

DAVIS-BACON ACT

COURSE OUTLINE

1. Contract Work Hours and Safety Standards Act

- Application
- Liquidated Damages
- Statute of Limitations

2. Copeland Anti-Kickback Act

- Application
- Requirements
- Penalties

3. The Miller Act

- Provisions
- Application
- Statute of Limitations

4. Davis-Bacon Act

- Provisions
- Application
- Wage Determinations
 - Types of Wage Determinations
 - General Wage Determinations
 - Project Wage Determinations
- Application
 - Establishing a Wage Determination
- Wage Rates
 - Basic Wage Rates
 - Fringe Benefits
- Classification
 - Area Practice
 - Conforming Additional Classifications
 - Apprentices and Trainees
- Definitions
- Statute of Limitations

Administration

Department of Energy Responsibilities

- Determine Davis-Bacon Coverage

- Contract Clauses and Wage Determination

- Educating Contractors

- Project Inspector Investigations

- Formal Investigations

- Withholding of Funds

Department of Labor Responsibilities

- Write Regulations and Procedures

- Formal Investigations

- Resolve Appeals

- Area Practice Surveys

INTRODUCTION

Labor standards legislation has been enacted by Congress for the purpose of providing a minimum level of income to employees for the work they perform, and to protect local wage scales of various classes of employment. Laws of this type, such as Davis-Bacon, have had a secondary purpose that is to eliminate the payment of low wages as a means of competition among contractors.

Other labor laws have been passed to control the number of hours worked by employees on a daily or weekly basis. The basic reason for this type of legislation is to encourage the spreading of employment to additional workers by placing a financial penalty on the employer for long work weeks.

Such acts are considered to be protective or remedial legislation. In interpreting them, the courts have generally constructed coverage on a broad basis to bring as many people as possible under their protection. Exemptions, on the other hand, have been construed narrowly as they remove employees from the protection provided.

These laws all have a common focus in their implementation. It is the responsibility of the employer not the employee, to comply with the requirements. Therefore, the applicable regulations all point to the actions which the employer must or shall do.

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

PROVISIONS

The contract Work Hours and Safety Standards Act (CWHSSA) was passed in 1962. Among its provisions, it consolidated a number of "eight hour" laws, some dating back to the 1890's, which provided for overtime pay after eight hours per day on Federal construction contracts. It required time and one-half to be paid for all hours worked in excess of eight per day and forty per week. It was amended in 1986 and the requirement for overtime compensation in excess of eight hours per day was deleted.

The purpose of Federal overtime requirements has been to place a financial burden on the employer for working employees very long hours. By doing this, the employer is encouraged to hire additional workers rather than using a lesser number. This has been a method employed by the government to reduce unemployment.

APPLICATION

This act is applicable to Federal construction contracts over \$100,000. It is also applicable to Federally assisted construction contracts containing Davis-Bacon wage standards to which the Federal Government is not a direct party, except where the Federal assistance is only in the nature of a loan guarantee or insurance. HUD provides a considerable amount of assistance of this type under the National Housing Act. All employees subject to Davis-Bacon requirements are covered under the overtime provisions of CWHSSA. Watchmen and guards are also covered, but other employees are not.

CWHSSA is also applicable to employees performing work under the Service Contract Act (SCA). This is on the same basis as under Davis-Bacon, being applicable to laborers, mechanics, watchmen and guards but not other employees. As SCA contracts involve a wide variety of services, many employees will not be covered under the CWHSSA requirements.

OVERTIME REQUIREMENTS

Overtime pay is required at a rate not less than one and one-half times the basic rate of pay for hours worked in excess of forty per week. In addition, liquidated damages may be assessed of ten dollars per day for each employee who was

not paid the proper overtime. The basic rate of pay for overtime computations cannot be less than the basic rate of pay required for the appropriate classification of work performed. If a higher rate is paid, it must also be used to determine overtime compensation.

Overtime compensation must be computed as a multiple of an hourly or hourly equivalent rate of pay. Compensation which is a single amount for the performance of a task or unspecified work time cannot qualify as an overtime payment. In addition, overtime pay which exceeds statutory requirements for one period of time may not be credited toward overtime required during a different period of time.

LIQUIDATED DAMAGES:

The Contract Work Hours and Safety Standards Act contains provisions for the assessment of liquidated damages in the amount of \$10 per day for each employee who does not receive the proper overtime compensation required under this law. The amount of damages assessed is in addition to any restitution of overtime wages that may be found payable to employees of the contractor.

The head of the contracting agency has the authority to review administrative determinations of liquidated damages and issue a final order affirming the determinations. If the head of the agency finds the liquidated damages are incorrect or the contractor or subcontractor inadvertently violated the act, after exercising due care, he may recommend to the Administrator of the Wage and Hour Division of the U. S. Department of Labor an appropriate adjustment or that the contractor or subcontractor be relieved of liability. The Administrator will make the final determination of damages due.

STATUTE OF LIMITATIONS

The statute of limitation under the Portal-to-Portal Act that is applicable to the Davis-Bacon Act is not applicable to CWHSSA. Instead, actions under CWHSSA are subject to the general limitation for contract actions against the government that is 6 years

COPELAND ACT

PROVISIONS:

"Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecuting, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract employment, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

The Copeland Act does not have wage requirements such as Davis-Bacon. Instead, it is a criminal statute providing punishment for actions of contractors or others who deprive employees of their earnings from Federal projects. There is no administrative relief under this law such as restitution.

