



Davis Bacon Frequently Asked Questions

FAQs

General Questions	Page 1
Certified Payroll	Page 13
Contract Work Hours And Safety Standards Act	Page 36
Wage Determinations	Page 36
Contract Work Hours and Safety Standards Act	Page 47
Training	Page 49
Tribal Governments	Page 52
Financial Assistance	Page 55

Davis Bacon Frequently Asked Questions (FAQs)

General Questions

Q: Where can I access DOE's Desk Guide to the Davis-Bacon Act?

A: DOE's Desk Guide to the Davis-Bacon Act is located on the GC-63 website at <http://www.energy.gov/gc/downloads/desk-guide-davis-bacon-act-0>. The 46-page Guide provides simple, non-technical guidance to help contractors and subcontractors better understand their obligations under DBA.

Q: What is the reporting period for the Semi-Annual Davis Bacon Enforcement Report? What is the Form Number?

A: The Department of Energy's (DOE) Semi-Annual Davis-Bacon Enforcement Report is due to the Department of Labor (DOL) by April 30 and October 31 of each year. The April 30 report is for the reporting period from October 1 through March 31 of each year, and the October 31 report is for the reporting period from April 1 through September 30 of each year. The Department asks for the information by the 20th of the month in which it is due (i.e., April 20 and October 20), so that all reports can be combined and a final report compiled for submission to DOL. The Department's form number is OMB 1910-5165.

Q: If a school receives a federal grant for several projects involving energy efficiency conservation and uses volunteers to install some of the energy efficiency retrofits and contractors to install other retrofits, would the school have to pay the volunteers prevailing wages?

A: Yes, the school must pay the volunteers the prevailing wage rate if the volunteers are performing construction activities. The Department of Labor states in its Field Operations Handbook (§15e23): "There are no exceptions to Davis-Bacon coverage for volunteer labor unless an exception is specifically provided for in the particular Davis-Bacon Related Act under which the project funds are derived." If the Davis-Bacon Related Act is silent on the subject of an exception for volunteer labor, projects funded under that Act are subject to Davis-Bacon coverage, the school must pay all workers the prevailing wage.

Q: Is it acceptable for DOE to contract with a DBA expert firm to perform the monitoring and enforcement responsibilities under DBA?

A: Contracting agencies may contract some monitoring responsibilities, such as review of certified payroll records, but cannot contract out their responsibility for the enforcement of the DBA/DBRA requirements.

Q: Is it acceptable for DOE contractors/grantees/Borrowers to use the HUD Davis-Bacon forms?

A: Please use the standard Department of Labor (DOL) forms, not HUD forms. Forms are available on www.dol.gov webpage. For example, the Certified Payroll form is found at: <http://www.dol.gov/esa/whd/forms/wh347.pdf>; the Request for Additional Classification is found at:

Davis Bacon Frequently Asked Questions (FAQs)

<http://www.dol.gov/whd/govcontracts/SF1444.pdf>; Standard Form for requesting a Project Wage Determination is found at:

<http://www.dol.gov/whd/programs/dbra/docs/sf308x.pdf>; and the Standard Form for Interview of Employees is SF-1445 is found at:

<http://www.gsa.gov/portal/forms/download/115910>.

Q: What are the roles of a Prime Contractor in the agency's DBA compliance? Do they include reporting and recordkeeping requirements?

A: As set forth in the Davis-Bacon Act Requirements clause and as required under the contract, Prime contractors have a large role in ensuring compliance with DBA requirements by subcontractors and lower tier subcontractors. These responsibilities include reporting and recordkeeping requirements; obtaining, maintaining, monitoring and reviewing the payroll records submitted by contractors and subcontractors; and assisting DOE in its DBA enforcement responsibilities. DOE is ultimately responsible for ensuring DBA compliance on federally funded or federally assisted projects. Costs associated with the Prime's responsibilities for DBA compliance will usually be allowable costs in accordance with the terms of the contract, unless the Prime acts negligently with regard to its responsibilities.

Q: Where do I go for questions about DBA requirements?

A: For questions regarding compliance with Davis-Bacon Act (DBA) requirements regarding a contract or grant award, please refer to your award documents. The award document contains required DBA clauses and other clauses that must be flowed down to contractors/subcontractors. All required Davis-Bacon language is in the grant or contract document and the applicable wage rates should have been included in the contract/grant. If you have questions after you have reviewed the award document, you should contact the Contracting Officer or Contract Specialist for assistance. You may also find answers in the DOE Desk Guidebook located on this website or at:

<http://energy.gov/gc/downloads/desk-guide-davis-bacon-act-0>

Q: We have a grant and our project involves automotive mechanics completing alternative fuel conversions on vehicles and school buses. Will DBA apply to the automotive mechanics?

A: No, DBA is not applicable to automotive mechanics.

Q: Reading the DOE Desk Guidebook on page 32 (paragraphs d. and e.); it says that the DBA certified payroll is submitted to DOE. Is that right?

d. The due date for each certified payroll to be submitted to DOE, as the contracting agency, or to the financial assistance recipient in accordance with the contract, is no later than one week after each weekly pay date.

e. The prime contractor is responsible for the timely submission to DOE of certified payrolls for all subcontractors. The prime contractor is obligated to

Davis Bacon Frequently Asked Questions (FAQs)

notify all subcontractors of the labor provisions of the contract and to ensure that each subcontractor submits timely, accurate and complete certified payrolls.

A: DOE created the "Desk Guide to the Davis-Bacon Act" to assist contractors and subcontractors performing construction work covered by the Davis-Bacon Act (DBA), as well as grantees, subgrantees and federal personnel, with understandable explanations of DBA requirements to assist all of these entities with DBA compliance issues. Whether the certified payroll record is submitted directly to the Department, to a Prime contractor, or to a financial assistance recipient (e.g., in the case of the Recovery Act grants, payroll records were submitted to the grantee State/State Entity), depends upon the language in the specific contract or financial assistance agreement.

The first page of the Desk Guide includes the following statement in bold letters: "The guidance provided in this document does not constitute legal advice or substitute for full and careful review of the contract or agreement requiring application of DBA provisions, and compliance with applicable statutes and regulations." The purpose of this statement was to emphasize to readers that the contract or financial assistance agreement clauses control.

In addition, Section 1-3(a)(2) of the Desk Guide states: "DBA- and DBRA-covered contracts resulting from grants, cooperative agreements, technology investment agreements, loans, or loan guarantees, will specifically identify the responsibilities of recipient, subrecipients, local agencies, guaranteed parties, and contractors to administer and enforce the provision of DBA, including reporting and recordkeeping requirements; obtaining, maintaining, monitoring, and reviewing payrolls; and assisting DOE in its DBA enforcement responsibilities." Statements in the Desk Guide that reference requirements for contractors to submit payrolls to DOE reflect standard DBA legal requirements.

Q: Are non-profit corporations subject to DBA?

A: For purposes of DBA, non-profit corporations are treated the same as for-profit corporations. Therefore, when performing work on government-funded projects, the non-profit must pay its employees the DBA prevailing wages.

Q: A subcontractor has regular, full-time employees, and performed work on a government-funded project; however, we recently discovered that the subcontractor continued its normal practice of paying employees every two weeks. When I asked the subcontractor about this, the subcontractor said his employees agreed to continue the every two week. Are there any exceptions permitted to the "weekly" pay requirement?

