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The Impact of the New Davis Bacon Rule

Part 3

By: Andy Martone

This is the third article in a three-part series detailing the impact of the new Davis Bacon rule on employers. Part One of this series explained changes that expanded the scope of Davis Bacon to cover locations and workers not previously covered and Part Two explained the changes that will affect the way that the prevailing wage rate is determined.

This article will describe the ways that the Department of Labor's new Davis Bacon rule will extend Davis Bacon to apply to employers other than employers who are signatory to contracts covered by Davis Bacon and explain the increasingly severe consequences of violating Davis Bacon.

Taken together, these changes increase employers' exposure under Davis Bacon in scope and in magnitude by:

1. Expanding the entities liable for Davis Bacon violations. Regulatory definitions can have the effect of altering the scope and interpretation of the law. With its new rule, the DOL created a new category of employer -- "prime contractor" -- which expands the scope of the business entities responsible for Davis Bacon violations.

Rather than just having the signatory entity¹ ("signatory") liable for Davis Bacon compliance, the Department of Labor's new definition of prime contractor includes not only the signatory, but also includes the following entities:

- A. The controlling shareholders/members of the signatory.
- B. If the signatory is a joint venture or partnership, the individual joint venture members/partners.

¹ The signatory entity or "signatory" is the legal entity that holds the prime contract.

- C. Any contractor that has been delegated the responsibility for overseeing all or substantially all of the construction covered by the prime contract.

This new definition means that many of the entities connected directly with the signatory -- including controlling shareholders and joint venture partners -- will be liable for the signatory's failure to comply with the requirements of Davis Bacon. In cases where two or more contractors enter into a joint venture that is the signatory on a Davis Bacon covered contract, the members of the joint venture will be separately liable for any violations. This liability is strict liability and does not require a finding of fault on the part of any individual partner or joint venture partner.

2. Increasing the use and consequences of debarment. Debarment can be the death penalty for a federal contractor, and the new rule both makes it easier to debar employers and increases the sphere of contractors that can be debarred as a result of a violation.

When an employer is debarred, it is prohibited from participating in future contracts covered by Davis Bacon and Davis Bacon-related acts. The Department of Labor's new rule makes it easier to debar an employer by allowing debarment in all cases where the employer shows a "disregard of obligations to employees or subcontractors" and eliminating the situations (under Davis Bacon-related acts) where an employer's violation had to be "aggravated or willful" in order for that employer to face debarment. In addition, under the new rule debarment will be for a mandatory 3-year period and there will no longer be the potential for early removal from the debarment list. Finally, if a prime contractor is subject to debarment, then all of the entities included in the definition for that "prime contractor" could be subject to debarment and violations by a lower-tier subcontractor may subject both the prime and upper-tier contractors to debarment (although for a contractor to be debarred for a downstream subcontractor's violation, the contractor must have either each have known or should have known of the subcontractor's violation or have been recklessly unaware of the subcontractor's violation).

3. Creating a new and broad definition of "subcontractor". The Department of Labor's new rule also added a definition for "subcontractor" as being "any contractor that agrees to perform or be responsible for the performance of any part of a contract that is subject wholly or in part to Davis Bacon or the Davis Bacon related Acts". This definition covers any subcontractor of any tier and is not limited to subcontractors who perform construction work.

4. Covering business owners. If a worker is a "laborer or a mechanic" covered by Davis Bacon, they must be paid the prevailing area wage rate regardless of whether or not they are a business owner or contractor. With the exception of bona fide owner-operators of trucks used for transportation of materials, when the owner of a business performs covered work, that person must be paid the prevailing area wage.

5. Making it easier to cross-withhold contract payments. The new rule specifies that cross-withholding can be from any contract held by the broadly defined "prime contractor," even if the contract was awarded by a different agency. This would allow cross-withholding not only on contracts held by the signatory, but also on contracts held by the controlling shareholders of the signatory, the joint venture partners of a signatory, or by the general contractor to whom work was delegated by the signatory.

6. Creating more upstream liability. Under the Department’s new rule, prime contractors and upper-tier subcontractors can be directly liable for their lower-tier subcontractors’ violations. Prime contractors will be automatically responsible for back wages owed by subcontractors, regardless of intent or knowledge.

7. Creating a new administrative cause of action for employees. The DOL’s new rule creates a new administrative claim for retaliation under Davis Bacon, making it unlawful for an employer to “discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any manner discriminate against” any employee, former employee or applicant for:

- A. Notifying any contractor of any conduct which the worker reasonably believes violates Davis Bacon.
- B. Filing a complaint or asserting rights under Davis Bacon.
- C. Cooperating in an investigation or other compliance action.

Employers found to have retaliated against an employee, former employee or applicant for conduct protected by the new anti-retaliation provisions would be subject to an administrative proceeding and could be liable for a full “make-whole” remedy, including reinstatement for full back wages and benefits.

Conclusion

The Department of Labor’s new Davis Bacon rule is a game changer. It dramatically increases the scope of projects and workers covered by Davis Bacon, it makes significant changes to the way that prevailing area wage rates will be determined (which will increase prevailing area wage rates, increase the influence of collective bargaining agreements on prevailing area wage rates and increase construction costs), it expands the sphere of liability for violations beyond the signatory contractor and substantially increase liabilities for penalties and exposure to debarment.

Taken together, these changes make it more challenging for employers to comply with Davis Bacon and make the consequences of failing to comply much more severe. To meet these challenges, employers should carefully evaluate both their contractual and legal obligations under Davis Bacon and develop a compliance plan to ensure that they do not get blindsided by an unexpected violation.

It remains to be seen as to how effective the anticipated litigation challenging this new rule will be in reversing any of these changes. However, absent a court order staying the enforcement of the new rule, contractors, subcontractors and employers performing covered work should plan for compliance.

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