ADMINISTRATION:

Each contractor must submit a weekly payroll for all laborers or mechanics employed on a project subject to Davis-Bacon. The payroll must contain a 'Statement of Compliance' signed by the contractor or agent who pays or supervises the payment of the people employed under the contract. This shall certify that each laborer or mechanic has been paid the full weekly wages earned without rebate or illegal deduction and not less than the applicable wage rates and fringe benefits for the classification of work performed.

The contracting agency or the Department of Labor does not prosecute an employer for violations of the Copeland Act. This is done by the Department of Justice. However, it will be either the contracting agency or the Department of Labor that will develop information concerning possible violations of this law and submit this along with recommendations to the Department of Justice for action.

THE MILLER ACT

PROVISIONS

Before award of every contract in excess of \$25,000 with the United States for construction, the contractor must furnish a performance bond and a payment bond for the protection of all those supplying labor and materials. Any person who provides materials or labor to the prime or a subcontractor on the bond-covered project and who is not paid within 90 days of the last day of performance may sue on the bond.

APPLICATION

The Miller Act imposes strict notification and statute of limitations requirements on those claiming under it. Written notice of the existence of a claim must be given by registered mail to the prime contractor within 90 days of the last day of performance. All suits to recover under the Miller Act must be commenced within one year after the last date of performance in the federal district court in which the contract was to be performed and executed. The individual laborer must bring the action in the name of the U.S. for his/her benefit **and the suite is prosecuted by the worker's own attorney.**

STATUTE OF LIMITATIONS

The Portal-to-Portal Act two year statute of limitations applies to action for recovery of wages under the Davis-Bacon Act. A Miller Act suite for recovery of Davis-Bacon wages is covered by this limitation. However, "willful" violations increase the limitations to three years.

DAVIS-BACON ACT:

PROVISIONS

The Davis-Bacon Act (DBA) was passed in 1931, amended in 1935 and again in 1964. It requires payment of locally "prevailing wages" and fringe benefits to laborers and mechanics employed on direct federal contracts in excess of \$2,000 for construction, alteration, or repair (including painting and decorating) of public buildings and public works.

All laborers and mechanics employed on or working on the site of work will be paid unconditionally and not less often than once a week, and without deductions or rebate on any account, the full amount of wages and fringe benefits due at the time of payment and computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Congress has extended Davis-Bacon prevailing wage requirements to some 60 so called related acts which provide Federal assistance for construction through grants, loans, loan guarantees and insurance, rather than direct contracts for construction with Federal agencies. The related acts include by reference, the requirements for payment of prevailing wages in accordance with the Davis-Bacon Act.

On direct Davis-Bacon projects an agency of the Federal Government usually signs the contract. On the related acts, an agency other than the Federal Government signs the contract. These include local housing authorities, public works authorities, cities, and state highway departments.

APPLICATION

DBA applies to all contracts, in excess of \$2,000, for the construction, alteration, or repair, including painting and decorating of public buildings or public works. This includes all utility systems within or attached to the building, e.g. power, gas water, communication, heating, air conditioning, etc. (Reference FAR 22.402(a)).

It will also apply to some non-construction contracts involving some construction work under specific conditions. (Reference FAR 22.402(b)).

- the construction work is to be performed on a public building or work
- the requirement for construction is at least \$2,000

- the construction requirements are substantial in relation to the contract, comparing type and quantity of work, not just the total value of the contract and the construction work
- the construction work is physically and functionally separate from other contract work

Regularly scheduled routine and recurring maintenance of a facility is not construction. It is maintenance service subject to the Service Contract Act (SCA). Facility support services contracts typically have both maintenance services and construction requirements. DBA typically will apply to the construction activities

Demolition work is subject to DBA if the demolition will be followed in the foreseeable future (within a five-year plan) by a construction effort on that site. This can be under the same or a separate contract. Demolition that is not followed by a construction effort is subject to SCA provisions.

Carpet laying that is a part of original, remodeling or renovation construction is subject to DBA. The replacing of existing carpet because it is no longer serviceable is not construction and SCA is applicable.

Soil boring contracts are considered covered by DBA if they are directly related and incidental to, or an integral part of, the actual construction process. Contracts for the formulation of engineering plans and specifications, designs, and site investigations are part of the preliminary work and are not part of the construction process.

WAGE DETERMINATIONS:

Wage determinations for Davis-Bacon and Related Act projects are issued by the Administrator of the Wage and Hour Division, U. S. Department of Labor (DOL). Each contains the minimum basic hourly wage and fringe benefits applicable to the individual employee classifications contained within it.

Types of Determinations

There are four types of construction. Each wage determination will cover one or more of the following types of construction. (Reference FAR 22.404-2(c))

Building - Sheltered enclosures with walk-in access.

Residential - Single family houses or apartments, four stories or less. Dormitories or hotels are not considered residential construction.

Highway - Paving (e.g. roads, streets, runways, alleys, and parking areas)

Heavy - All others (e.g. bridges, dams, dredging, and tunnels).

General Wage Determinations

General wage determinations are most common for construction projects in large and medium size metropolitan areas. These may also be applicable in other areas where construction trade unions have substantial strength or there is enough activity to justify the issuing of this type of determination.

General wage determinations are issued by DOL and published by the Superintendent of Documents. They are available on line at www.wdol.gov. Notices are published each Friday in the Federal Register by DOL listing new and modified wage determinations issued that date. (Reference FAR 22,494-2(a)).