A: Payment of wages every two weeks is a violation of the Davis-Bacon Act. Employees cannot waive the weekly pay requirement. The Davis-Bacon Act requires payment to employees "no less frequently than weekly." Only Congress can change this requirement by amending the Davis-Bacon Act.

Davis Bacon Frequently Asked Questions (FAQs)

Q: I recently took a new position requiring me to review certified payroll records. Is there any Davis-Bacon training provided by the DOL or DOE or other Federal agency?

A: DOE has three DBA webinar trainings posted on its website at: http://www2.eere.energy.gov/wip/davis-bacon_act.html. There is a certified payroll webinar, a basic introduction to DBA webinar, and a DBA compliance webinar presented by DOL. These webinars are free and can be viewed at your desk on your computer. The presentations are also available for you to download and use for future reference. DOL usually provides several training sessions at different locations around the United States and you may find copies of the presentations or upcoming training sessions at: <http://www.dol.gov/whd/govcontracts/dbra.htm> under "E-Tools."

Q: A City grantee is retrofitting street lighting in their city downtown. City workers will remove the old fixtures and send the fixtures off site to be retrofitted. Offsite workers will retrofit the fixtures with new components and then ship the lights back to the City. City workers will then install the retrofitted fixtures. Question is whether DBA extends to the work performed by the offsite workers.

A: The DBA limits coverage to laborers or mechanics on the "site of work." The DOL Field Operations Handbook (FOH), Section 15b04(b)(1), provides that the 'Site of 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 . . . 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' because of proximity."

The retrofitting facility would not be included in the "site of work" because its location and continuance in operation are determined wholly without regard to this particular federally-assisted contract project. The DOL FOH, Section 15b04(b)(3), indicates that "even though mechanics and laborers working at such an establishment may repair or maintain machinery used in contract performance, . . . while continuing normal commercial work, . . . the activities performed as such establishments" are not subject to the DBA wage determination "because they do not constitute the "site of work."

Once the "site of work" has been determined, here the city lights downtown, the wage determination is applicable only to those mechanics and laborers employed by a contractor or subcontractor within such limits. In this case, because the city employees will remove the old fixtures and then install the retrofitted fixtures, the DBA will not be applicable to this project because State and local units of government are not considered contractors under the DBA when the construction is performed by their own employees.

Q: The DBA Poster Notice regarding "Employee Rights under the Davis-Bacon Act" indicates the following:

Davis Bacon Frequently Asked Questions (FAQs)

If you do not receive proper pay, or require further information on the applicable wages, contact the Contracting Officer listed below:

or contact the U.S. Department of Labor's Wage and Hour Division.

Can you tell me who the "Contracting Officer" is as far as this notice is concerned?

A: The Contracting Officer means the DOE Contracting Officer found on the Awards page of the contract or grant from DOE. The contractor should insert either the name of the Contracting Officer or the name of the Contracting Specialist on the Poster along with the address and telephone number.

Q: If we will be using some funds to perform energy audits, are the energy auditors subject to the DBA if the resident chooses the auditor?

A: The DBA applies to laborers and mechanics employed at the work site. DBA is not applicable to energy auditors, inspectors, and other personnel not performing physical or manual work at the site of the construction work.

"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. . . . The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent."

Q: I do not understand what the "labor standard clauses" that are to be in subcontracts are - please explain in more detail.

A: The governing regulations at 29 CFR Part 5 require, among other things, that certain clauses pertaining to labor standards be inserted in contracts for federally financed and/or assisted construction. The regulations at 29 CFR 5.5(a) state, in relevant part, that the "Agency head shall cause or require the contracting officer to insert . . . the following clauses (or any modifications thereof to meet the particular needs of the agency, *Provided*, That such modifications are first approved by the Department of Labor)." Accordingly, the contract instrument between DOE and the Prime requires DBA requirements to be flowed down to subgrantees/contractors/subcontractors.

Q: Are non-federal matching funds paying for labor subject to DBRA?

Davis Bacon Frequently Asked Questions (FAQs)

A: It depends upon the financial assistance enabling statute. The Recovery Act DBRA provides that “all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part” with Recovery Act funding are subject to the DBA. Under a match requirement, all funding associated with the match becomes part of the project budget and the entire project (funded by the match + the grant) is subject to the DBA.

Q: As an employer paying a prevailing wage to an employee, should the employer be receiving more for the work to compensate for the difference?

A: Employers who bid for work on a project where Davis-Bacon applies must factor the Davis-Bacon wage rates into their bid amount. The bid solicitations for Davis-Bacon covered projects must include the appropriate DBA wage determination(s). The DBA wage determination in a bid solicitation (or request for proposals for a negotiated contract) establishes the minimum wage rates plus fringe for laborers and mechanics on the project. The rates listed are the wages DOL has found prevailing on similar construction in the locality where the work is to be performed. Laborers and mechanics must be paid at least the appropriate prevailing wage (including fringe benefits, if any) listed on the wage determination for the classification(s) of work actually performed (without regard to skill, except as provided in the contract clause regarding apprentices and trainees).

The employer may pay more than the DBA prevailing rates, but not less than the amount set forth on the applicable wage determination for the classification of work performed. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked, provided that the employer’s payroll records accurately set forth the time spent in each classification in which work is performed.

Q: I am confused about using residential for the construction type on DOL's site to find the required wage and benefits. Our projects are not residential. I have noticed that the rates are lower for construction type residential than for construction type building.

A: Do not use the residential construction classification unless the building meets the definition of a residential building. For all work on buildings other than residential, use the “building construction” classification.

There are four construction classification types: building, highway, residential and heavy. The following provides a brief overview of each type:

Building Construction includes construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment or supplies; all construction of such structures; the installation of utilities and of equipment, both above and below grade levels; as well as incidental grading, utilities and paving. Such structures need not be “habitable” to be building construction. Also,

Davis Bacon Frequently Asked Questions (FAQs)

the installation of heavy machinery and/or equipment does not generally change the project's character as a building.

Highway Construction includes construction, alteration or repair of roads, streets, highways, runways, taxiways, alleys, trails, paths, parking areas, and other similar projects not incidental to building or heavy construction.

Residential Construction includes the construction, alteration or repair of single-family houses, and multi-family apartment or condominium buildings of no more than four stories in height. This includes all incidental items such as site work, parking areas, utilities, streets, and sidewalks. For residential multi-family buildings over 4 stories in height, use the Building Construction classification.

Heavy Construction includes those projects that are not properly classified as either "building", "highway", or "residential." Unlike these classifications, heavy construction is not a homogenous classification. Because of this catch-all nature, projects within the heavy classification may sometimes be distinguished on the basis of their particular project characteristics, and separate schedules may be issued for dredging projects, water and sewer line projects, dams, bridges, and other projects.

For additional and more detailed guidance, please refer to DOL All Agency Memorandums (AAM) 130 and 131. All Agency Memorandums may be found at: <http://www.wdol.gov/aam.aspx>.

Q: Where has requirement for semi-annual reporting been referenced?

A: All contractors, grantees, loan/loan guarantee borrowers performing DBA covered work have DBA clauses in the contract/grant/loan documents requiring compliance with DBA and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are incorporated within the clauses. DOL regulations, 29 CFR 5.7(b) provides:

(b) Semi-annual enforcement reports. To assist the Secretary in fulfilling the responsibilities under Reorganization Plan No. 15 of 1950, Federal agencies shall furnish to the Administrator by April 30 and October 31 of each calendar year semi-annual reports on compliance with and enforcement of the labor standards provisions of the Davis-Bacon Act and its related acts covering the periods of October 1 through March 31 and April 1 through September 30, respectively. Such reports shall be prepared in the manner prescribed in memoranda issued to Federal agencies by the Administrator.

