

Labor Department's Davis-Bacon Act Final Rule: Changes for Federal Contractors

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The U.S. Department of Labor's (DOL) [Updating the Davis-Bacon and Related Acts Regulations](#) final rule includes hundreds of pages of changes to the Davis-Bacon and Related Acts (DBRA) standards and is estimated to impact over 1 million construction workers. The final rule will go into effect on October 23, 2023.

The DOL also published [Frequently Asked Questions](#) on the final rule.

While compliance with the DBRA will be more complicated for employers, the DOL advises that the updates come after "an increased number of federally funded projects," as well as the need to "provide clarity to contracting agencies, contractors, and workers, to enhance the effectiveness and consistency of the administration and enforcement of the DBRA."

All contracting agencies and contractors should review the final rule in its entirety.

Does the DBRA Apply?

The [DBRA](#) applies to federal contractors and subcontractors performing on contracts in excess of \$2,000 for construction, alteration, or repair of public buildings or public works and requires employees be paid no less than local prevailing wages and fringe benefits for corresponding work on similar projects in the area.

While the final rule does not modify the types of projects subject to DBRA standards, it provides several clarifications regarding the types of industries subject to the DBRA. Still covered under the DBRA are:

- Solar panels, wind turbines, broadband installation, and installation of electric car chargers if they are built as a part of a contract with a federal agency or otherwise covered by a Related Act;
- Demolition and removal activities when such activities in and of themselves constitute construction, alteration, or repair of a building or work;
- Survey crews and flaggers who perform primarily physical or manual work while employed by contractors or subcontractors on a DBA- or Related Acts-covered project on the site of the work immediately prior to or during construction in direct support of construction crews; and
- Delivery drivers for onsite time related to offsite delivery if such time is not de minimis. The DOL has issued guidance to determine if a project is de minimis.

New Provisions: How They Apply

Key revisions include:

New Definition of “Prevailing Wage.” The DOL has redefined the term “prevailing wage” and returned to a three-step process for determining what the prevailing wage will be for certain classifications in certain geographic areas. First, if the majority of workers in the classification in the area (both union and non-union) are paid the same rate, that rate is the prevailing wage. Second, if no majority rate exists, then the wage rate paid to at least 30 percent of workers in the classification in the area will be the prevailing wage. Third, if no wage rate is paid to at least 30 percent of workers, then the weighted average rate in the classification is considered to be the prevailing wage. This modification in calculating the prevailing wage (or wage floor) will likely lead to higher pay for employees.

Adjustments for Non-Collectively Bargained Rates. The final rule adds a provision for periodically adjusting certain non-collectively bargained rates. These periodic updates will be based on total compensation data from the Employment Cost Index data published by the Bureau of Labor Statistics. The DOL provides that these rates may be adjusted no more than once every three years, no sooner than three years after the date of the rate’s publication, continuing until the next survey results in a new general wage determination.

Adoption of Wage Rates Set by State and Local Governments. A new provision allows the DOL to adopt wage rates set by state and local governments under certain circumstances. To do this, the DOL explains that four criteria must be met:

1. The state or local government must set prevailing wage rates, and collect relevant data, using a survey or other process that generally is open to full participation by all interested parties.
2. The state or local wage rate must reflect both a basic hourly rate of pay and any locally prevailing bona fide fringe benefits, and each of these can be calculated separately.
3. The state or local government must classify laborers and mechanics in a manner that is recognized within the field of construction.
4. The state or local government’s criteria for setting prevailing wage rates must be substantially similar to those the DOL administrator uses in making wage determinations.

Codification of Annualizing Fringe Benefits. The final rule codifies the requirement that fringe benefits should be annualized. Annualization, according to the DOL, “prohibits contractors from using fringe benefit plan contributions attributable to work on private projects to meet their prevailing wage obligation.”

Increased Recordkeeping Requirements. The final rule requires that payroll and other basic records be maintained for at least three years after all work on the prime contract is completed. It adds that the last known telephone number, email address, correct classification(s) of work actually performed, and hours worked in each classification must be kept on file for each worker.

Anti-Retaliation Provisions. The final rule includes an anti-retaliation provision intended to improve the DOL’s enforcement mechanisms, employer compliance, and relief to make workers “whole” following retaliation resulting from a DBRA complaint. Added remedies include:

- Reinstatement to former employment;
- Front pay, back pay, and interest;
- Compensatory damages; and
- Posting of a notice to workers that the contractor/subcontractor agrees to follow the DBRA requirements. *The final rule updates the standard poster to include anti-retaliation information.*

Wage Determination in Current Contracts

Under the final rule, for contracts created on or before October 23, 2023, current wage determinations will apply for the life of the contract. However, according to DOL guidance:

if a contract is modified to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order or requires the contractor to perform work for an additional time period not originally obligated, then the most recent version of any applicable wage determination(s) must be incorporated into the contract.

Additional Compliance Assistance

A Jackson Lewis [webinar on the DBRA final rule](#) will be held on Sept. 28, 2023.

Jackson Lewis attorneys are available should contracting agencies or contractors have questions regarding the final rule or its implementation.

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