Project Wage Determinations

Project wage determinations are issued at the request of the contracting agency for specific projects, where no general wage determinations are applicable. The agency prepares a SF-308, Request for Project Determination, and submits it to DOL. They may only be used for the project listed on the request. If the contract is not awarded within 180 days of the issue date, the wage determination expires. Project wage determinations are usually found in non-metropolitan counties or areas where there has not been sufficient Federal construction to make the issuing of a general wage determination necessary.

Project or general wage determinations included in a contract are effective for the duration of the contract, regardless of the length of time.

Application of Wage Determinations

Wage determinations are applicable to all projects subject to Davis-Bacon requirements. The contracting agency is responsible to insure the proper wage determinations are incorporated into bid specifications and contract. All modifications of a general wage determination shall be effective for any project to which the determination applies if published before contract award. For contracts entered into pursuant to competitive bidding procedures, modifications published less than 10 days before the opening of bids shall be effective unless the agency finds there is not a reasonable time still available, before the opening of bids, to include them in the specifications. (Reference 29 CFR Part 1.6(c)(3)(I))

DOL has issued a memorandum directing agencies to incorporate the most current DBA WD into contracts with options to extend the term of the contract at the time of each modification to exercise that option.

Projects with residential or building schedules may include incidental work such as site preparation, parking areas, sidewalks, utilities and grading work. Such work will carry

the same schedule as the overall project, unless the work is more than incidental. If more than 20% of the project will involve work of a different character than the primary portion of the project, include a second schedule of rates for that type of work.

If demolition is followed by construction, DBA is applicable to the demolition contract. It should contain the same WD schedule that will be applicable to the follow-on construction. **Demolition is considered to be followed by construction if construction is expected to follow demolition with five years.**

Challenged Wage Determinations

The Department of Labor Wage Appeals Board has determined that government contractors must challenge the accuracy of prevailing wage determinations before bid opening and award.

Letters of Inadvertence and Modifications

Upon the Labor Department's own initiative or at the request of the contracting agency, the Administrator, Wage and Hour Division, may correct any wage determination found to contain clerical errors. Such corrections shall be effective immediately and shall apply to any solicitation or active contract. (Reference 29 CFR Part 1.6(d).

If an award is not made within 90 days after bid opening, any modification to a general wage determination, notice of which was published in the Federal Register before award, shall be effective for any resulting contract unless an extension of the 90-day period is obtained from the Administrator, Wage and Hour Division. An agency head or a designee may request such an extension. Any request for extension must contain adequate justification (Reference 29 CFR Part 1.6(c)(3)(iv).

Establishing a Wage Determination

Wage determinations are based on surveys conducted by the Department of Labor. The survey will usually cover a single county. In some circumstances it may be extended into a larger area. This could include an entire metropolitan area or a group of rural counties that must be combined to accumulate sufficient projects for a survey. Rural and urban counties cannot be included within the same survey. Wage determinations are made to insure the payment of locally prevailing wages on federally funded construction projects. The prevailing wage shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the Classification, the 'prevailing wage' shall be the average of the wages paid weighted by the total number employed in the classification."

A general wage determination when issued will contain as complete a listing of crafts as can be accumulated from the available data. Since a general determination is intended for use on many projects and should be effective for a prolonged period of time, it is necessary that it be as complete and current as possible. To avoid the issuing of supersedeas determinations frequently, general determinations are modified from time to time so current changes in wages paid, such as wage accelerators in negotiated rates, become the prevailing wages.

Project determinations are requested by the contracting agency for a specific construction project where a general determination is not available. The process for establishing this type of determination is the same as that for a general determination. The contracting agency will request the crafts needed and data will be gathered only on those crafts. When the determination is issued, it will normally not include additional crafts. These determinations are good for 180 days from date of issue. If not used within that period of time, they are void. The contracting agency may request an extension instead of waiting for a new decision to be issued.

WAGE RATES

The wage rates contained in a determination consist of basic hourly amounts of pay plus fringe benefits if required for each classification of work. These are the minimum rates that shall be paid by the employer for work performed on the project. Payment of a higher rate is not prohibited and is a matter of policy of the firm or agreement between the employer and employees.

Although precise hourly rates and fringe benefits are specified in the wage determination, the employer may vary these individual items as long as the total hourly amount paid for each class of work is equal to that required in the contract. Care must be taken to ensure the employees receive the full amount due.

The payment of the fringe benefit amount required is an area that can be very simple for the employer to properly. It also may be quite complex due to the practices of the firm. (Reference 29 CFR Part 5.20 - 5.31)

Three methods are normally employed for making fringe benefit payments. Employers who have agreed to collective bargaining contracts pay the fringe benefits into union sponsored trust funds. These amounts usually equal or exceed the requirements in the wage determination and the employer satisfies this stipulation.

Contractors who do not have negotiated agreements, and therefore do not pay into the above type of funds, must find an alternate method of satisfying the requirements. Payments of the fringe benefits directly to the employee in cash is the most straightforward method available. By paying this each week along with the wages earned, the employer does not accumulate any liability.

The last method used is payment into the employer's fringe benefit plans. There are usually no problems using this method if the fringe benefits of the employer are controlled by a trustee or other third person. If not, the contractor must request a determination by the Secretary of Labor that the applicable standards of Davis-Bacon have been met. In addition, the contractor may be required to set-aside in a separate account assets for meeting the obligations of the plan or program.

Deductions from wages required by law, for prepayment of wages, those required by court process, to provide health care insurance or pensions, are among the common allowable deductions under Davis-Bacon. In addition the contractor may apply to the Secretary of Labor for permission to make any deduction not specifically allowed. Permission may be granted when it is found that the contractor does not make a profit from the deduction, it is not prohibited by law, it is voluntary or provided for in a collective bargaining agreement, and it serves the convenience and interest of the employee.