As a result of the requirement in 29 CFR 5.7, made applicable to those performing DBA covered work, those with contracts, grants, or loans/loan guarantees must provide the information to the DOE for incorporation into the Agency's Semi-Annual Enforcement Report.

Davis Bacon Frequently Asked Questions (FAQs)

Q: You mentioned the semi-annual report. Is there a form for this report?

A: DOE's Form 1910-5165 provides the format for the report. Approximately one-month prior to the date due, your DOE point of contact will request the information.

Q: We have a local prevailing wage ordinance, which is based on State prevailing wage law. We require all projects to comply. However, we do not collect weekly payrolls. With an upgraded HVAC unit installation where there is some duct work, but not much - how much is 'incidental'? If some duct work, but not a lot, do we still have to collect the certified payrolls?

A: Contractors and subcontractors must comply with State and Federal prevailing wage laws. The contractor/subcontractor must complete weekly certified payrolls and submit them to the Agency or as directed by the Agency.

Each specific contract/loan/grant must be reviewed on a case-by-case basis for a determination as to whether the installation of equipment is covered by the Davis-Bacon Act. The Davis-Bacon Act includes "altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site." 29 C.F.R. 5.2(j)(1)(i). Where a Recovery Act-funded grant includes funding for both the purchase of equipment and installation, and installation requires substantial amounts of construction, reconstruction, alteration, or repair work (as compared to being incidental to the purchase of equipment), the DBA would be applicable. Factors to be considered in determining whether installation requires substantial amounts of construction include the extent to which structural modifications to buildings are needed to accommodate the equipment (i.e., widening entrances, relocating walls, or installing electrical wiring), and the cost of the installation work - either in terms of absolute amount or in relation to the cost of the equipment and the total project cost. For a definitive decision on whether the DBA would apply to the installation of the HVAC equipment, please contact the Contracting Officer or Contracting Specialist.

Q: Where do we get form 1413? I cannot find it on www.wdol.gov.

A: You may download Standard Form 1413 from the General Services Administration website at: <http://www.gsa.gov/portal/forms/download/115794>.

Q: As an employer paying a prevailing wage to an employee, should the employer be receiving more for the work to compensate for the difference?

A: Employers who bid to work on a project where Davis-Bacon applies must factor the Davis-Bacon wage rates into their bid amount. The bid solicitations for DB-covered projects must include DBA wage determinations. The DBA wage determination in a bid solicitation (or request for proposals for a negotiated contract) establishes the minimum wage rates required to be paid to laborers and mechanics to be employed on the project. The rates listed are the wages DOL has found prevailing on similar construction in the locality. Laborers and

Davis Bacon Frequently Asked Questions (FAQs)

mechanics must be paid at least the appropriate prevailing wage (including fringe benefits, if any) listed on the wage determination for the classification(s) of work actually performed (without regard to skill, except as provided in the contract clause regarding apprentices and trainees).

The employer may pay more than the DBA prevailing rates but may not pay less than the amount set forth on the applicable wage determination for the classification of work performed. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein, provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed.

Q: If a business owner performs work on a DBA covered project, for example hanging drywall, performing electrical work, or installing sheetmetal, is he/she exempt from DB reporting requirements?

A: The DBA requirements apply to "laborers and mechanics." The DBA itself and DOL rules published in Title 29 of the Code of Federal Regulations (CFR) provide longstanding regulatory definitions of terms that apply in the administration and enforcement of the Davis-Bacon and related Acts. The language of the Davis-Bacon Act demonstrates a Congressional objective to ensure that individuals performing the work of laborers and mechanics are guaranteed the prevailing wage rates included in the contract specifications "regardless of any contractual relationship which may be alleged to exist between a contractor or subcontractor and such laborers and mechanics." Because of this express intent, individuals who perform work on a contract subject to the Davis-Bacon labor standards and who meet the regulatory definition of a laborer or mechanic found at 29 CFR 5.2(m) must be compensated at the prevailing wage rate by the contractor for any work so performed.

Section 5.2(m) defines laborers and mechanics as those workers whose duties are manual or physical in nature, including those who use tools or perform a trade. The definition of laborers and mechanics excludes workers whose duties are primarily administrative, executive, or clerical, rather than manual. Therefore, where the prime contractor is an individual owner who is operating his or her own bona fide business and performs the work of a laborer or mechanic on the project, that individual need not pay him or herself the applicable prevailing wage rate for the classification of work performed. (The owner would not be a "laborer or mechanic.") This policy would also apply to a prime contractor, which is a bona fide partnership consisting of substantially equal partners who each are actively engaged in the management thereof and share in its profits and losses, and also performing laborer or mechanic work on the project. On the other hand, "partners" of a business association whose only contribution to the partnership is their labor and whose sole compensation is wages or a draw fixed by the dominant partner or partners must be compensated at the prevailing wage of

Davis Bacon Frequently Asked Questions (FAQs)

laborers or mechanics on covered contracts even when the association functions as the prime contractor.

The regulatory definition of the term “*laborer or mechanic*” specifically states that persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR Part 541 are not laborers or mechanics. Under the “541 regulations,” a special rule for business owners provides that an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), AND who is actively engaged in its management, is considered a bona fide exempt executive. See 29 CFR 541.101-102. Therefore, such an individual would not be a “laborer” or “mechanic” under the DBA.

If the business owner is a sole proprietor, the contracting entity must determine that the person they are contracting with is truly a bona fide sole proprietor of a company. The contracting entity must maintain a record of the company Federal Tax ID number and a copy of the business license in the contracting file. Additionally, prior to awarding the contract, ask whether the sole proprietor plans to have anyone else assist with the work, as others brought on to perform laborer or mechanic work will be subject to the DBA. Such a bona fide sole proprietor is exempt from DBA and that individual is not required to submit a certified payroll for weeks in which he or she does not employ others in the performance of work on the contract/project. However, DOE recommends that owners of a business who also perform construction work list themselves on a certified payroll and under the column for “Work Classification” insert the word “owner.”

Remember that laborers and mechanics classified as independent contractors or “1099 workers” are generally covered by the DBA and must be paid the DBA wages and listed on the contractor’s certified payroll record.

Q: Is record retention required for 3 years after the "project completion date" or the "grant period completion date"? Some of these projects will only take a few months and will not last for the duration of the grant period.

A: Contractors must retain the payroll records and all supporting documentation for a period of 3 years after the project completion date. Contractors must maintain the DBA records as required by their contract. Grantees must maintain DBA records pursuant to OMB Circular A-110 and 10 CFR 600.242. Although Department of Labor regulations provide the records are to be kept for 3 years from the end of the contract, the DOE grant award terms tell the grantees to follow 10 CFR 600.242 (by reference), which requires the grantee to maintain all supporting documentation for 3 years after the submission of the final cost report - usually 90 days after the end of the Grant Project Period. Since contracts/sub-grants fall within the overall Grant Agreement Project Period, the grantee would

Davis Bacon Frequently Asked Questions (FAQs)

need to maintain the DBA payroll records for the potentially longer period of the Grant award and not just 3 years after the contract/subgrant ends.

Q: Would you explain the Form 1413 a little more? Do we need to have one of these on file for every contractor and sub-contractor they are using?

