis-Bacon Act requires contractors and subcontractors performing work on government contracts in excess of

\$2,000 to pay their employees the prevailing wage rate and fringe benefit rate based on

their specific labor classification, among other factors.

Although we are unable to address all the nuances

of prevailing wage laws in

this short article, our goal is to provide an overview of prevailing wage requirements, identify potential pitfalls when working under prevailing wage statutes, and discuss the consequences of violating prevailing wage laws.

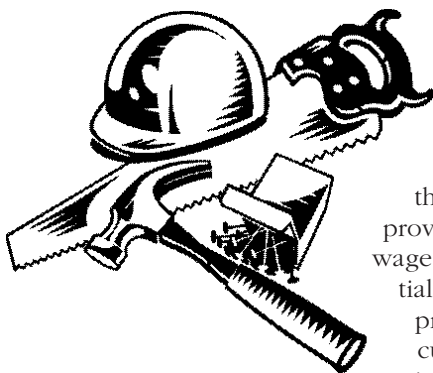
applies. This determination depends on whether the source of the funding is the federal government or a state or local government. At times, a project may be funded by more than one government entity. In those situations, the contractor should comply with the statute that results in the highest rate of pay for the employees performing the specific work. Although we focus on federal prevailing wage requirements under the Davis-Bacon Act here, it is imperative contractors and subcontractors are familiar with the prevailing wage requirements under their state and local laws as well.

Establishing Prevailing Wage Rates and Fringe Benefits

Workers on publicly funded highway and building construction projects must be paid the prevailing wage rate identified in the statute for workers performing similar work in their geographic area. The prevailing wage rate is made up of two components: an hourly base rate and an hourly fringe benefit rate. The fringe benefit rate is established as prevailing in that particular geographic location.

The Department of Labor (DOL) publishes rates, which are determined through surveys. At the outset of a wage rate survey, the DOL contacts congressional representatives, state and local agencies, trade associations, and unions to solicit wage rate and benefit information and to identify contractors who may have relevant wage and benefit rate information. After the rate information has been collected, the DOL determines whether more than 50 percent of the workers in a single classification are paid the union wage rate or the same wage rate. If so, then the union or same wage rate prevails for that classification. If not, a weighted average wage rate is calculated.

An employer may meet its obligation to contribute the prevailing amount of fringe benefits in a number of ways. First, it may pay the total prevailing wage rate, including the fringe benefit amount, as cash wages. Alternatively, any payments made or costs incurred by the employer for "bona fide" fringe benefits may be credited toward the fringe benefit contribution portion of the prevailing wage. Finally, a combination of cash wages paid and "bona fide" fringe benefits provided may be used to meet the total required prevailing wage. Fringe benefits must be paid for all hours worked on a publicly funded project, including both straight time and overtime hours.



Prevailing Wage Jobs

The first step for a contractor or a subcontractor considering whether to bid on a publicly funded project is determining which statutory scheme

Prevailing wage rates are re-evaluated (and often revised) on an annual basis. However, the time of the annual review varies by state and local government, and thus does not always occur at the beginning of each calendar year. Additionally, there are various stages of construction projects: when a bid is solicited for a particular project, when a bid is submitted, when a project is started, and when a project is completed. The entire project can span several months and even years. Thus, it is important to understand which prevailing wage rates apply so to competitively bid a project and stay on budget.

The prevailing wage rates *in place at the time the bids are solicited* are controlling. These same rates will apply throughout the construction project, even if the project lasts four years and the published prevailing wage rates increase or decrease during that time. Often, the applicable prevailing hourly base rates and fringe benefit rates are provided in the bid solicitation documents.

Labor Classifications

The prevailing wage rate that applies to a particular worker depends on the labor classification of the work being performed by that worker. For example, someone classified as a general laborer in Hennepin County, Minn., may be assigned a basic rate of \$30.06 plus fringe benefits, while a roofer is assigned a basic rate of \$33.34, and a sprinkler fitter is assigned a basic rate of \$39.24. It is important to note that a single worker may be classified in different ways throughout a single workday if he or she is performing different types of labor.

Unfortunately, not all work performed on a given project falls neatly into the pre-established classifications. For example, consider a situation in which a contractor is installing a green roof on a public building. At a certain phase of the project, workers will lay sod, plant trees or perennial plants on the roof, and possibly lay walkway pavers. Should these workers be classified as roofers simply because they are working on a roof? Or are they classified as landscapers because they are performing landscaping work? When they are removing debris, perhaps they should be classified as general laborers. Unfortunately, there is little guidance available to contractors and subcontractors on the type of work each classification should encompass and how to classify workers when the appropriate classification does not clearly fit into established statutory definitions.

In an attempt to comply with the Davis-Bacon Act or other applicable statutes, one option is to simply classify workers at the higher rate of pay. However, the cost of doing so can be quite significant, given the variation in rates, and this could result in the contractor's bid not being competitive enough and thus not being awarded the project. The best way to ensure a predictable cost of labor and avoid an altercation with the contracting government agency is to

attempt to identify any classification pitfalls, like the example provided above, at the outset of the project and agree on the appropriate classification for the specific tasks to be performed. This usually requires close attention to the actual tasks to be performed, and can lengthen the bidding process.