CLASSIFICATION

The Davis-Bacon wage rates required are based on the location of the project and the classifications of work performed. An understanding of how the classification of activities is determined and administered will assist the contractor in complying with Davis-Bacon requirements and also provide a way to hold labor costs down.

The prevailing rates are based on the practices in the area where a project is located. In the same manner, the classification practices are those which are used by the contractors whose rates prevailed in the wage determination.

When negotiated rates prevail, classification practices of the contractors who are a party to the appropriate collective bargaining agreements shall be used. Additionally, jurisdictional agreements among labor unions will be considered in establishing the correct classification to perform various tasks on a project. In those situations where non-union shop rates are contained in the wage determination, the practices of the employers who were in the survey will be used to properly classify employees.

It is the responsibility of the contractor to pay employees not less than the rate specified for the classification of work performed. Good judgment coupled with an understanding of the local classification practices will resolve most questions in an acceptable manner. In situations where additional data is needed, assistance may be obtained from the contracting agency, contractor associations, unions, or the Department of Labor. The decision of which wage rate is applicable still belongs to the contractor and will be final unless a determination by the contracting agency or the Department of Labor is different.

The contractor is required only to pay a specified rate for the work performed that falls within the applicable class. Therefore some flexibility exists which allows the employer to realize financial savings. If the majority of work performed falls within a skilled craft, it is not necessary to use that craft rate for all work performed. Work that is properly done by a lower paid craft or laborer classification may be paid at those rates. The employer is free to pay the rate applicable for the type of work performed regardless of whom does it. Of course collective bargaining or other agreements may limit the ability of the employer to exercise these options.

Inadvertent errors in classification seldom cause substantial Davis-Bacon violations. These usually involve a limited number of employees working at the incorrect rate. It is only when the employer fails to adequately evaluate the work to be performed or deliberately selects an incorrect craft with a low rate that major violations occur.

The contractor is responsible to prepare and keep accurate records of names and addresses of employees, hours worked, rates of pay, classification of work performed and all additions or deduction from wages. These records protect the contractor and provide information to the contracting officer and DOL necessary to ensure compliance with DBA requirements. (Reference WAB Case No. 76-6 Fry Brothers)

Conforming Rates:

"The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met: (Reference 29 CFR Part 5.5(a)(1)(ii)(A) and FAR 22.406-3).

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

The establishing of a conforming wage rate for a new classification of work is a matter of agreement. If the contractor, the employees, or their representatives, and the contracting officer agree upon the proper rate for a new classification, the contracting officer will submit this action to the Administrator of the Wage and Hour Division, U. S. Department of Labor. Under these conditions, the probability of the rate being approved by the Administrator is very high. The time for approval should also be short.

Should the parties not agree upon a classification and wage rate, the contracting officer must refer the questions, including all views of all interested parties and the recommendations of the contracting officer to the Administrator for determination. It usually takes longer for this type of situation to be resolved; therefore the contractor must proceed with an area of uncertainty concerning labor costs.

Whatever wage rate is finally determined appropriate, the contractor must apply that rate to all work performed on the project within the classification in question. It is in the best interest of the contractor to obtain the rate as soon as possible. This not only eliminates an area of uncertainty, but also reduces the risk of paying more than necessary for work performed with limited opportunity to recover the overpayment.

Apprentices and Trainees:

The employment of apprentices and trainees at rates less than those required for craftsmen on Davis-Bacon projects is permitted. Apprentices must be individually registered in an apprenticeship program registered with the U. S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau. Trainees must be employed pursuant to and individually registered and receiving on-the-job training in a program which has been approved in advance by the U. S. Department of Labor (Reference 29 CFR Part 5.5(a)(3)(iii)(4) and FAR 22.406-4).

The ratio of apprentices to journeymen in any craft classification may not be greater than the ratio permitted to the contractor as to the entire workforce under the registered program. The ratio of trainees to journeyman on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration.

Any worker listed on the payroll, as an apprentice, who is not registered, shall be paid not less than the rate contained in the applicable wage determination for the work actually performed. Any apprentice employed in excess of the applicable ratio shall be paid not less than the rate contained in the applicable wage determination for the work actually performed. When a contractor is performing construction in a locality other than that in which its program is registered, the ratio and wage rates (expressed as a percentage of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress expressed as a percentage of the journeyman's hourly rate specified in the applicable wage determination. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress expressed as a percentage of the journeyman's hourly rate specified in the applicable wage determination. Any trainee employed in excess of the applicable ratio shall be paid not less than the rate contained in the applicable wage determination for the work actually performed. Any worker listed on the payroll as a trainee, who is not registered, shall be paid not less than the rate contained in the applicable wage determination for the work actually performed.

Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed in the wage determination for the applicable classification. Trainees shall be paid fringe benefits in accordance with the provisions of the training program. If the training program does not specify fringe benefits, trainees must be paid the full amount of fringe benefits listed in the wage determination for the applicable classification.

Should an apprenticeship or training program have approval withdrawn by the Department of Labor, contractors can no longer employ apprentices or trainees at rates less than that in the applicable wage determinations for the work actually performed until an acceptable program is approved.

