

Prevailing Wage Compliance Overview

Presented by Sam Melamed



Session Objectives

Discuss compliance issues related to David-Bacon

- Apprenticeship
- Site of Work
- Drivers
- Helpers

Session Objectives

- Fringe benefit compliance landscape
- Compliance specifics for allowable Fringe Benefits
 - Health
 - HRA/HSA
 - Ancillary
 - Retirement
 - SUB
 - PTO
 - Apprenticeship programs
 - Wellness benefits

Session Objectives

- Most common mistakes and audit issues
- Differences in funded and unfunded plans
- Review the correct methods for taking credit off the fringes for benefits that you offer
- Healthcare Reform and it's impact
- Where to learn more

Davis-Bacon Act and Related Acts

- Enacted in 1931
- Requires prevailing wages to be paid on all federal contracts over \$2,000
- Fringe Benefits included in the 1964 amendment
- Applies to projects that have limited federal funding but meet the \$2,000 requirement

Increased Compliance Enforcement

- Budget increase request of 16% in 2015
- Hired hundreds more auditors in FY 2015
- 300 of 305 new employees will be investigators/auditors
- “Law Enforcement Organization”
- Directed Investigations
- Auditors are using sweeps; general contractors are liable for every tier of subs

Increased Compliance Enforcement

- 1,000+ investigators in 2013
- 33,146 compliance actions
- W&H goal of debarring 90 companies this year compared to 10-20 in past years
- Public database of violators is available online (Not updated in real time)
- http://ogesdw.dol.gov/views/data_summary.php

Site of the Work

- Davis-Bacon applies only to laborers and mechanics employed “directly upon the site of the work”
- A three-part definition applies to determine the scope of the term “site of the work”

Site of the Work Definition 1

- DB applies only to workers on the “site of the work”
 - The physical place or places where the construction called for in the contract will remain after work has been completed; and,
 - Any other site where a **significant** portion of the building or work is constructed, *provided that* such site is established specifically for the contract

Site of the Work Definition 2

- “Site of the work” also includes job headquarters, tool yards, batch plants, borrow pits, etc., *provided* they are:
 - Located adjacent or virtually adjacent to the “site of the work” described in paragraph 1; and
 - Dedicated exclusively (or nearly so) to the performance of the contract or project

Site of the Work Definition 3

- “Site of the work” does not include:
 - A contractor’s or subcontractor’s permanent home office, branch locations, fabrication plants, tool yards, etc.; or
 - A contractor or subcontractor whose location and continuance in operation are determined without regard to a particular covered project.

Definition 3 part 2

- Also not included in the “site of the work” are:
 - Fabrication plants, batch plants, job headquarters, tool yards, etc., of a commercial supplier established by a supplier of materials
 - Before the opening of bids for a project, and
 - Not located on the actual site of the work
 - Such permanent, previously established facilities, are not part of the “site of the work,” even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract

Truck Drivers

- Covered by Davis-Bacon when driving on the site of work
- Covered when driving from locations that are considered “site of work” to the actual worksite
- Covered when unloading at site of work unless the loading or unloading is truly minimal
- New owner operator position

Apprenticeship Programs

- Davis-Bacon allows credit against the fringe for ***approved apprenticeship programs***.
 - Annual cost divided by annual hours (2,080)*
 - Credited to the employee enrolled
 - Ratio based on the program's rules

*varies by state

Helpers

- May be employed if:
 - Duties are clearly defined and distinct from other classifications on the wage determination
 - There is an established prevailing practice in the area,
 - They are not employed in an informal training program

Overtime Issues

- Time and a half of base wage
- Assessed on daily and weekly overtime counts
- Weekend and holiday wages differ

Employer Decides How to Satisfy the Wage Obligation

Contractors typically pay the “base” amount in cash and then choose how to pay the “fringe” portion:

1. For vacation and holidays;
2. Into an approved apprenticeship program;
3. Furnish “bona fide” fringe benefits; or
4. As cash, and have it treated as wages

On Federal projects Contractors may dip into the base to level the wages as long as they pay a base higher than minimum wage

Allowable Fringes Statute

- 29 CFR § 5.5(a)(1)(iv)
- The fringe benefits enumerated in the Davis- Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits

What Makes a Fringe Benefit Plan “Bona Fide?”

