

Davis-Bacon Compliance Principles

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DBA/DBRA Compliance Principles

- Laborers and mechanics
- Site of the work
- Truck drivers
- Apprentices Trainees & Helpers
- Area Practice
- Fringe Benefits
- Federal contracts: PCA interaction with DBA
- Computing overtime pay

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Laborers and Mechanics

- Workers whose duties are manual or physical in nature
- Includes apprentices, trainees, and helpers
- For CWHSSA, includes watchmen and guards

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Laborers and Mechanics

- Does not include:
 - Timekeepers, inspectors, architects, engineers
 - Bona fide executive, administrative, and professional employees as defined under FLSA
- Working foremen are generally non-exempt
 - must be paid the Davis Bacon (DB) rate for the classification of work performed if not 541 exempt

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Site of the Work

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

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Site of the Work Definition ¶1

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

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Site of the Work Definition ¶2

- "Site of the work" also includes job headquarters, tool yards, batch plants, borrow pits, etc., *provided* they are:
 - Located adjacent or virtually adjacent to the "site of the work" described in paragraph 1 and
 - Dedicated exclusively or nearly so to the performance of the contract or project
 - Except if they are excluded – see next slide

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Site of the Work Definition ¶3

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

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Definition ¶3 (Cont'd.)

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

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Truck Drivers

- Truck drivers of the contractor or subcontractor are covered by Davis-Bacon for time:
 - Spent driving on the "site of the work," and
 - Spent loading or unloading materials and supplies on the "site of the work," if such time is more than *de minimis*

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Truck Drivers

- Truck drivers are also covered when:
 - Transporting materials and supplies between a facility that is part of the "site of the work" and the actual construction site; or
 - Transporting portions of a building or work between a site where a significant portion of the project is being constructed and the physical place where the building or work will remain

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Truck Drivers

- Truck drivers are not covered in the following instances:
 - Material delivery truck drivers while off the "site of the work"
 - Truck drivers of a contractor or subcontractor traveling between a commercial facility and the Davis-Bacon job when they are off the "site of the work"
 - Truck drivers whose time spent on the "site of the work" is *de minimis* for pick-up or drop off

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Truck Drivers Owner-Operators

- DOL has an enforcement position with respect to *bona fide* owner-operators of trucks who are independent contractors (an owner-operator is a person who owns and drives a truck). Certified payrolls including the names of such owner-operators do not need to show the hours worked or the rates paid, only the notation "owner-operator".
- This position does not apply to owner-operators of other equipment such as bulldozers, cranes, etc.

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Apprentices

- Persons individually registered in a bona fide apprenticeship program registered with DOL or a DOL approved State apprenticeship agency
- Include individuals in their first 90 days of probationary employment as an apprentice
- DOL regulations: 29 CFR 5.2(n)(1) and 5.5(a)(4)(i)

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Trainees

- Persons registered and receiving on-the-job training in a construction occupation under a program that has been approved in advance by DOL's Employment Training Administration (ETA)
- DOL regulations: 29 CFR 5.2(n)(2) and 5.5(a)(4)(ii)

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Apprentices and Trainees

- Are laborers and mechanics, but are not listed on the WD
- Permitted to be used on covered projects and paid less than the journeyman rate when:
 - Individually registered in an approved apprenticeship or training program
 - Paid the percentage of hourly rate required by the apprenticeship or training program

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Apprentices and Trainees

- Paid the FB's specified in the approved program, or the full amount of FB's listed on the WD, if the program is silent; and,
- Within the allowable ratio specified in the approved program for the number of apprentices or trainees to journeymen

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Helpers

- May be employed if:
 - Duties are clearly defined and distinct from other classifications on the WD
 - An established prevailing practice in the area,
 - Not employed in an informal training program
- May be added to WD if all above conditions are met; no WD class performs the work

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Area Practice Surveys

- Used to determine proper classification of workers on Davis-Bacon projects
- Limited Area Practice survey is acceptable when the prevailing practice is clear based upon preliminary data
- Full Area Practice Survey is necessary when preliminary data indicate varied classification practices

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Conducting a “Limited” Area Practice Survey Involving Union Rates

- Contact unions whose members may perform the work in question to determine if they performed the work in question on similar projects in same county during the year prior to lock-in date of WD applied to contract
- Survey each union on how workers who performed that work were classified
- If the unions agree, obtain confirmation from the collective bargaining representatives of contractors

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Conducting a “Limited” Area Practice Survey Involving Open-Shop Rates

- Contact open-shop contractors to determine if they worked on similar projects in the same county during the year prior to the lock-in date of the WD applied to the contract
- If so, ask how workers were classified
- If all or a clear majority of contractors agree, the prevailing area practice is established

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Conducting a “Limited” Area Practice Survey Involving Mixed Rates