A: SF-1413, Statement and Acknowledgment, is prescribed for use in obtaining contractor acknowledgment of inclusion of required clauses in subcontracts. The contractor and subcontractors at any tier are required to submit a fully executed SF 1413 upon award of each subcontract.

Q: Is the Agency required to post the wage rate in the Invitation for Bid or simply list the link to the DOL? Is it the Public Agency's responsibility or the Contractors?

A: The Public Agency must inform potential bidders that the work will be subject to the DBA, and may either attach the wage decision in the bid documents or incorporate it by reference to the appropriate website: www.wdol.gov.

Q: If routine maintenance is not subject to DB, are lighting retrofits considered to be routine maintenance?

A: In most cases, lighting retrofits that require exchanging ballasts, new wiring, or installation of new fixtures, is not considered "routine maintenance." Routine maintenance would include a simple exchange of an incandescent bulb for a new energy efficient bulb. If you have specific questions with regard to whether DBA is applicable to a specific project, please contact your Contracting Officer or Contracting Specialist.

Q: We are drilling some bore holes for the purpose of obtaining data to be used in gather data to determine the best area to build geothermal energy systems. Is this covered by DBA?

A: Exploratory drilling for the purpose of obtaining data to be used for planning of a project, the actual construction of which has not been authorized and for which funds have not been appropriated, is not covered by DBA. However, where the overall design of these wells is such that the wells are being constructed so that they can become an integrated component of the public work, where the design and construction techniques for these wells are detailed and sophisticated (and require multiple crafts) more than one would normally use for drilling of test wells, the work will be subject to DBA.

DOL has several examples in their Field Operations Handbook at 15d05. Drilling work is generally considered construction work, unless it truly is for exploration.

Q: Is warranty work that occurs after the construction has concluded covered by the Davis-Bacon Act?

Davis Bacon Frequently Asked Questions (FAQs)

A: If the warranty work is performed after the construction contractor and subcontractors have finished, left the site, and the contracting agency has accepted construction of the project, the work would not be covered by DBA. Generally, a certificate of final completion of construction occurs once all necessary testing to establish operational status at the site has occurred and the project has become operational. At this point, the construction financed by the government is complete, and any warranty work rising to the level of construction would not be a part of the DBA-covered construction project because it is not work closely related in purpose (repairing equipment already in operational status, as opposed to construction associated with build-up of the equipment) or time (segregated by the certificate of completion date).

Certified Payroll Records

Q: What is a certified payroll record and where can I find a copy with instructions for completing it?

A: Contractors must pay laborers and mechanics employed on the work site at least once a week. Covered employers must submit a certified payroll on a weekly basis. The employer must sign the certified payroll, affirming that the information is complete and accurate. Falsification of the certified payroll record can result in debarment from future contracts for up to three years and/or criminal penalties. You find a copy of a certified payroll form (WH-347) on the Labor Department's Wage and Hour Division website at: <http://www.dol.gov/whd/forms/wh347.pdf> and the instructions for completing the form is at: <http://www.dol.gov/whd/forms/wh347instr.htm>.

Q: What makes a payroll record "certified?"

A: Each payroll submitted must be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of those employees paid under the contract. The certification statement is required by the DBA contract clause set forth in the contract or grant. The DOL certification statement form is available at: <http://www.dol.gov/whd/forms/wh347.pdf>, on the second page of the WH-347 form. The contractor or subcontractor must submit a signed copy of the second page or a form with the identical language, even where the contractor/subcontractor uses a payroll print-out or form other than the WH-347 for submittal of weekly payroll.

Davis Bacon Frequently Asked Questions (FAQs)

Q: My understanding is that the person signing the compliance form is the one who did the payroll. Is there another form to appoint the signer, Fed Form 105 or 106?

A: The DOL regulations require that the "Statement of Compliance" be signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the person employed under the contract. The DOL has stated that the authorized agent should be an officer or manager of the company with authority to sign on behalf of the contractor or subcontractor. This signature is the "certification" because the person signing the report is guaranteeing that the information being reported is accurate and correct.

Q: Do the certified payrolls need to be sent in each week or would it be acceptable to ask the subcontractor to send in an original certified payroll at the start of the project (i.e., first week's payroll to confirm prevailing wage/ Davis Bacon compliance) and allow them to hold any remaining certified payrolls and submit them at the conclusion of the project?

A: The certified payrolls must be submitted by the contractor to the Department or its Prime Contractor within 7-days of the date the contractor pays the employees. The contractor submits the original to the Department/Prime on a weekly basis. The Department/Prime must review contractor records on an ongoing basis.

Q: A subcontractor has regular, full-time employees and performed work on a DBA covered project; however, the subcontractor continued with its normal practice of paying employees every two weeks. This appears to violate Davis-Bacon Act (DBA), but are there exceptions permitted to the "once a week" minimum if the employees agree to be paid less frequently? And if so, what form does that agreement need to take?

A: Payment of wages every two weeks is a violation of the Davis-Bacon Act. Employees may not waive the right to be paid weekly and there are no exceptions permitted. The Davis-Bacon Act itself requires that employees be paid no less frequently that weekly and, therefore, only Congress may change this requirement.

Q: A subcontractor failed to submit the certified weekly payrolls. When asked, the subcontractor immediately completed, signed, and submitted all of the delinquent weekly payrolls; however, all certifications have the same date. Is there a cost or penalty to impose on the subcontractor for the late filing of the certified payrolls or is the matter closed now that the subcontractor is caught up and remains in compliance?

A: If the contractor continues to work, it is advisable to perform employee interviews to ensure the contractor paid employees correctly and as set forth on all the payroll records. Where the contractor has paid correctly, and now complied with the Department of Labor (DOL) regulations requiring submission of

Davis Bacon Frequently Asked Questions (FAQs)

the weekly-certified payroll records (CPRs), there are no cost or penalty to the subcontractor. Had the subcontractor failed to comply with the requirement and refused to do a catch-up, the DOL would require the contractor to pay any back wages owed and fine the subcontractor for its failure to submit the Davis-Bacon Act weekly as required. DOL may also take action to debar the contractor from award of a contract for work on a government-funded project for a period of up to three years.

Q: Is it acceptable for the contractor weekly payroll to be bundled and provided to the grantee on a monthly basis?

A: No, it is not acceptable to bundle payrolls. A contractor bundling the weekly payrolls and forwarding on a monthly basis would be in violation of the DBA requirements. The DOL Regulations at 29 CFR § 3.4 specifically state: “(a) Each weekly statement required under § 3.3 shall be delivered by the contractor or subcontractor, within seven days after the regular payment date of the payroll period, to a representative of a Federal or State agency. . .”

Q: Are “No Work” payrolls mandatory?

A: No. A certified payroll report is not required for a week in which a contractor performs no work. When there is no work, the contractor simply inserts the correct payroll report number on the next certified payroll record submission. If it is anticipated that a long period of no work will occur, it would be a good practice to attach a note to the last payroll stating there is no work anticipated for a period of weeks (for example 6 weeks). It is also a best practice to provide a statement when the work ends to make it easier for an auditor to understand a lapse or to know when that contractor’s work is complete. This is especially true on large projects with several contractors and subs.

Q: What do I do about a contractor that has family members helping them on occasion? Our contractor keeps referring to wages being paid in "cash." Is it okay for those contractors with family members helping to pay them cash (i.e., no withholding tax)?

A: Contractors must pay DBA wages to all laborers and mechanics performing DBA-covered work and all must be entered on the weekly certified payroll, regardless of whether any individual is also a family member. Covered workers must be paid the correct wages and appropriate taxes withheld and paid by the contractor. Contractors must follow all applicable laws for their employees, regardless of whether someone is a family member, and this includes paying the appropriate withholding taxes.

