The Impact of the New Davis Bacon Rule

By: Andy Martone

On August 8, 2023, the United States Department of Labor finally published its long-awaited Davis Bacon rule. The DOL's 812 pages of rule justifications and explanations contain many substantial changes which will both expand the scope of work covered by Davis Bacon and which will change the way that the DOL administers the Act. Unless blocked by legal action, the new rule will take effect around October 23, 2023.

The DOL's new rule represents the most significant Davis Bacon rulemaking in 40 years, and there's a lot to unpack. This is the first in a series of three explanatory articles that will examine the most significant of the changes and some of their practical effects.

These changes fall within 1 of 3 general categories:

1. Changes that expand the scope of Davis Bacon to cover locations and workers not previously covered.

2. Changes that will affect the way the prevailing wage is calculated and applied.

3. Changes that will increase employer's responsibilities with regard to complying with Davis Bacon and increase the severity of failing to comply.

This article will explore and explain the most significant of the expansions in the scope and coverage of Davis Bacon contained in the new rule.

Expanding the coverage of Davis Bacon

Davis Bacon requires that prevailing wages must be paid to "all mechanics and laborers employed on the site of the work" and defines laborers and mechanics as those workers whose duties are manual or physical in nature. The "site of work" is generally defined as the physical place or places where the building or work will remain.

While these definitions sound simple, for decades the Department of Labor has been working to expand the coverage of Davis Bacon by increasing the categories of workers considered to be "laborers and mechanics" covered by the Act and by expanding the definition of the "site of work" to include locations that are not part of the physical site of construction.

The Department of Labor's August 8, 2023 final rule creates the most substantial expansion in the history of the Act. These expansions include:

A. Materials suppliers are only exempt if they meet certain tests. Material suppliers were normally exempt from Davis Bacon requirements. However, this is no longer always the case, and to be exempt from Davis Bacon under the new Rule, a material supplier must meet all of the following criteria:

1. Its obligation for work on the contract or project must be strictly limited to **only** the delivery of materials, supplies or equipment and incidental activities such as loading or unloading. This can include the pickup of those materials/supplies/equipment from the jobsite, but an employer that only picks up materials without also engaging in delivery is not considered to be a material supplier exempt from Davis Bacon.

2. The material supplier must have facilities that manufacture the materials, supplies or equipment used for the contract or project.

3. The material supplier cannot be located on the primary or secondary construction site.

4. The material supplier was either established before the opening of bids on the contract or is not dedicated nearly exclusively to the performance of the contract.

5. The material supplier does not engage in any covered work on the site.

If an employer fails to meet all of these criteria, they are not a material supplier exempt from Davis Bacon's requirements.

B. More truck drivers will be covered by Davis Bacon. Normally, the transportation of materials or supplies to or from the site of work is not covered by Davis Bacon. This will change under the new Rule, which expands the categories of transportation work that will be covered to include:

1. Transportation of one or more significant portions [1]of the building or work between a secondary construction site[2] and the primary construction site.

2. Transportation between an adjacent or virtually adjacent dedicated support site and either the primary construction site or secondary construction site.

3. Time spent on the site loading, unloading, or waiting for materials to be loaded or unloaded - if the driver's time aggregated on a daily or weekly basis is more than *de minimis*.

Under the new *de minimis* standard, all time spent by truck drivers on a work site during a workday or work week will be aggregated for purposes of determining if that on site time is *de minimis*. This new rule (which the Department of Labor mischaracterizes as a "clarification") will bring a significant number of truck drivers under Davis Bacon and require their employers to keep track of their time actually spent on site on a daily basis.

Truck owner-operators who are bona fide independent contractors are not subject to the requirements of Davis Bacon, although it is important to note that any employees hired by truck owner-operators are covered by Davis Bacon and that owner-operators of other construction equipment such as bulldozers are also covered by Davis Bacon.

C. Off-site modular construction will be covered by Davis Bacon. Under the new rule, the "site of work" will be expanded to include any site where:

1. A significant portion of a building or work is constructed.

2. If the site is dedicated exclusively or nearly exclusively to the performance of a covered project or contract for a period of time.