Recordkeeping, Reporting, and Posting Requirements

The Davis-Bacon Act requires contractors and subcontractors to maintain certain records while performing work on publicly funded construction projects. In addition to records that must be maintained under the Fair Labor Standards Act (FLSA) and similar state law, the Davis-Bacon Act requires maintaining records which include: (1) name, address, and social security number of each employee; (2) each employee's labor classification(s); (3) hourly rates of pay (including rates of contributions or costs anticipated for fringe benefits); (4) daily and weekly numbers of hours worked; (5) deductions made; and (6) actual wages paid. These records must be maintained during the course of the publicly funded project and for a period of three years thereafter. Therefore, the three-year retention period required by the FLSA may be extended for employers performing work that is subject to the Davis-Bacon Act.

In addition to maintaining records, contractors and subcontractors must submit to the contracting agency weekly certified payroll records that conform to federal regulations. Contractors must also post, in a prominent and easily visible place on the construction site, both the applicable prevailing wage rate schedule and a poster entitled "Employee Rights Under the Davis-Bacon Act," which can be found at www.dol.gov/whd/programs/dbra/wh1321.htm.

Enforcement and Penalties

Although many contractors and subcontractors have been performing work on publicly funded projects for years and understand the requirements associated with the work, the increase in government funding for construction projects as well as the decrease in demand for private construction projects has resulted in contracts being awarded to contractors relatively inexperienced in prevailing wage requirements. Further, the publicity surrounding the Recovery Act has resulted in close scrutiny of the funds and increased pressure on government entities to ensure compliance with the Davis-Bacon Act and other applicable statutes or ordinances. Thus, understanding the requirements of the Davis-Bacon Act and corresponding state and local laws is more important than ever.

Predictably, the contracting government agency will enforce the requirements of prevailing wage laws on a publicly funded contract. Less predictably, labor unions will also monitor the worksites of pub-

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industries. Smith is the co-author of the 2008 edition of Protecting and Enforcing Copyright (MCLE Inc. 3rd ed. 2008) as well as several other articles about various aspects of copyright law. © 2011 Nicole Rizzo Smith. All rights reserved.

Endnotes

¹H.R. 2196, 111th Cong. (2009), available at thomas.loc.gov/cgi-bin/query/z?c111:H.R.2196, reintroduced to Congress on July 13, 2011, as H.R. 2511.

²*Supra*, note 1.

³S. 3728, 111th Cong. (2010), available at thomas.loc.gov/cgi-bin/query/z?c111:S.3728.

⁴nymag.com/daily/fashion/2011/07/proenza-schoulers-lazaro-herna.html; *supra* note 3.

⁵17 U.S.C. § 101.

⁶*Protection for Fashion Design: Hearing on H.R. 5055 Before the H. Subcomm. on Courts, the Internet, and Intellectual Property*, 109th Cong. 2d Sess. Hearings Before the House Subcomm. on Courts, the Internet, and Intellectual Property, 109th Cong. 197-219 (2006) (statement of U.S. Copyright Office).

⁷17 U.S.C. § 102(a)(5).

⁸17 U.S.C. § 1301(a). A “vessel” is a “craft that is designed and capable of independently steering a course on or through water through its own means

of propulsion; and that is designed and capable of carrying and transporting one or more passengers.” A “hull” is “the frame or body of a vessel, including the deck of a vessel, exclusive of masts, sails, yards, and rigging.”

⁹489 U.S. 141 (1989).

¹⁰*Supra*, note 3.

¹¹*Supra*, note 3.

¹²*Supra*, note 3.

¹³*Supra*, note 6.

¹⁴*See* runway.blogs.nytimes.com/2010/08/05/schumer-bill-seeks-to-protect-fashion-design/?partner=rss&emc=rss

¹⁵*Supra*, notes 4, 14.

¹⁶www.counterfeitchic.com/2010/08/introducing-the-innovative-design-protection-and-piracy-prevention-act.html

¹⁷*Supra*, note 16.

¹⁸*Supra*, note 16.

¹⁹*Supra*, note 16.

²⁰*Supra*, note 16.

²¹*Supra*, note 16.

²²*Supra*, note 16.

²³*See supra*, note 4.

²⁴*See supra*, note 4.

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licly funded construction projects, particularly when a contract was awarded to a nonunion contractor. They may even interview workers to determine whether the Davis-Bacon Act or a state or local equivalent is being violated. Employees, too, may report violations or enforce the Davis-Bacon Act through a civil lawsuit.

When it comes to penalties, an employer found to have violated prevailing wage requirements or failed to maintain records as required under the Davis-Bacon Act can face contract termination, debarment from future government contracts for up to three years, and the withholding of contract payments to satisfy any unpaid wages. Other potential damages under various prevailing wage statutes may include fines, penalties, liquidated damages, and an award of attorney's fees. Under some statutes, willful violations can result in criminal sanctions including imprisonment.

It is a challenging time to be in the construction industry. Nailing down the proper classifications by correlating the actual tasks performed by the worker to the statutory hourly base wage and fringe benefit rates applicable at the time the bid is solicited, will assist contractors in successfully navigating the prevailing wage laws. **TFL**

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