Q: A contractor lists fourteen owners of the company. I found that the contractor splits the money earned for each job between all the people that work on the job – the “owners.” What should I do?

Davis Bacon Frequently Asked Questions (FAQs)

A: Bona fide owners or partners are exempt from payment of DBA prevailing wage and the contractor need not comply with the DBA requirements. An employee who owns at least a *bona fide* 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a *bona fide* exempt executive. The salary and salary basis requirements do not apply to the exemption of business owners under 29 C.F.R. § 541.101. An individual with a 20 percent or greater interest in a business, who is required to work long hours, makes no management decisions, supervises no one, and has no authority over personnel, does not qualify for the executive exemption. To qualify for the exemption, a minority owner with at least a bona-fide 20 percent interest in the business must be actively engaged in management. See 29 C.F.R. § 541.101.

The company must provide documentation that an individual it claims to be an owner is a *bona fide* owner and exercises the required management responsibilities. It is impossible for 14 owners to each have a 20 percent equity interest in the company. Therefore, in this case, the contractor must pay each of the "owners" the required DBA wages.

Q: A subcontractor's employee has his weekly wages garnished (by a court order) and the garnishment is listed under the "Other" deduction column on the weekly certified payroll. Do I need a copy of the court order to verify his wages are being garnished correctly? Do I need a letter from the employee's company stating what this "other" deduction is? Basically, do I need to attach any documentation to the weekly certified payroll to show that his "other" deduction is for a court-ordered garnishment?

A: A copy of the court ordered garnishment should not be sent with the certified payroll record because such garnishments contain personal information concerning the employee. The appropriate documentation would consist of a memo/letter from the employer indicating the receipt of a garnishment order and the amount to be withheld - no reason for the garnishment should be stated. The memo/letter should be attached to the first payroll in which the garnished amount is withheld. No further documentation is needed for that specific garnishment on other weekly certified payrolls.

Q: If workers are normally paid for travel time to and from the job site and this travel time causes the total work hours to exceed 40 hours per week, is the employer required to pay overtime wages for the travel time? For example, if the workers worked on the jobsite for 40 hours and in addition had seven hours of travel time, would the employer be required by Davis-Bacon to pay overtime wages for the seven hours? In the specific case in question, the local union service agreement requires only that the travel time be compensated at the regular rate.

A: Where employees work more than 40 hours on DBA covered contracts during a period of seven consecutive days (workweek), pursuant to the Contract Work

Davis Bacon Frequently Asked Questions (FAQs)

Hours and Safety Standards Act (CWHSSA), contractors and subcontractors are required to pay these employees one and one-half times their basic rates of pay for all hours over 40 worked on covered contract work in a workweek. If employees work more than 40 hours in a workweek that includes both DBA and non-DBA work, and the DBA work does not exceed 40 hour, the CWHSSA is not applicable. However, these contractors and subcontractors are probably subject to the Fair Labor Standards Act (FLSA), which requires employees receive one and one-half times their basic rates of pay for all hours over 40 worked in a workweek, regardless of whether it is DBA-covered work. When an employee works at two or more different rates in an overtime workweek, the weighted average is to be used for calculating the employee's regular rate. Additional information may be found in DOL Regulations 29 CFR § 778.115, stating the weighted average method is the method to be used when an employee works both DBA covered and non-covered hours. The following is an example of how to calculate overtime using the weighted average method. Using this methodology, the number of hours worked at each rate is multiplied by the rate of pay and the total is divided by the total hours worked in the week, including those over 40.

Example:

- DBA-covered WAP work = 40 hours @ \$20.00/hour = \$800.00
- Non-DBA covered work = 7 hours @ \$10.00 = \$70.00
- \$800.00 + \$70.00 = \$870.00/47 hours for the week = \$18.51 blended rate
- $\$18.51/2 = \9.26 (half time due for each overtime hour)
- $\$9.26 \times 7$ overtime hours = \$64.82 (overtime premium due)
- $\$870.00 + \$64.82 = \$934.82$ (total compensation due)

Where DBA-covered work and non-DBA covered work are performed in a workweek the employer may pay the rate in effect when the worker exceeds a total of 40 hours in the work week, provided specific rules in 29 CFR 778.419 are followed. These rules include: (1) notify workers of the regular non-DBA work wage at the beginning of the work week, and (2) segregate the hours to show when the DBA and non-DBA hours were performed. The contractor must be able to provide detailed documentation showing when the hours were worked to explain why the employee was not paid either the blended rate or the DBA rate on the hours worked over 40 in a work week. Using the example above, the employer may pay 7 hours of overtime at the rate of \$15.00 per hour (time and one-half the \$10.00 pay rate), if the employer keeps detailed records showing that the 7 overtime hours were worked on non-DBA covered work. Travel would be non-DBA covered work.

Q: Are we required to pay overtime on the prevailing wage and fringe? Say the prevailing wage is \$36.00 and the fringe is \$11. Should overtime be calculated based on the total wage determination of \$47? Or is it only calculated on the base wage of \$36?

A: The Contract Work Hours and Safety Standards Act (CWHSSA) requires contractors and subcontractors to pay employees who work over 40 hours in a a

Davis Bacon Frequently Asked Questions (FAQs)

period of seven consecutive days (workweek), one and one-half times their basic rates of pay for all hours over 40 worked on covered contract work. Overtime payments are based upon the prevailing wage rate. The DBA fringe benefit is excluded from the overtime calculation. In your example, the overtime rate should be based upon the \$36.00 base wage for an overtime rate of \$54.00 per hour. You should be aware that where an employee is paid a higher wage than the applicable DBA rate, the actual basic rate of pay is the one upon which the employee's overtime computation must be made. Therefore, if the employee was actually paid \$40.00 per hour, then the overtime rate would be \$60.00 per hour.

Q: I have a certified payroll report where the actual DB hours are 20.32 and they have 5.5 hours of overtime. Should the 5.5 hours of overtime be paid at the overtime rate?

A: Based upon this example, it appears that the employee worked on both DBA-covered and non-DBA covered work during the pay period and worked 5.5 hours more than 40 in the workweek. Because the 5.5 hours is entered on the time sheet, the premium pay would be due under CWHSSA for the individual in that workweek at one and one-half times the DBA wages plus fringe at the straight fringe rate.

Q: Is a weighted average wage + fringe amount required on overtime when an employee has two or more classifications?

A: When the employee works more than 40 hours at two or more rate classifications on a DBA-covered project, the contractor should pay the employee overtime for all hours worked over 40 at the weighted average rate, as set forth in 29 CFR 778.115.

Q: I have a payroll that shows a contractor paid an employee overtime when he worked more than 8 hours a day, even if the employee did not reach 40 hours yet for the week – is this acceptable?

A: The DBA requires that all laborers and mechanics employed on the job site be paid at least the wages listed in the applicable wage determination for the work performed by the various classes of laborers and mechanics for all hours worked. There is no federal daily overtime pay requirement on projects subject to DBA requirements. However, such requirements may apply to such projects under state (or local) laws.