- Specified in writing and communicated to covered employees (technically only applicable to unfunded plans)
- Irrevocable contributions
- Contributions made to a third party or trust
- Convey a benefit to the person actually performing the work
- Are made regularly, not less often than *quarterly*
- Accounted for on an hourly basis
(weekly payroll reporting form WH347)

Allowable Fringes

Health Insurance

- Davis-Bacon allows credit against the fringe for health insurance
- Payment must be made directly to the insurance company or a third part or trust
- HRA, HSA and Gap plans are allowable fringes as long as they meet the vesting requirements
- Wellness programs and smoking cessation plans can be considered a bona fide fringe if they meet the outlined standards

ACA and Fringes

- Wage and Hour division is working on a document detailing their positions
- Expect no major changes
- Penalties are not creditable
- Expectation is that defined contributions to exchanges will be creditable
- Rates will mostly rise, reducing pension contributions

ACA and Fringes

- Age banded rates are a new problem
- Contractors may not average the costs
- TPA's are allowed to do averaging
- ABC request is pending
- Partially self-funded plans are one option

Allowable Fringes Ancillary Benefits

- Dental insurance
- Vision insurance
- Hearing insurance
- Employee Assistance Programs (EAP)
- Disability insurance (Short-term and long-term)
- Life insurance
- Critical Illness and accident plans

Allowable Fringes Retirement Plans

- 401K
- Money Purchase
- Simple IRA
- ESOP (Under very specific circumstances)
- Traditional pension plan
- Profit-sharing plan (Must make estimated payments)

Allowable Fringes Retirement Plans

- Exempt from annualization with essentially immediate vesting
- Utilize Schedule A to “discriminate”
- Credit based on actual contributions made
- May turn on and off at any time
- Plan design can be specific to your circumstances:
 - **“The Boost”** - Helps increase HCE contributions
 - **“The Offset”** - Use fringe to satisfy profit sharing and save more money!

Prevailing Wage Retirement Plan Must Have:

- Immediate eligibility and immediate entry
- NO last day of plan year employment requirement
- NO minimum hours requirement to receive contribution
- Immediate 100% vesting (or essentially immediate)
- Contributions no less often than quarterly

Allowable Fringes

Supplementary Unemployment Benefits (SUB Plans)

- Exempt from annualization
- Exempt from FICA
- Can only disburse when employee is laid off
- Appropriate for contractors with consistent downtime
- May be exempt from state income tax
- Employees receive 1099
- Includes federal income tax withholding

Allowable Fringes

Vacation/Holiday/PTO

- Generally considered an unfunded plan
- Best practice is to segregate the funds
- Must comply with the following:
 - Reasonably anticipated to provide benefits
 - Financially responsible plan
 - Legally binding agreement
 - Communicated in Writing

Allowable Fringes

Apprenticeship Programs

- Bona Fide apprentice program
 - Recognized by the State Agency approved by ETA
 - Recognized directly by ETA
- Only costs actually incurred
- Trade specific
- Tuition, books, tools and materials

Sample Wage Determination Electrician in California



BASE
WAGE + Training

+

FRINGE
BENEFIT

\$41.30

\$13.65

TOTAL HOURLY WAGE

\$54.95

One Problem When Performing Government Work....

Many contractors pay some or all of the mandatory fringe benefit package as wages because it is the easiest way to satisfy DOL compliance. It is also the most costly method...

Why?

All cash wages subject to payroll burden:

FICA	7.65%
FUTA & SUTA*	2%
General Liability*	2% - 15%
Workers' Comp*	5% - 30%

The actual payroll burden can be 11%-40%
This increases your labor costs

*varies by company & state

How It Works...

Pay Fringe in Paycheck

Base Wage	\$41.30
Fringe	<u>\$ 13.65</u>
Total Wage	\$54.95
Payroll Burden (20%)	<u>\$ 10.99</u>
Bid Cost	\$65.94

Pay Fringe to “Bona Fide” Plan

Base Wage	<u>\$41.30</u>
Total Wage	\$41.30
Payroll Burden (20%)	<u>\$8.26</u>
“Bona Fide” Plans	<u>\$13.65</u>
Bid Cost	\$63.21

**\$2.73/hr
savings per
person**

Electrical Contractor

- About 75% of this contractor's work is government
 - 2,080 annual hours x 75% = 1,560 hours
- There are 25 hourly employees
- The hourly savings by removing the fringe from payroll is \$2.73
- The annual savings:
 - 1,560 hours x 25 EEs x \$1.38 hour = **\$104,470**



Calculating Benefit Credit for Group Medical and Ancillary Programs

- Take the annual employer cost
 - Divide by 2,080 hours per year*
 - Give hourly equivalent
- Concern is overtime hours, over-funding the benefit
- Alternative is to pay for benefits by hours worked

*varies by state and actual hours worked

Annualization Principle

- Applies to benefits of a continuous nature (*e.g.*, health insurance, defined benefit pension plans)
- Determine hourly rate of contribution that is creditable toward contractor's Davis-Bacon prevailing wage obligation by:
 - Dividing the total annual contributions by the total annual hours worked (both Davis-Bacon and non-Davis-Bacon work); and
 - Allocating fringe benefit credits so that Davis-Bacon work is not be used to fund benefits on private (non-Davis-Bacon) work



Hour Bank Example for John Doe

Month Worked	Month Benefit Provided	Hours Worked	Hourly Rate	Contribution Required	Hours of Credit Required	Depleted From Hour Bank	Hour Bank account
June	Aug	160	\$1.00	\$160	-130	0	30
July	Sept	180	\$1.00	\$180	-130	0	80
Aug	Oct	100	\$1.00	\$100	-130	30	50



Hour Bank Accounting Helps Because . . .