- Union and open-shop rates in the WD are involved in the area practice question
- For WD classification that has union rate, contact appropriate union and open-shop contractors to seek information as discussed on slide regarding limited area practice survey for union rates
- For WD classification that has open-shop rate, contact open-shop contractors to determine if open-shop workers performed the work in question on similar projects in the same county during the year prior to the WD lock-in date
- If all parties, or a clear majority agree, the area practice is established

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Conducting a “Full” Area Practice Survey

- Identify the similar projects (same type of construction) in progress during year prior to WD lock-in-date in local area of project in question
- Identify firms that performed the work in question and contact those that are either open-shop or union based on the wage rates in the WD
- From each relevant firm contacted (open shop or union), determine the week in which greatest number of workers performed the work in question and how they were classified

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Conducting a “Full” Area Practice Survey

- Compile the relevant information received, tally the relevant employment data, and total the number of workers in each classification that performed the work in question
- Only union sector data can be used to support a union classification and rate on the WD
- Only open shop sector can support use of non-union classification and rate on WD
- The classification with clear majority (60%) is proper (local prevailing) classification for the work

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Wages & Fringe Benefits

- DBA: the term “wages” or “prevailing wages” includes:
 - The basic hourly rate (BHR)
 - Contractor contributions *irrevocably* made to a trustee or third party pursuant to a bona fide fringe benefit (FB) fund, plan, or program
 - The rate of costs the contractor reasonably anticipates in providing bona fide FB's where certain conditions are met

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Fringe Benefits

- Under DBA, FB's are a component “prevailing wage”
- The WD obligation may be satisfied by:
 - Paying the BHR and FB in cash
 - Contributing payments to a bona fide plan
 - Any combination of the two

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Fringe Benefits

- Must be paid weekly for all hours worked
- Cash wages paid in excess of BHR may count to offset or satisfy the FB obligation (unlike under SCA)

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Fringe Benefit Example

■ BHR	\$10.00
■ FB	\$ 1.00
■ Total prevailing wage	\$11.00

■ The contractor may comply by paying:

- \$11.00 in cash wages
- \$10.00 in cash wages plus \$1.00 for FB
- \$ 9.00 in cash wages plus \$2.00 for FB

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Examples of Fringe Benefits

- Life Insurance
- Health Insurance
- Pension
- Vacation
- Holiday
- Sick Leave

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Funded Fringe Benefit Plans

- Contractors may take credit (without prior approval from DOL) for bona fide FB fund contributions made to third-party trustees or insurers that:
 - Are *irrevocably* paid; and,
 - Are made regularly, not less often than *quarterly*
- Credit is for payments made for individual workers eligible to participate in the plan, program, or fund

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Unfunded Fringe Benefit Plans

- Costs for an "unfunded" FB plan count towards WD obligation if specific following are met:
 - Costs reasonably anticipated to provide bona fide FB
 - Pursuant to an enforceable commitment
 - Carried out under a financially responsible plan
 - Has been communicated in writing to affected workers

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Annualization Principle

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

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Annualization Defined Contribution Pension Plans

- Davis-Bacon credit is based on the effective annual rate of contributions for all hours worked in a year (both Davis-Bacon and non-Davis-Bacon work)
- An exception to the annualization principle applies to plans that provide immediate participation and essentially immediate vesting (100% vesting after an employee works 500 or fewer hours).
 - This exception allows full credit for the amount of contributions made on Davis-Bacon work

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Annualization Example Defined Contribution Pension Plan

A firm's contribution for an employee's pension plan that does not provide for immediate vesting was computed at \$2,000 a year. The employee worked 1,500 hours on a Davis-Bacon project and 500 hours on other jobs not Davis-Bacon covered

Credit per hour: $\$2,000 / 2000 \text{ (hours)} = \1.00

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Annualization Example Medical Insurance

■ Employer provides medical insurance at \$200 per month to electrician on Davis-Bacon project. WD requires \$12.00 plus \$2.50 in FB's, or \$14.50 an hour. Employee works 160 hours a month

- \$200/160 hours = \$1.25 (credit per hour)
- No other benefit provided
- Electrician is due: \$13.25 an hour
($\$14.50 - \$1.25 = 13.25$, is remaining balance of applicable prevailing wage)

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Discharging DB Prevailing Wage Obligation

■ If WD requires a prevailing wage of \$14.50 (\$12.00 BHR plus \$2.50 in FB's), the contractor can comply by paying:

- \$14.50 in cash wages; or
- \$12.00 plus \$2.50 in bona fide FB; or
- \$11.00 plus \$3.50 in bona fide FBs

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Computing Overtime Hours (CWHSSA Earnings)

An employee worked 44 hours as electrician,
where WD BHR is \$12.00 plus \$2.50 in FB's:

44 hours	X	\$ 2.50	=	\$110.00	FB's
44 hours	X	\$12.00	=	\$528.00	BHR
4 hours	X	\$12.00/2	=	\$ 24.00	OT
				<u> </u>	
				\$662.00	