Two federal laws may require premium pay for overtime hours – in excess of 40 hours in a workweek. Compliance with the federal overtime pay requirements (both CWHSSA and FLSA) is achieved if each laborer and mechanic is paid at least the applicable overtime pay for the number of hours he or she works over 40 hours in each workweek. A workweek, which can begin on any day of the week, is 7 consecutive 24-hour periods or 168 consecutive hours. Congress repealed the daily overtime pay requirement under CWHSSA in 1986. However,

Davis Bacon Frequently Asked Questions (FAQs)

under some state laws and under the terms of some collective bargaining agreements, overtime pay after 8 hours in a day may be required. Thus, some payrolls may reflect that a contractor is complying with requirements other than those that apply under applicable federal laws.

Q: Who is responsible for collecting certified payroll records and verifying the proper wages have been paid.

A: The Department or its Prime Contractor is responsible for obtaining and maintaining the original of the certified payroll and making sure the subgrantees/contractors are complying with the DBA.

Q: Does the owner of a company have to list him/herself on the certified payroll record if the owner also performs the work of a laborer or mechanic at the work site? Are owners subject to DBA?

A: *Bona fide* owners who are exempt pursuant to Department of Labor regulations, 29 CFR Part 541, are not laborers and mechanics and are not subject to the DBA. However, the owner must provide evidence to the Prime proving ownership and that the owner meets the exemption requirements (in cases where there are more than one owner). DOE recommends owners of a business who also perform construction work, list themselves on the certified payroll and under the column for "Work Classification" insert the word "owner." Additionally, the owner of a contracting or subcontracting company, or authorized officer or employee who supervises the payment of wages must sign the Statement of Compliance for the certified payroll.

Q: What if certified payroll lists the classification as "laborer"? Shouldn't it have an actual title listed in the wage determinations?

A: You need to refer to the Wage Determination that applies to the project in question. Often Wage Determinations do include a classification of "laborer." Take care to determine the correctness of classifications and to determine whether there is a disproportionate employment of "laborers." You should conduct employee interviews to determine exactly what work the "laborer" is performing. The actual work performed is the basis for determining the proper classification, and the scope of work for a job classification is determined according to the locally prevailing practice.

Q: We have a subcontractor that is hesitant to provide original signed authorizations for deductions because they wish to keep the originals in their file.

A: The contractor is not required to provide original signed documents supporting the deductions. While the contractor must provide an original signed certified payroll record, the accompanying supporting documentation may be a copy of the original authorization documents.

Davis Bacon Frequently Asked Questions (FAQs)

Q: An employee (of one the subcontractors) is voluntarily having their child support deducted from their pay. Does this require a signed letter of authorization by the employee?

A: Yes. The appropriate documentation would consist of a copy of a written signed letter from the employee to the employer requesting that the employer make the child support deduction from his/her weekly wages and set forth the amount to be withheld. A copy of the letter should be attached to the first payroll in which the amount is withheld. No further documentation is needed for that specific deduction on other weekly certified payrolls.

Q: Are we required to review 100% of certified payrolls submitted by contractors and subcontractors?

A: Neither DOE nor DOL requires a 100% review of all certified payrolls. However, there should be a review of at least the first four or five weeks of submitted certified payrolls for accuracy from each contractor and subcontractor on a project. Once it is established that a contractor and subcontractors are submitting timely and accurate payrolls, a random representative sample (based on the dollar amount of the project and number of contractors involved) should be part of the routine monitoring for DBA compliance. The size of the sampling may be driven by whether the contractor is an established “compliant” contractor (few if any violations or errors noted in prior payrolls) or whether the contractor routinely has problems with classifications, errors in reporting, missing payrolls, etc. Some judgment must be exercised to (a) ensure compliance; and (b) not become the contractor's bookkeeper. Remember also that checking payrolls and math is only a small part of a compliance program - periodic interviews and reviewing some daily site reports will help confirm that all of the workers working on the site are listed, classified properly, and paid the amount reported on the payroll.

Q: If a subcontractor goes out of business during or after construction, but prior to final closeout of the construction project, who would be responsible for obtaining missing payroll records from a defunct contractor?

A: The prime contractor/General Contractor is responsible for assuring that all subcontractors comply with DBA requirements. If the contractor goes out of business, the prime must withhold contract funds from the contractor in order to make sure the employees are properly paid for all work performed. Additionally, the prime/general contractor must immediately notify the contracting officer of the event, so that DOE can notify DOL. The prime/general contractor must obtain all payroll information, including any information necessary to ensure the proper payment of wages and fringe to subcontractor employees for all work performed.

Q: Is it a requirement for contractors and the prime to maintain the social security numbers of all workers covered by DBA?

Davis Bacon Frequently Asked Questions (FAQs)

A: The contractor must maintain full social security number, home address, and telephone numbers of all employees for a period of at least 3-years after completion of a covered project, should an audit become necessary. This information is not submitted on the weekly-certified payroll record.

On December 19, 2008, the DOL issued its Final Rule, 73 FR 77504, entitled, *Protecting the Privacy of Workers: Labor standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction*. This Final Rule (the Rule) revised DOL's regulations issued pursuant to the Davis-Bacon and Related Acts and the Copeland Anti-Kickback Act to protect the personal privacy of laborers and mechanics employed on covered construction contracts. The effective date of the Rule was January 18, 2009, and changed the regulations at 29 C.F.R 5.5(a)(3)(i), (ii). The DOL decided certified payrolls no longer require complete social security numbers and home addresses for individual workers and that not including such information would better protect the personal information of the workers.

As a result, 29 CFR 5.5(a)(3)(ii)(A) specifically provides for submission of the certified payroll "shall set out accurately and completely all information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number)."

Q: Is it acceptable for the Prime to redact or change anything on the certified payroll (e.g., redact the first five digits of a social security number (SSN), when the certified payroll is submitted with the entire SSN)?

A: No, it is not acceptable for anyone other than the employer submitting the certified payroll record to redact or change anything on the original certified payroll record. The DBA labor standards regulations and the WH-347 specifically DO NOT permit the inclusion of full social security numbers on the certified payroll records. If the Prime or DOE receives a payroll with the full social security number, the payroll record must immediately be returned to the contractor for correction. The contractor must submit a revised certified payroll with only the last 4 digits of the social security number. Do not accept a certified payroll record with the full social security number on it.

Q: How should a contractor/employer make a correction on a payroll record, if the contractor has noticed an error and does not want to completely start over with a new WH-347?

A: The contractor/employer may draw a single line through the error, initial, and date the line and insert a correction. There should be no correction fluid or tape

Davis Bacon Frequently Asked Questions (FAQs)

used on the form. If there is more than one error, the contractor should start over as the form will become too difficult to review and enforce.

Q: If a contractor makes a mathematical error and overpays an employee on a weekly payroll report may the contractor take a deduction for the overpayment on a subsequent weekly payroll? If so, may the contractor/employer call it a “wage overpayment correction” in the deductions section of the payroll record?

A: Yes, the contractor may take a deduction for over payment or prepayment of wages. The DOL regulations at 29 CFR 3.5(b) provides:

Any deduction of sums previously paid to the employee as a bona fide prepayment of wages when such prepayment is made without discount or interest. A bona fide prepayment of wages is considered to have been made only when cash or its equivalent has been advanced to the person employed in such manner as to give him complete freedom of disposition of the advanced funds.

Therefore, where a contractor makes a mathematical or clerical error and overpays an employee on a weekly payroll, the contractor/employer may take a deduction for the overpayment on a subsequent weekly payroll and may call that a "wage prepayment." The contractor should provide a narrative report attached to the payroll explaining the need for the wage prepayment correction.