DEFINITIONS

Many Federal labor laws contain definitions of specific terms. The purpose is to identify precise meanings or terminology having significant impact on the administration of the law. Such definitions may not follow common usage, a situation that can cause some confusion. The following definitions are applicable to Davis-Bacon. They provide meaning to terms important to the contractor in performing work subject to the requirements of this law. (Reference 29 CFR Part 5.2 and FAR 22.401)

"The term 'contract' means any prime contract which is subject wholly or in part to the labor standards provisions of any of the acts listed in title 29 CFR part 5.1 and any subcontract of any tier thereunder let under the prime contract." Therefore any contractor performing work under the prime contract which is covered by labor standards is also subject to requirements of those same labor standards."

"The term 'labor standards' means the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other status listed in part 5.1 and the regulations in parts 1 and 3."

"The terms 'building' or 'work' generally include construction activity as distinguished from manufacturing, furnishing of materials, or services and maintenance work. The terms include without limitation, building, structures, and improvements of all types, . . .".

"The term 'construction', 'prosecution', 'completion', or 'repair' mean all types of work done on a particular building or work at the site thereof, all work done in the construction or development of the project, including without limitation, altering, remodeling, installation on the site of the work of items fabricated off-site, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work, by persons employed by the contractor or subcontractor."

"The term 'laborer' or 'mechanic' includes at least 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. The term 'laborer' or 'mechanic' includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual." "Working foremen who devote more than 20 percent of their time during the workweek to mechanical or laborer duties, and who do not meet the criteria of Part 541, are laborers and mechanics for the time so spent."

"Apprentice means (i) a person 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, or with a State Apprenticeship Agency recognized by the Bureau, or (ii) a person 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 Bureau of Apprenticeship and Training or a State Apprenticeship Agency to be eligible for probationary employment as an apprentice."

"Trainee mean a person 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."

"A helper is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice."

"Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion or repair of a public building or public work financed in whole or in part by loans, grants, or guarantees from the United States is 'employed' regardless of any contractual relationship alleged to exist between the contractor and such person."

"The term 'public building' or 'public work' includes building or work, the construction, prosecution, completion or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency."

SITE OF THE WORK, 29 CFR PART 5.2:

The 'site of the work' is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and as discussed in paragraph (1)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the 'site'." (Reference WAB Case No. 81-17 Midway Excavation)

"Except as provided in paragraph (1)(3) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc. are part of the 'site of the work' provided they are dedicated exclusively or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them."

The inclusion or exclusion of a specific work location as part of the "site of the work" can affect the wage requirements applicable to various parts of a project. Activities that the contractor can perform in a permanent facility, such as home offices, fabrication plants, and tool yards are not covered under Davis-Bacon requirements.

These exceptions to Davis-Bacon are limited. This is another area where the utilization of sound judgment by the contractor in evaluating the reality of the situation will result in proper decisions concerning work locations where prevailing wages must be paid.

STATUTE OF LIMITATIONS

The two-year statute of limitations contained in the Portal-to-Portal Act are applicable to DBA. However, a six-year statute of limitation is applicable to the "related acts", as they are not named in the Portal-to-Portal Act. **The American Recovery and Reinvestment Act of 2009 is a related act. The statute of limitations does not apply to administrative proceedings.**

ADMINISTRATION OF DAVIS-BACON

DEPARTMENT OF ENERGY

Administration and enforcement of labor standards on Federal construction projects varied widely among contracting agencies. To correct this situation, Reorganization Plan No. 14 of 1950 was implemented. The purpose of that plan was to provide more uniform and adequate protection for workers through consistent enforcement of existing legislation. This plan did not contain any new or expanded statutes.

This plan authorized the Secretary of Labor to coordinate the administration of legislation relating to wages and hour on Federally financed or assisted projects by prescribing standards, regulations, and procedures to be used in enforcement activities by the various Federal agencies involved. It also allowed the Department of Labor to make investigations in addition to those still to be made by the Federal agencies.

Reorganization Plan No. 14 is still in effect today. **The primary authority and responsibility for administration and enforcement of labor standards belongs to the contracting agency.** (Reference 29 CFR Subtitle A).

Administration

Davis-Bacon Act Coverage

The contracting or funding agency **shall** determine if a contract is covered under DBA and subject to the provisions of the statute (Reference 29 CFR Part 5.5a. This responsibility cannot be delegated.

Most contracts clearly fall within or outside of DBA. Thorough knowledge of what is considered construction and the activities to be performed under a proposed contract, coupled with sound logic and judgment will assure a correct determination in a preponderant majority of cases. (Reference DEAR 970.2204-1-1 and DOE Acquisition Guide Chapter 22)

There are always instances of close questions concerning DBA coverage. Some of these are applicable to contracts of many agencies. Others are unique to DOE and its facilities. When construction is performed within an existing facility, instances always arise about the jurisdiction of work belonging to employees working at that location and that which is a construction activity and subject to DBA.

Contract Clauses and Wage Determination Incorporation

The following FAR clauses must be incorporated into all solicitations and contracts in excess of \$2,000 for construction in the United States.

FAR 52.222-6 through 52.222-15

In addition, FAR Clause 52.222-4 must be incorporated into every contract for \$100,000 or more.

Contracts that are not primarily for construction may require some construction work to be performed. If this work meets the requirements under FAR 22.402(b), the contracting officer shall insert the above clauses into the solicitation and contract. **The contracting officer shall also identify the item(s) of construction work to which the clauses apply.**

The appropriate Davis-Bacon wage determination(s) must be incorporated into the solicitation and contract. If the contract includes multiple schedules, the contractors determine which schedule of prevailing wages applies to various construction items. Contractors are to be advised regarding the duties performed by the various crafts in

the wage determination, if they inquire. If two or more classifications may perform the work in question, an area practice survey may be required.

