

# NOW & NEXT

## Labor & Employment Alert

AUGUST 11, 2023

### USDOL proposes biggest change to prevailing wage requirements in 40+ years

By Christopher J. Stevens and Vincent E. Polsinelli

The Final Rule is expected to mirror the Proposed Rule published in March 2022, which enjoyed support from labor unions, but faced opposition from the construction industry.



#### What's the Impact?

- / Prevailing wage rates will be calculated differently and are likely to increase.
- / Single-rate classifications will become the new norm for projects spanning multiple counties.
- / Workers will be expressly protected from retaliation arising from complaints about pay practices.

The United States Department of Labor (USDOL) announced that it will soon publish a Final Rule, updating the implementing regulations of the [Davis-Bacon Act](#) (DBA),<sup>1</sup> that will dramatically impact employers with federal construction contracts. Though the Final Rule has not been released, it is expected to closely track the [Proposed Rule](#) that USDOL published on March 18,

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<sup>1</sup> The Davis-Bacon Act is a federal law that establishes the requirement for paying the local prevailing wages to laborers and mechanics hired by contractors on public works projects.

2022 (the Proposed Rule). The Proposed Rule, which generally received strong support from labor unions and fierce opposition from the construction industry, resulted in USDOL receiving nearly 40,000 comments.

The Proposed Rule, which spanned 108 pages of the *Federal Register*, contains a litany of changes to already complex law applicable to projects covered by the DBA. Among the most noteworthy changes, the anticipated Final Rule would:

- / Reimpose the “30% Rule” for classifications of workers for which there is not a single prevailing rate;
- / Expressly authorize USDOL to adopt state and local wage determinations as the prevailing wage if certain criteria are met;
- / Provide for more frequent updates to prevailing wage rates;
- / Create new enforcement mechanisms;
- / Create new worker protections.

## A (partial) return to the “30% Rule”

The change drawing the most scrutiny is a proposed amendment to the definition of “prevailing wage,” indicating a return to the original methodology for calculating rates. Under that process, USDOL first identifies as “prevailing” any wage rate paid to the majority of workers within a classification. If there is none, the prevailing wage is the rate paid to the greatest number of workers, so long as they amount to at least 30% of the workers within a classification (known as the “30% Rule”). If there is still no established rate, a weighted average is taken to determine the prevailing wage.

In 1982, however, the regulations were amended to eliminate the second step in that process (*i.e.*, the 30% Rule). Since then, the prevailing wage has been determined by identifying the rate paid to a majority of workers or, if none exists, by taking a weighted average.

The Final Rule would reinstate the 30% Rule. As a result, before turning to a weighted average, USDOL will analyze whether at least 30% of workers within a classification are earning a certain rate. If so, that rate (instead of a weighted average of all the rates) will be the new prevailing wage.

## Expanding the prevailing wage universe

The Final Rule would also expand the universe of data considered when calculating a prevailing wage in several material ways. For example, the Final Rule would expand the geographic area considered when setting a prevailing wage—particularly with respect to highway projects. Current law allows for multiple prevailing wages on a county-by-county basis (when applicable). The Final Rule would expressly authorize USDOL to issue project-wide prevailing wage determinations with a single rate for each classification, calculated using data from all the relevant counties where a project will occur.

It would also allow USDOL to expressly adopt state and local wage determinations, often well above the floor established by federal law, as the prevailing wage if certain criteria are met. The criteria are that (1) the state or local government must set rates and collect data using a process open to participation by all interested parties; (2) the state or local rates must reflect both a basic hourly rate and any locally prevailing fringe benefits; (3) the state or local government must classify laborers or mechanics in a way recognized within the field of construction; and (4) the state or local government's rate-setting criteria must be "substantially similar" to those utilized by USDOL.

## New worker protections

The Final Rule also creates new worker protections, primarily in two ways. First, the Final Rule would add a new section to the regulations making it unlawful to take adverse action against a worker that raises concerns about pay practices or participates in agency investigations. Second, it includes—by operation of law—anti-retaliation provisions in standard Davis-Bacon contract clauses relating to DBA compliance and workplace hours/safety. Employers subject to such contracts would be expressly prohibited from retaliating against workers who raised qualifying concerns.

## What's next?

As is clear from the foregoing, a sea change is on the horizon for employers subject to the DBA and its implementing regulations. The Final Rule will make several changes to that space, only some of which are summarized above. All of those changes will go into effect sixty (60) days after the Final Rule is published in the *Federal Register*—subject to anticipated court challenges and potential injunctive relief.

These impending changes to the cost of labor, combined with continued volatility in construction materials pricing, heighten the need for thoughtful and nimble business planning and ensuring that contracts and work authorizations anticipate future changes to the prevailing wage. Impacts may be felt beyond the world of federal contracting in what continues to be a tight labor market with fluidity between public and private projects.

Employers subject to the DBA should consult with their attorneys to understand these changes and make sure they are prepared to comply if and when the Final Rule becomes effective. Businesses should also consider internal training on the Proposed Rule to help ensure compliance and prevent claims of worker retaliation.

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