Q: We are a subcontractor to an Agency Prime. The Prime is requiring all my subs to provide certified payroll forms, but they are all sole proprietors. I understand that a sole proprietor is exempt from DBA and there is no requirement for certified payrolls, but the Prime’s representative has requested that we have the forms completed. Knowing the above rule about sole proprietors, they want the hours worked and the days worked as well as the payroll form. It is our concern that requiring sole proprietors to complete the form would be falsification of the document.

A: It would not be falsification of the form for the sole proprietor to complete the form honestly. The sole proprietor enters his/her name and identifying number and hours worked and the days worked. Under “Classification,” the contractor enters "Sole Proprietor" or “owner” and is not required to pay him/herself the DBA wages providing the sole proprietor meets the definition of a *bona fide* owner of a business. The sole proprietor signs the certification indicating that the payroll information submitted is correct. While a sole proprietor is not required to complete the form for DOE or Department of Labor (DOL) purposes, the Prime may require additional information from a contractor that is not required by DOL or DOE.

The contractor must make sure the person with whom the contractor enters into a contract is a *bona fide* sole proprietor of a company. The contractor must maintain, and provide to the Prime if requested, a record of the company Federal

Davis Bacon Frequently Asked Questions (FAQs)

Tax ID and a copy of the business license or proof of incorporation from the state where incorporated. Additionally, the contract to the sole proprietor must include the DBA clauses and the sole proprietor notified that all workers hired by the sole proprietor must receive the applicable DBA wage plus fringe.

Workers classified as “**independent contractors**” or “**1099 workers**” are covered by DBA and must be paid the DBA wages and listed on the contractor’s certified payroll record.

NOTE: If the contractor/subcontractor hires an individual who is “self-employed,” but not a “sole proprietor,” the contractor/subcontractor must pay the independent contractor the DBA wages and complete the certified payroll.

Q: Our contractor is calling a worker a 1099 for tax purposes and not filling out the tax deduction section of the WH-347. When asked, the contractor said it is because the worker is paying their own taxes. Is that OK?

A: Generally, workers classified as **independent contractors** or “**1099 workers**” are covered by the DBA and must be paid the DBA wages and listed on the contractor’s certified payroll record if they are laborers or mechanics as defined in 29 CFR 5.2(m). Taxes must be paid in accordance with applicable federal State and local tax laws. IRS rules apply. However, failure to pay taxes appropriately is not a DBA issue. Questions regarding proper payment of taxes should be addressed to the Internal Revenue Service.

Q: We have a contract to upgrade a building leased by a DOE contractor. Contracts have been awarded to various prime contractors. A prime contractor has brought in a subcontractor to perform installation of heating system equipment. The subcontractor is self employed and is conducting the work himself. It appears that he may not have to report a DBA prevailing wage rate, but I am confused by the language in Section 3.1(6) in the Desk Guide. Would you please confirm whether the self-employed subcontractor has to report DBA prevailing wages?

A: If the subcontractor claims he/she is a sole proprietor, the prime contracting entity must determine that the person is truly a bona fide sole proprietor of a company. The contracting entity must maintain a record of the subcontractor's company Federal Tax ID number and a copy of the business license in the contracting file. If the individual is a bona fide business owner, the business owner is exempt from DBA and there is no requirement for him/her to submit certified payrolls.

Workers classified as independent contractors or "1099 workers" are covered by the DBA and must be paid the DBA wages and must be listed on the prime contractor's certified payroll record. If the prime contractor hires an individual who is "self-employed", but that individual has not taken the steps to become a business owner and is not, therefore, a "sole proprietor", the prime contractor

Davis Bacon Frequently Asked Questions (FAQs)

must pay the independent contractor the DBA wages and complete the certified payroll.

The prime contractor is responsible for ensuring all "self-employed" subcontractors are bona fide business owners. If the subcontractor is not a bona fide business owner, the prime contractor must provide evidence that it paid the individual the appropriate DBA wages plus fringe for the time the individual worked and submit certified payroll reports identifying the individual on the prime's certified payroll.

Q: Would you please tell me where to find a form to use for the Davis-Bacon Employee Interview Questionnaire?

A: The Standard Form (SF)-1445 may be used for the interviews. SF-1445 may be found at: <https://www.acquisition.gov/far/html/FormsStandard65.html>

Grantees are reminded that the use of the SF-1445 is optional. There is no requirement that any specific form be used for employee interviews.

While there is no requirement for a form, the interviewer must document the interview, and the SF-1445 highlights the types of information that are relevant to ensuring compliance with the applicable labor standards. Interviews with employees must be taken in confidence. When completing the employee interview, the interviewer must request the employee's permanent mailing address, and may request the employee's Social Security Number. The employee may be working on the project and only in the area temporarily. Try to obtain the best address for contacting the worker at a future time. However, it is preferable to rely on the payrolls for the employee identifying number, and the full social security numbers should be obtained from contractor records if potential violations indicate that back wages may be due covered workers. These documents will contain personal information and must be secured to protect the privacy of the employees. DOE recommends that the Recipient/Grantee complete the interviews on-site rather than through the mail.

Q: Our standard practice for federal contracts and federal grants subject to DBA is to conduct one employee interview per DBA worker classification per contractor during their first week on the job. Is that acceptable?

A: Conducting only one employee interview per worker classification and only during the first week on the job is not an acceptable process. First, performing only one interview per employee classification immediately ends any assurance of confidentiality when performing the interview. The contractor will know which employees were interviewed and, if so inclined, retaliate against the employee(s) should information be found indicating the contractor is not properly complying with DBA. The process should require an interview of as many employees as possible in each employee classification. If there is only one or two employees in a classification, then interview all employees on the construction site over a few days. Second, performing employee interviews prior to receipt of the first certified

Davis Bacon Frequently Asked Questions (FAQs)

payroll will provide limited information and not allow for preparation in advance of the site visit. The purpose of the interview is to determine whether the contractor is reporting accurately the hours worked and wages paid to employees. While a visit during the first week on the contract will provide the representative with information and give the representative an opportunity to assure the contractor has the Employee Rights Poster and Wage Determinations posted, additional interviews will be required after the State receives the first certified payroll on the project. Additional interviews of employees will be required following review of at least one certified payroll to compare the information set forth on the payroll record and the information received from the employees. Questions to employees about working overtime and payment of time and one-half for those hours worked can only be addressed after a period of time on the job and receipt of wages. The information from the interview is compared with the payroll information to determine whether the payrolls are complete and accurate.

Q: How often are employee interviews required to be done? Must an interview be done for every contractor?

A: It is recommended that employee interviews be conducted at least once for each contractor working on a contract. Interviews are not necessary for each house completed. Where the contractor's contract is small and lasts for a short time (less than three months), once may be sufficient; however, if errors/inaccuracies are found during the interviews, then follow-up interviews are necessary. For contractors with larger contracts performing an interview quarterly may be sufficient if no inaccuracies/misclassifications are found and everything appears to be in order. The interviews must be sufficient in number to establish the adequacy and accuracy of the payroll records and the nature and extent of any violations. The interviews should be representative of all classifications of employees on the project under investigation. Employees should be questioned regarding other employees they worked with and the duties performed by those employees. The Department or Prime Contractor should perform the employee interviews and compare what is learned during the interview with what is appearing on the certified payroll records. Employees should be informed that the information given is confidential and that his/her identify will not be disclosed to the employer without the employee's written permission (See 29 C.F.R. 5.6(a)(5)). Employees should not be interviewed in the presence of the employer, another employee, or any other person. Employees may be interviewed during working hours on the job, in accordance with 29 C.F.R. 45.5(a)(3)(ii). If a contractor has significant turnover, or employees fear reprisals or intimidation, or it appears there is misclassification and/or falsification of payroll records, the local DOL Wage and Hour Office should be immediately notified along with the DOE Contracting Officer and Contractor Human Resource Specialist.