This means that if a significant portion of the structure under construction is prefabricated at a dedicated site, then the fabrication of the module or component would be work covered by Davis Bacon and the location where the module is being completed would be considered part of the site of work.

D. Flaggers are covered. Safety flaggers are considered to be working on the site of construction and covered by Davis Bacon if they are working virtually adjacent to the primary

[1] A "significant portion" of a building or work is a section or segment of a building or work which will only require minimal construction work to complete other than the installation or final assembly at the place where the building will remain. This definition does not include materials or prefabricated component parts such as prefabricated housing components.

[2]A "secondary" construction site is defined as a site where a significant portion of the building or work is constructed if the construction is for a specific use, the site is not being used for the manufacture or construction of a product made available to the general public and the site was either established specifically for the performance of the contract or project or if it is dedicated nearly exclusively to the performance of the contract or project for a specific period of time.

construction site – a flagger working a "short distance down a highway" from a project would be covered.

E. Many survey workers would be covered by Davis Bacon. –The new rule attempts to resolve the long-standing dispute as to whether or not survey workers are "laborers and mechanics" covered by Davis Bacon. Noting much disagreement on this subject, the Department concluded that "whether or not a specific survey crew member is covered by Davis Bacon is a question of fact which takes into account the actual duties performed by the worker and whether the duties are manual or physical in nature, including the use of tools or work of a trade". A survey crew member who spends most of their time taking or assisting in taking measurements would likely be covered by Davis Bacon (if they do not meet the test for an exempt professional) if their work is performed on site, immediately prior to or during construction, and in direct support of construction crews. Given the broad definition of subcontractor[3], it does not seem to matter whether they are performing these duties as an employee of a construction contractor or as the employee of a professional survey company.

F. The coverage of demolition work would be expanded. Demolition work where the demolition and/or removal activities themselves were the project (for example, asbestos abatement) has traditionally been covered by Davis Bacon. However, the new rule has significantly expanded the scope of demolition activities that would be covered by Davis Bacon to include demolition in situations where subsequent construction that would be covered by Davis Bacon is planned or contemplated[4] at the site of the demolition either as part of the same contract or as part of a future contract.

G. Energy infrastructure and related activities will be unequivocally covered. The installation of solar panels, wind turbines, broadband installation and the installation of electric car chargers will be explicitly covered by Davis Bacon.

What's next?

Unless blocked by a federal court, the new Davis Bacon rule will go into effect on or about October 23, 2023. However, it is likely that several interested parties will challenge various aspects of this new rule in court. As part of these challenges, the challengers will ask the federal court to enjoin (or block) the enforcement of the new rule until the court processes are resolved.

In the normal litigation process, the affected parties would file a lawsuit in federal district court challenging the Department of Labor's authority to make the new rule, arguing that the DOL exceeded its authority by changing the scope and coverage of Davis Bacon, which only

[3] The new rule defines "subcontractor" as "any contractor that agrees to perform or to be responsible for the performance of **any** part of a contract that is subject wholly or in part to the labor standards provisions of Davis Bacon and Davis Bacon related Acts.

[4] The factors used to determine whether subsequent construction is "contemplated" include the existence of engineering or architectural plans or surveys for the subsequent construction, the allocation of or application for federal funds for subsequent construction, contract negotiations or bid solicitations for subsequent construction, or the stated intent of relevant government officials that there will be subsequent construction.

Congress has the power to do. The federal court would hear evidence, review legal briefs and filings, and issue a decision.

Following the decision of the federal district court, the matter would move up to the appellate court when the party that did not prevail before the district court files an appeal. After the appellate court has reached a decision, the matter will probably come before the United States Supreme Court for final decision.

It is likely that it will take more than a year for the enforceability of the new rule to be fully adjudicated.

This article is intended to be a brief explanation of some of the more significant aspects of the new Davis Bacon rule. It is not intended to be an exhaustive explanation of the 812-page rule-making and does not constitute legal advice. Davis Bacon and the Davis Bacon Related Acts are complex statutes with decades of case law and numerous applicable regulations, and specific questions should be addressed with legal counsel.