- The required hours of work credit will qualify an eligible employee (and his/her eligible dependents) for one calendar month of benefits
- Employees may accumulate hours of work credit for excess hours worked
- Prevents possible ineligibility under traditional programs
- Protects employees from layoffs, inclement weather, etc.
- Allows employees to bank months of health care
- Allows employer to pay only for actual hours worked

Calculating Benefit for Vacation & Holidays

- Davis-Bacon allows credit for Vacation & Holidays Paid
 - Annual cost divided by annual hours (2,080)*
 - Must be vested and pay out on departure
 - Auditors are getting very aggressive

*varies by state

Apprentice Rates

- Apprentice rates are a percentage of the base wage.
- Apprentice fringes remain the same as the job class unless specified differently in the apprenticeship document
 - Base \$24 Fringe \$6
 - 60% apprentice Base \$14.40 Fringe \$6
 - 75% apprentice Base \$18 Fringe \$6
- Number of apprentices allowed is an acceptable ratio to journeymen
- With too many apprentices, first on job are classified as apprentices

Common Cited Violations

- Misclassification of laborers and mechanics
- Failure to pay full wage for all hours worked
- Inadequate recordkeeping
- Overtime crediting
- Failure to maintain apprenticeship docs
- Certified payroll errors and timing issues
- Apprentice ratios (both ways)

ABC Survey

- Most members support repeal
- Most members just do a small amount
- 56% of those performing prevailing wage work have been audited
- Most concerned with Audit Trail

DOL Prevailing Wage Conferences

- Four more to be held this year
 - Chicago, April 1-3
 - San Diego, April 22-24
 - Houston, May 7-9
 - Atlanta, June 3-5
- Funding requests pending for other conferences
- Updates at <http://www.dol.gov/whd/govcontracts/PrevailingWageConferences.htm>
- Email list at whdpwc@dol.gov

Other DOL News

- Update to the Prevailing Wage Resource Manual was released in September
- Prevailing Wage webinars are posted online, including slides and video
- <http://www.dol.gov/whd/recovery/>

State and Municipal Differences

- Generally based on federal rules
- Exceptions abound
- Large spread in expertise level
- PTO and apprenticeship treatment varies
- Some additional benefits allowed
- Fringe portion paid as wages must pay time and half for overtime in some states

States with Prevailing Wage Laws

- Alaska, Arkansas, California, Connecticut, Delaware, DC, Hawaii, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, Wyoming

ABC Insurance Trust

Prevailing Wage Expertise

- Compliance assistance available
- Audit support for IRS, DOL, GC, local compliance officer inquiries
- Assist with certified payroll reports, fringe benefit statements, wage determinations, etc.
- Industry experts on staff in Washington, D.C.

Important Links

- Violation Database
http://ogesdw.dol.gov/data_summary.php
- Certified Payroll Exercise
http://www.dol.gov/whd/PDF/Certified_Payroll_Exercise_ver_Sept2011.pdf

Important Links

- DBRA FAQ's
<http://www.dol.gov/esa/whd/programs/dbra/faqs.htm>
- DOL Wage & Hour Division <http://www.dol.gov/esa/WHD>
- DOL Davis Bacon Fact Sheet
<http://www.dol.gov/esa/whd/regs/compliance/whdfs66.pdf>
- Wage determinations on line <http://www.wdol.gov>
- Selecting the appropriate construction type (see section 4b) <http://www.wdol.gov/usrguide/sectionc.aspx#c4b>
<http://www.dol.gov/esa/whd/programs/dbra/docs/memo-131.pdf>

Important Links

- Selecting a wage determination
<http://www.wdol.gov/dba.aspx#0>
- Wage rate posting requirements
<http://www.dol.gov/esa/whd/programs/dbra/wh1321.htm>
- Performing a review of certified payrolls
<http://www.dol.gov/esa/whd/forms/wh347.pdf>
- Conducting labor interviews
<http://www.gsa.gov/portal/forms/download/115910>

Important Links

- DOL employment law guide
<http://www.dol.gov/compliance/guide/dbra.htm>
- Davis Bacon Reference Material
<http://www.gpo.gov/davisbacon/referencemat.html>
- Prevailing Wage Resource Book
<http://www.dol.gov/esa/whd/recovery/pwrb/toc.htm>
- DOL wage and Hour Division ARRA website
<http://www.dol.gov/esa/whd/recovery>

Need Legal Assistance?

Contact Maury Baskin

ABC General Counsel

Littler Mendelson, PC

202.772.2526

MBaskin@littler.com



Thank you!

Questions & Answers

For more information
contact Sam Melamed at
202-595-1757 or email
Melamed@abc.org