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Overtime Computation where Employee Employed at Two Rates

During a workweek an employee works 20 hours as an
Electrician at \$12.00 BHR plus \$2.50 in FB's and as a
Painter for 24 hours at \$10.00 BHR plus \$3.00 in FB's.
The regular rate for determining the Overtime rate is:

20 X \$12.00 = \$240.00 (as Electrician)
24 X \$10.00 = \$240.00 (as Painter)
\$480.00/44 = \$10.91

Overtime due: \$10.91 X 1/2 X 4 hours = \$21.82

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INTERACTION AMONG GOVERNMENT CONTRACTS LAWS

■ **Federal contracts requiring PCA & DBA**

- PCA covered contract has **more than incidental** amount of construction work
- DBA applies to construction work
- Construction includes "construction, alteration and repair, including painting and decorating"
- See FAR 48 C.F.R. § 22.402(b).

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**INTERACTION AMONG
GOVERNMENT CONTRACTS LAWS Cont.**

PCA & DBA – Example 1

Contract for supply of security system:

Davis-Bacon applies to:

- Replacement of existing conduit,
- Laying cable, and
- Tearing out and replacing walls.

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**INTERACTION AMONG
GOVERNMENT CONTRACTS LAWS Cont.**

PCA & DBA – Example 2

Contract for supply and installation of modular furniture

DBA applies to:

- Bolting furniture or fixtures to floors, walls and/or ceilings,
- Modifying walls, floors and/or ceilings to accommodate shelving,
- Installing electrical connections for desk area outlets.

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**INTERACTION AMONG
GOVERNMENT CONTRACTS LAWS Cont.**

PCA & DBA – Example 3

Lighting retrofit contract for supply and installation of energy-efficient lighting fixtures:

- DBA applies to installing new ballasts and/or lighting fixtures.

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American Reinvestment & Recovery Act of 2009 (ARRA)

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Overview of ARRA

- Signed into law by President Obama on February 17, 2009
- Division A of ARRA appropriates substantial funding for
 - Construction, alteration and repair of federal buildings
 - Infrastructure projects such as roads, bridges, public transit, water systems, and housing
 - Various activities that federal agencies may contract out for service employees to perform

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Labor Standards Coverage on ARRA funded projects

- Davis-Bacon requirements apply to:
 - Federal contracts funded by ARRA
 - Most ARRA-assisted construction projects
- Reorganization Plan No. 14 of 1950 gives:
 - Federal agencies responsibility to ensure that laborers and mechanics are paid at least the prevailing rates established by DOL
 - DOL has regulatory authority and oversight responsibility and can investigate compliance.

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ARRA Labor Standards Implementation

- Federal agencies must:
 - Ensure that their bid solicitations and resulting covered contracts contain labor standards and wage determinations in accordance with Federal Acquisition Regulations
 - Generally, ensure that recipients of assistance funded by ARRA appropriations require contractors and subcontractors to pay laborers and mechanics employed on covered ARRA-assisted construction at least the Davis-Bacon prevailing wages

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ARRA Division B

- Division B of ARRA requires application of Davis-Bacon prevailing wage requirements to projects financed with certain tax-favored bonds
 - New clean renewable energy bonds
 - Qualified energy conservation bonds
 - Qualified zone academy bonds
 - Qualified school construction bonds
 - Recovery zone economic development bonds
- as defined in relevant Internal Revenue Code provisions
- If issued after ARRA enactment (Feb. 17, 2009)

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DOL ARRA Guidance

- All Agency Memorandum No. 207, dated May 29, 2009, provides DOL basic guidance on Davis-Bacon labor standards applicability to federal and federally assisted construction work funded under ARRA
- Advisory letters, such as those issued to the Department of Energy and Department of Interior, provide further guidance

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WHD ARRA Website & HUD Clarification

- The Wage and Hour Division has established a special ARRA website where AAM No. 207, important links, and other relevant information is posted: www.dol.gov/esa/whd/recovery
- The scope of Davis-Bacon applicability to certain specific HUD programs is affected by a provision in the Supplemental Appropriations Act of 2009, enacted on June 24, 2009 (Pub. L. 111-32)

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Clarification on DB applicability to HUD programs

- Section 1205 of the Supplemental Appropriations Act of 2009 applies to the same statutory provisions applicable to non-ARRA funded assistance under specific programs to ARRA funded assistance under those programs
- Thus, previously applicable thresholds on coverage now apply to ARRA projects funded under:
 - CDBG, Public Housing, and Native American Housing programs
- ARRA funding not affected by section 1205 of the supplemental appropriations act:
 - Assisted Housing Green Retrofit
 - Lead Hazard Reduction / Healthy Homes Program
 - HUD's tax credit assistance program

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