The next article in this series will address the changes to the methods that the DOL uses to determine how the prevailing wage will be calculated under the new rule.

The Impact of the New Davis Bacon Rule

Part 2

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In addition to expanding the scope of Davis Bacon to cover more workers and more off-site locations, the Department of Laborer's new Davis Bacon rule made substantial changes in the way that prevailing area wage rates will be calculated in the future.

While some of the components in the DOL's new rule are true clarifications of existing practices, other components are outright changes.

Among the most significant changes are:

1. The return of the 30% Rule. Prevailing area wage rates are currently set by determining: a) the wage rate paid to the majority (more than 50%) of the workers; b) in the appropriate classification; c) on similar projects in the area; d) during the period in question. These are the "relevant workers" for purposes of establishing prevailing area wage rates.

If there is not a majority wage rate paid to the relevant workers, then the prevailing wage rate is set at the weighted average of the wage rates paid to all of the relevant workers.

The new rule would return to the pre-Reagan "30% rule," adding a middle step to the analysis and determining prevailing area wage rates using the following method, in order:

A. The wage rate paid to the majority of the relevant workers – this is not a change.

B. If there is no wage rate paid to the majority of relevant workers, then the prevailing wage rate would be set at the wage rate paid to the greatest number of relevant workers, provided that those workers constitute at least 30% of the relevant workforce.

C. If no wage rate is paid to 30% or more of the relevant workers, then the prevailing wage rate would be set at the average weighted wage rate paid to the relevant workers.

By reinstituting the 30% rule and creating a situation where a lower level "plurality" wage rate (and not the weighted average) will be used to set the prevailing wage rate if there is not a majority wage rate, the new rule will result in collective bargaining agreements being given more weight in establishing prevailing area wage rates in areas where many (but not most) of the relevant workers work under the terms of a collective bargaining agreement.

The same process will be used for fringe benefit calculations. In addition, employers must annualize fringe benefit contribution rates, meaning that in cases where employers do not pay for covered fringe benefits on an hourly basis, the employer must calculate the annual value of its fringe benefits on an individual employee basis by dividing the total annual cost of the fringe benefit(s) by the total number of hours each employee works on all projects in a year. Employers must also obtain DOL review and approval for their existing fringe benefits within 18 months.

2. Periodic adjustments (increases) of non-collectively bargained prevailing wage rates. In many cases, prevailing area wage rates are closely tied to collective bargaining agreements. However, in areas where collective bargaining agreements are not used to establish the prevailing area wage rate (because they do not cover a majority of the relevant workers), the new rule would update[1] the prevailing wage rates every three years based on the general wage determinations made by the Bureau of Labor Statistics in its ECI wage data.

The ECI (Employment Cost Index) measures the change in the hourly labor cost for both wage and benefits to employers over time by using a fixed "basket" labor to produce a pure cost change. The ECI increased by 1% from March 2023 to June 2023 and increased by over 4.5% the year ending June 2023.

This change will have the effect of providing regular and potentially substantial increases to the prevailing area wage for non-collectively bargained (non-union) areas. Because it will be done on a three-year basis, these increases are likely to be substantial.

3. Expanding the scope of the data used to set prevailing wage rates. Under the current Davis Bacon rules, the default area for making a wage determination is the county, and wage determinations are normally based on wage survey data received from projects of a similar character in a given county, by construction type (building, residential, highway, heavy). The new rule makes several changes to this basic formula.

A. Expanding beyond the county level.

Under the new rule, if there is not sufficient usage data in any county to determine the prevailing wage rate, the DOL will progressively expand the geographic scope of the data search using the following process:

[1] In areas where the prevailing wage rates were not based on collectively bargained contracts, 46% of the rates were 10 or more years old.

1. First, the geographic scope will be expanded to include a group of surrounding counties.

2. If there is still not sufficient usage data to make a prevailing wage determination, the DOL would consider a larger grouping of counties in the state (a "super group") and could use data at a state-wide level.

B. Mixing urban and rural data.

There is currently a prohibition on combining data from metropolitan and rural counties to determine the prevailing area wage rates -- this prohibition applies even if the rural and metropolitan counties are next to each other. The new rule would abolish this prohibition and allow the DOL to use data from metropolitan counties to help set prevailing wage rates in rural counties if the DOL's wage survey of the rural county did not obtain sufficient current wage data to set a prevailing wage rate.