A modified general wage determination shall be effective if it is received by the contracting agency, or notice of the modification is published in the Federal Register 10 or more calendar days before the date of bid opening, whichever occurs first. If this occurs less than 10 calendar days before bid opening, the contracting officer shall incorporate the modified wage determination unless there is not reasonable time available before bid opening to notify the prospective bidders.

If an award is not made within 90 days after bid opening, any modification to a general wage determination, notice of which is published in the Federal Register before award, shall be effective for any resulting contract unless an extension of the 90-day period is obtained from the Administrator, Wage and Hour Division. An agency head or a designee may request such an extension. (Reference FAR 22-404-6(b)(6)).

Education of Contractors and Potential Contractors

Thorough enforcement by the contracting agency requires three types of activity focused on achieving compliance with labor standards requirements in construction contracts. These are education of contractors and potential contractors, project inspector investigations and full scale investigations.

Education of potential contractors is usually initiated in pre bid conferences. Labor standards requirements for the contract are presented to and discussed with potential bidders. Questions they may have are answered and they are advised the subject will be an item reviewed with successful bidders.

Because prevailing rates are specified in DBA contracts, potential bidders should be advised that they are expected to employ competent people on the project. Therefore, only the highest quality of work will be acceptable.

For those firms who are successful bidders, labor standards should be included as a topic in meetings held prior to the start of construction and during the life of the project. In addition, the contractors should be encouraged to seek information about labor standards where potential problems may exist.

Certified Payrolls

The prime contractor and all subcontractors are required to submit weekly completed certified payrolls for all employees working at the site of the work to the contracting officer. It is the responsibility of the prime contractor to obtain them from the subcontractors and provide them to the contracting officer. **If the certified payrolls are not received on a timely basis, the contracting officer shall withhold funds from the contract.**

Certified payrolls may be submitted on form WH- 347 which can be obtained from the Department of Labor. Instructions how to complete it are also available. The contractor is not required to use the form. However, all of the required information must be included in the certified payrolls submitted.

Apprentices

Each apprentice must be individually registered in an apprenticeship program approved by the U. S. Department of Labor Bureau of Apprenticeship and Training or an authorized state agency. The registration will identify the apprentice, the program he is enrolled in and the progression level at which he is to be paid. This must be provided to the contracting officer before the individual can legally work on the project at apprentice wages. Otherwise, the full journeyman wages must be paid for the work performed.

Enforcement

Guidance

Guidance for enforcement activities is contained in 29CFR Subpart A, 29CFR Part 5, FAR 22.406 through 22.406-13.

Project Inspector Investigations

Project inspector investigations are not an intensive fact finding function as are formal investigations. Rather, this is an ongoing monitoring of labor standards over the duration of a contract. Project inspectors are the individuals most able to provide continuing information gathering and evaluation of the day to day compliance of contractors with these requirements. (Reference 29 CFR Subpart A and FAR 22.406-7)

The project inspector must be informed of the labor standards requirements applicable to the contractors and that these provisions must be enforced as vigorously as other requirements of the contract specifications. He also must understand that maintaining compliance during the course of construction is in the best interest of the government and the contractor.

Following are the functions that would normally be performed by the project inspector in fulfilling the requirements to adequately monitor the labor standards requirements under Davis-Bacon and other applicable laws.

1. Include in project inspector daily reports the number and types of employees working on the project each day, starting and ending time of the workday and which employers had workers on the job.

2. Spot check weekly certified payrolls and time sheets to verify payment of correct wage rates for the various classifications of work, proper ratio of apprentices to journeymen on the project, and a reasonable relationship of skilled workers to laborers.
3. Take a reasonable number of employee interviews, oral and written, to verify hours worked, wages and fringe benefits received and duties performed by individual worker
4. Compare the information obtained from the above sources as a crosscheck on the level of compliance of the employer. If errors are disclosed which appear to be inadvertent and minor in nature, the contractor should be informed of them and that corrective action must be taken. Verify that the corrective action has been accomplished.
5. If violations are revealed which are of a serious or recurring type, the contracting officer must be immediately notified of these problems with sufficient detail that a decision can be made if a formal investigation should be conducted.
6. Complaints from employees shall be taken when requested. As much information as possible should be obtained at this time. In all instances the identity of the complainant and the information furnished shall be considered confidential.

Withholding of Funds

The contracting officer **shall** withhold funds if the contractor fails to promptly submit certified payrolls for its employees or those of its subcontractors. The amount will be determined by the contracting office that is necessary to protect the interest of the Government and the employees of the contractor or subcontractor. **This is a required action, not an optional one. (Reference FAR 22.406-6(b)**

Formal Investigations

The Department of Energy is responsible to conduct formal investigations. These are normally performed by industrial relations specialist or other individuals determined by the contracting officer to perform that function. This type of investigation will include sufficient fact finding to determine the status of compliance of the contractor and to make recommendations as to litigation or debarment actions against that company and its responsible officials. Common investigation steps are as follows: (Reference 29 CFR Subpart A and FAR 22.406-8)

1. Examine the contract, wage determination, posting requirements, certified payrolls, time and work records and daily inspection reports.
2. Check on conformity with apprenticeship requirements and for classifications of laborers or mechanics not listed in the wage determination.
3. Transcribe or copy payroll and other records as necessary.

As far as possible, the above should be completed prior to meeting with the contractor to formally open the investigation. The information obtained will often indicate the nature and extent of probable violations.