This "mixing" of wage data would only apply to surrounding counties -- counties that share a border with the county for which additional wage date is sought -- and it would not be utilized if there is already sufficient wage data to allow the DOL to determine the prevailing wage. This mixing will have the greatest impact in situations where a rural county borders a metropolitan county.

The net impact of expanding the scope of data used to determine prevailing area wage rates will result in increasing the prevailing area wage rates in lower-rate counties by blending the wage rates in those counties with higher wage rates from neighboring counties. These changes will have a particular impact on renewable energy projects (such as solar farms and wind farms) covered by Davis Bacon and/or the Inflation Reduction Act -- many such projects are undertaken in rural areas, and blending wage data from rural areas with lower population and wage density with wage data from neighboring counties/metropolitan areas (with higher prevailing wage rates) will increase the prevailing wage rates and the overall cost of renewable energy projects.

C. Highway Projects.

The definition of "area" for purposes of prevailing wage determinations has been expanded to address highway projects. On multi-county highway projects, prevailing wage determinations may be based on the state department of transportation's highway districts or similar state subdivisions rather than using the counties in which the highway is located. This will increase the cost of highway projects that are located in multiple counties that include both metropolitan and rural counties.

4. Mid-contract increases in the prevailing wage rate. Under the current regulations, prevailing wage determinations are generally applicable for the duration of a covered contract after those rates are incorporated into the contract.

Under the new rule, if a revised wage determination is issued after the contract award (or after the beginning of construction if there was no contract award), the new determination will apply to the project if:

A. The contract is changed to include substantial additional, covered work that was not within the scope of work of the original contract. This could include any significant change orders.

B. The contract is modified to require the contractor to perform work for an additional period of time not originally covered in the contract, including situations where an option to extend the term of the contract is exercised. This would not apply if a contractor is simply given additional time to complete the original scope of work.

C. The contract covers construction, alteration, or repair work over a period of time that is not tied to the completion of any particular project. Contracts of this nature must update the applicable prevailing wage determinations on the anniversary date of the contract award unless the contracting agency has obtained prior written approval from the DOL.

It is important to note that the new rule does not provide for automatic contract price adjustments when the prevailing wage determination is increased – the Department of Labor's position on this issue is "the Department believes that issues related to budgeting, pricing and cost associated with these types of contracts can be addressed between the contractor and the agency as part of the contracting process."

5. Adopting state and local prevailing wage rate determinations. Under the new rule, the state/local prevailing wage rates may be adopted by the DOL if the Administrator of its Wage and Hour Division concludes that:

A. The state/local government process is open to full participation by all interested parties.

B. The state/local prevailing wage rates reflect both the basic hourly rate of pay and the prevailing fringe benefits, which must be calculated separately.

C. The state/local government determinations use relevant worker classifications can be related to the DOL's recognized workers classifications.

D. The state/local government's criteria for setting prevailing wage rates are "substantially similar" to those used by the DOL, based on a totality of circumstances.

The Administrator will have substantial discretion in making these determinations and given the current level of deference courts give to administrative agencies, it will be extremely difficult to challenge the DOL's adoption of a state/local prevailing wage rate.

The impact of this change will be to subject employers to the vagaries of state/local government agencies, which tend to have more highly politicized (and one-sided) decision-making processes. This would allow parties who have a greater influence on state/local politics to essentially set the federal prevailing wage rate under Davis Bacon.

Conclusion

The net effects of these clarifications and changes are essentially twofold:

1. They will generally increase prevailing area wage rates; and

2. They will increase the influence that collective bargaining agreements have on establishing prevailing area wage rates.

These changes make it increasingly important for employers covered by Davis Bacon to both stay up to date on the appropriate prevailing wage rates to be paid to their covered workers and to pay particular attention to the language in their covered contracts. This is especially true given the increased (and potentially dire) legal consequences of failing to comply with Davis Bacon's requirements, which will be explained in Part 3 of this article.