4. Initial employer interview. The initial employer interview is held with the highest official of the contractor who is available. This is held to inform the employer that an investigation is being conducted and the purpose is to determine compliance with Davis-Bacon and all other applicable labor standards requirements. In addition, at this time information should be obtained of the full legal name of the firm, trade names, address and full names of officers, owners and their titles. This is also the time to obtain names and addresses of sub-contractors and similar information that may be needed to complete the investigation.
5. Examine additional records of the contractor. These may include individual payroll records, time books or cards and logs of work performed on the project. The extent of additional record examination is often determined by the information obtained which prompted the investigation. Transcribe or copy records you will need to complete your investigation.
6. Employee interviews. Employee interviews are essential to a complete investigation. They should represent all classifications of work performed by the contractor and sufficient in number to provide a good sampling of the employees of the firm. The primary purpose is to establish the adequacy and accuracy of the records and nature and extent of violations. In situations where violations are believed to exist but cannot be determined from the records and interviews of present employees, former employees should be interviewed to help establish the status of compliance of the employer.

The employee should be informed that the information given is confidential and that it will not be disclosed to the employer without his written permission. Current employees are normally interviewed at the job site except in cases involving falsification of records or possible intimidation of employees. Under these conditions, the interview may be conducted at another location such as the employee's home or office of the agency. All employee interviews should

be conducted in private.

An interview statement should be prepared in most instances. It should record the information obtained in the manner stated by the employee; it should be read by him, and contain a statement that it has been read and that it is correct. The statement should be written in the first person and phrased in the employee's manner of speaking. The employee should sign the statement and the signature witnessed by the person conducting the interview.

In situations where no or minimal violations are disclosed, many of the employee interviews may be taken on an "oral" basis. The information should be summarized with each interview recorded separately. This will save substantial time for the agency employee and the worker.

7. Employees often inquire about provisions of the laws, compliance with those provisions by their employer and interviews of other employees. The employee has the right to be informed of the provisions of the laws and his rights under them. He may not be given information that came from the employer's records or another employee. Opinions should not be expressed as to whether any back wages are due an employee because of the violations by the employer.
8. Conclusion of the investigation. When the investigation is completed and a determination has been made of the employer's compliance or noncompliance, a conference shall be held with the employer or his designated representative. The employer is advised of the investigation findings and that these findings are based entirely on the facts and information disclosed by the investigation.

The employer must be advised the specific actions necessary to eliminate the violations, if any, and provided appropriate informational material. In cases that do not require further review, payment of restitution may be arranged. Such arrangements may not be made in cases where there is a dispute concerning the amounts due or where litigation is under consideration.

If violations under Contract Work Hours and Safety Standards Act are determined to exist, the employer must be advised that liquidated damages under this law may be assessed. He should not be told of the amount of such damages that have been computed.

9. Settlement of the investigation by restitution is the most common conclusion. Computation of the amount due may be made by the agency, or the employer may be requested to perform this task. Computations prepared by the employer must be reviewed by the agency prior to payment of the wages to the employees. It is helpful to have the employer make the computations, as this

can become a time consuming chore.

A summary of the amount due employees should be prepared and a copy provided to the employer. The employer is expected to make every reasonable effort to locate and pay employees the wages due. The agency shall advise the employer what proof of payment is required.

Wages that cannot be delivered are to be paid to the government. The employer should make a check to "Department of Labor - Wage-Hour" for the gross amount due the unlocated employees. This is forwarded to the appropriate regional office of the Wage-Hour Division along with a list showing names, last known, address, social security number and individual amounts due to the unlocated employees.

10. An investigation report shall be prepared and in all cases where willful violations are found or underpayment of \$1,000 or more is disclosed, the report shall be forwarded to the Secretary of Labor through DOE/HQ. Specific recommendations should be made in cases involving potential debarment, criminal action, or assessment of liquidated damages.

Withholding of Funds

The contracting officer **shall** withhold funds if the contractor fails to promptly submit certified payrolls for its employees or those of its subcontractors. The amount will be determined by the contracting office that is necessary to protect the interest of the Government and the employees of the contractor or subcontractor. This is a required action, not an optional one. (Reference FAR 22.406-6(b))

Following an investigation, a contractor or subcontractor may refuse to make restitution of wages due or refuse to assure future compliance. When this happens, the contracting officer **must** withhold from payments due the contractor an amount equal to the estimated wage underpayment and estimated liquidated damages due the United States under CWHSSA. Where future compliance is not assured, the estimate of funds to be withheld shall be projected to the end of the contract. (Reference FAR 22.406-9(a))

Funds available from the contract may not be sufficient to cover all of the wage underpayments and liquidated damages due. Fund will then be withheld from any other contract held by the same prime contractor subject to either DBA or CWHSSA requirements. This could include a request to other agencies having contracts with the same prime contractor.

Funds held that are in excess of the amount necessary to cover the estimated wage underpayment and liquidated damages should be returned to the contractor. However, if the funds were withheld at the request of DOL, they cannot be returned to the contractor without approval of that department.

Statute of Limitations

The Davis-Bacon Act is named in the Portal-to-Portal Act. Because of this, It is subject to a two-year statute of limitations. CWHSSA is not named and it is subject to the general six-year statute of limitations for contracts. The six-year statute of limitation is applicable to the related acts, including **The American Recovery and Reinvestment Act of 2009. These limitations do not apply to administrative proceedings. This would include appeals to the Administrator of the Wage and Hour Division, Administrative Law Judge hearings and appeals to the Administrative Review Board.**

Types of Violations:

Violations of Davis-Bacon and CWHSSA requirements occur in almost all construction contracts subject to these laws. The employer who intends to comply with the requirements usually will not have violations of a serious nature. They will be small and probably involve only a limited number of employees. The contractor who ignores or deliberately tries to evade the requirements will have serious problems of compliance with the labor standards stipulations of the contract. Among the more common violations are the following:

1. Misclassification of Employees:

The employer will select a classification of employee that has a low wage rate and is related to the type of work being performed.

2. Use of Apprentices and Trainees:

The employer will classify employees as apprentices or trainees who are not properly registered in these programs. In other instances, the employer will exceed the apprenticeship or trainee ratios to pay lower wages on the DB project.

Normally restitution of wages to excess apprentices is computed for the individuals who were the last ones hired on the project. If this is not possible to determine, restitution will be computed equitably among all of the claimed apprentices in weeks where the excess occurred.

Both of the above problems are ones that may be detected rather easily. Such

practices will often show up clearly on the certified payrolls of the employer. Other common violations occur frequently and are more difficult to detect

3. Use of employees not shown on certified payrolls:

Contractors will often have more employees on a project than appear on the certified payrolls. In this manner, they can pay them less than the required rates without having a record of them being on the job.

4. Reduction of or banking of hours:

Employees may work hours in excess of 8 per day or 40 per week on a project. The employer will show a reduced number hours on the certified payroll. The excess hours may be paid at a lower rate, not paid to the employee, or paid at straight time rather than overtime rates.

5. Reducing benefit payments:

Employers pay excessive amounts of wages into benefit funds that are used to cover other employee costs. This could include providing benefits to employees who do not perform DBA work. In some cases, benefits are structured in such a way that the employee will not be able to use them.

6. Considering work not subject to Davis-Bacon requirements:

Work performed at temporary facilities of the employer is paid at less than Davis-Bacon rates.

7. Falsification:

Deliberate violations of wage underpayment usually done with the records of the firm showing a picture of complete compliance.

8. Excessive fringe Benefit Payments

Employers contribute into fringe benefit plans only for work performed under Davis-Bacon requirements. Fringe benefit payments for DBA work cannot be used to cover period of non-DBA covered work.

Employers have devised elaborate plans to divert DBA fringe benefits into other purposes. Any benefit plan that appears unusual or excessive must be judged carefully against the criteria contained in 29 CFR Part 5.20 - 5.31.

Performance of duties

The contracting officer may perform all of the responsibilities under DB or delegate them. They may also be performed by an outside party under contract.

DEPARTMENT OF LABOR

Regulations

The first obligation of the Department of Labor was to establish standards and write regulations for the administration of labor standards. These regulations have been modified at various times to reflect statutory changes and administration policies. Changes to the regulations have generally not been drastic and they have withstood most challenges.

Investigations

The Department of Labor conducts investigations of contractors under the Davis-Bacon and related acts independent of those done by the contracting agencies. It may, at the request of the contracting agency, conduct an investigation of a specific contractor performing work for that agency. **However, it is highly probable DOL will cooperate with or assist DOE in conducting the investigation rather than doing this on an independent basis.** If a contractor is performing work for more than one agency, that would be a reason for DOL to honor a request to conduct the investigation on an independent basis.

The policies of DOL require that the contracting agency be advised if an investigation is to be done of one of its contractors. **The agency has the option to perform the investigation or allow DOL to do it.** If DOL does the investigation, it should invite the agency to participate in the opening conference with the employer and the conclusion of the investigation.

Appeal Procedures

DOL conducts administrative law Judge or administrative Review Board hearings concerning the Davis-Bacon Act. These usually result from investigations performed by it or the contracting agency. Recommendations by the contracting agency will be given consideration in determining if such action is appropriate. A contractor who wishes to contest a determination of non-compliance has the right to request a hearing to determine the accuracy of the decision. **DBA issues are not subject to the disputes clause of the contract.**

Note: Effective 17 April 1996, the Wage Appeals Board was eliminated, and jurisdiction passed to the Administrative Review Board

All Agency Memoranda

All agency memoranda are issued by the Administrator of the Wage and Hour Division to provide information of general interest to all Federal agencies concerning DBA. These are not issued at a scheduled time, but rather on an as-need basis. It is the responsibility of the individual agencies to ensure the internal distribution of these memoranda. Examples are under tab 10 of the course handout.

Area Practice Surveys

Disputes may arise concerning the proper classification of employees performing a specific type of work on a project. These often involve the use of laborers to perform a task claimed by a skilled craft. DOL will conduct an Area Practice Survey to determine the proper classification.

The survey will initially include the county where the project is located and be limited to projects of a similar nature active with the period of one year before the start of construction of the project in question. If sufficient information is not available, it may be expanded to surrounding counties and up to three years prior to the beginning of the project in question.

DOL will make one of two determinations based on the data provided. If a majority of employees performing the work are from a single craft, that craft will be determined to prevail and must be used on the current project. Should no craft have a majority of the workers performing the task or there are no projects of a similar nature, DOL will not decide which craft should perform the work. Instead, it will allow the contractor to select the craft to be used.

DAVIS-BACON WAGE SURVEYS

Responsibility

The responsibility to gather, evaluate, and analyze wage data for determination of prevailing wages under the Davis-Bacon Act belongs to the Wage and Hour Division of the U. S. Department of Labor. In addition, the Administrator of that division is responsible for issuing all general and project wage determinations under this law.