Q: What should you do if you interview an employee who was not documented on the payroll?

Davis Bacon Frequently Asked Questions (FAQs)

A: Such information suggests that the contractor may not be paying and reporting covered workers in compliance with DBA. You should perform an investigation and require the contractor to retroactively pay the covered workers any back wages due, require an amended payroll showing the additional employees, and obtain documents showing the wages have been paid. Additionally, notify the DOE Contracting Officer of the non-compliance. If the contractor is unwilling to correct the non-compliance, DOE will coordinate with DOL to determine appropriate enforcement action.

Q: What if information on payroll does not match up with information provided from an employee interview?

A: If information on the certified payroll and that provided by employees during the interviews differ, there is likely DBA non-compliance. You should try to obtain additional information from the contractor to clarify relevant factual information, require the contractor to pay any wages owed to covered worker and correct the certified payrolls (amend the certified payrolls) accordingly. Additionally, notify the DOE Contracting Officer, to coordinate appropriate enforcement action with DOL.

Q: If a possible violation is discovered as a result of doing a worker interview, does the worker have the right to request that the interviewer not pursue the matter? (This can happen in a situation where the worker is concerned about confidentiality and the possibility that his/her employer will learn of the workers complaint).

A: An employee may decide not give his/her permission for you to use the interview to prove a violation. If that happens, the interviewer should try to document the violation based on information other than the employee's interview. Please notify the DOE Contracting Officer of the suspected non-compliance, so that we may notify DOL for immediate assistance in determining the best way to handle the situation.

Q: According to the instructions from DOL, contractors are required to submit weekly copies of all payrolls. A potential contractor raised questions regarding a situation where its subcontractors outsource payroll and employees are paid a week later than worked. In this scenario, the contractor would report the weekly payroll, but that payroll would be for hours worked two weeks prior to the payroll report. For example, if employees worked the week of August 23-27. They would be paid on September 3. Their wages/hours (certified payroll records) would be reported to the subrecipient/recipient on Tuesday, September 7. Is that acceptable and consistent with Davis Bacon requirements?

A: The employer/contractor has seven (7) calendar days from the end of the work-week/payroll period to pay employees. The work-week and payroll period are both 7 consecutive days and the terms may be used interchangeably and a payroll period for checks may not be more than 7 consecutive days. The employer/contractor has 7 days from the date the employees are paid to submit

Davis Bacon Frequently Asked Questions (FAQs)

the certified payroll to the Agency/Prime. Therefore, in your example, the employees perform covered work August 23 - 27 (assuming the workweek is August 22 - 28) and the employer/contractor must pay those employees by September 4th. Therefore, paying the employees on the 3rd of September falls within the requirements. The employer/contractor has 7 calendar days from the date the employees are paid to file the certified payroll with the Prime or the Agency, which would be by the 10th of September in this example. Therefore, by submitting the certified payroll records to the Agency or Prime on the 7th of September, the employer/contractor would be in compliance with the Davis-Bacon Act requirements.

Q: If a contractor has salaried employees working on a DBA covered project who have similar job titles to the worker classifications on the Wage Determinations, such as electricians, are those workers subject to the DBA requirements? The on-site workers will be salaried employees of the company with whom we will have a contract.

A: An employer may pay employees based upon a salaried amount; however, that salaried amount must be no less than what the employer would be required to pay the employee under the applicable wage classification. The employer must show on the certified payroll record that the salaried amount meets or exceeds the hourly rate plus fringe.

For example, assume that the rate of pay for an electrician, using the Building Construction wage determination, in the locality where the work is being performed is as follows: ELECTRICIAN....\$ 27.66 wages + fringe of 3% + \$10.00 = \$27.66 + \$0.83 + \$10.00, or a total of \$38.48 per hour. If the employer pays the employee a salary of at least \$38.48 per hour or \$1,539.20 per week, the employer will have met the requirements under the DBA for paying the prevailing wage. Where the employer has a salaried worker on the job site who is exempt from the overtime provisions under Fair Labor Standards Act (FLSA), 29 CFR Part 541, that employee is not a DBA covered worker. However, a working foreman or supervisor who devotes more than 20% of their time during a workweek performing DBA covered work and who do not meet the exemption criteria of 29 CFR Part 541, must be paid the applicable DBA wage rate for the time performing DBA covered work. All non-exempt employees must be paid DBA wages on a covered project and paid time and one-half for hours worked over 40 in a workweek. Additional information regarding FLSA Part 541 exemption criteria may be found at www.dol.gov/elaws/overtime.html.

Q: With regard to fringe benefits, could you please detail the documentation that contractors should submitted to the Department or Prime?

A: The contractor should provide information regarding benefits the contractor provides to employees (e.g., a list of the benefits and calculation of fringe credit). The contractor/employer is not required to submit a copy of the benefit plans or the entire new employee packet, but should provide information explaining the benefits. Additionally, information should include employee costs of the benefit

Davis Bacon Frequently Asked Questions (FAQs)

(cost of employee's share of health insurance or a matching contribution to a 401(k) plan). The contractor may provide a narrative document explaining this information is included in the "information packet" or "employee handouts," etc. employees receive the first day of employment or on the day an employee accepts employment or whenever provided to the employee. The contractor may provide additional information about the benefits. The information the contractor provides is to enable a reviewer of the certified payroll to confirm that the contractor provides *bona fide* benefits, the employer's calculation of the credit for providing those benefits is accurate, and the employer's process for conveying information about the benefits.

Q: The DOL instructions for Form WH-347 (certified weekly payroll) do not direct the employer to provide (1) additional information regarding the payment of fringe benefits or (2) any information regarding the type of fringe benefit plans and how such is communicated to employees. Some of the DOE guidance, however, indicates that an employer should provide such information along with the certified weekly payroll. (Examples are inserted below for your reference.) Could you please clarify what information or documentation, if any, an employer must provide to a recipient or subrecipient regarding fringe benefits?

A: There is no DOL regulatory requirement that contractors submit information regarding the type of fringe benefits the contractor provides to his/her employees with the certified payroll record. The DOE guidance and FAQs are designed to provide the greatest assistance to those reviewing the certified payroll records. If the contractor indicates he/she is providing fringe benefits, but does not provide that information with the first certified payroll, the reviewer of the certified payroll has no way to verify that the contractor is actually providing bona fide fringe benefits and that the information has been communicated to the contractor's employees. As a result, the reviewer of the certified payroll records will be required to take the extra step to contact the contractor, by letter, telephone, or in person to obtain the information from the contractor to ensure the benefits are bona fide. This extra step in the process will take additional time on behalf of the reviewer of the certified payroll records. DOE believes that requiring the contractor to provide the information with the first payroll provides notice to the contractor that only legitimate fringe benefits are acceptable and provides the information the reviewers need to fulfill their responsibilities in assuring the contractors and subcontractors comply with all DBA requirements.

Q: Please provide information about hours worked, sick leave, vacation time, and overtime for DBA.

A: The DBA requires payment of at least the minimum wage, as set forth on a DBA Wage Determination issued by the Department of Labor, to all covered, nonexempt employees for all hours worked. The Contract Work Hours and Safety Standards Act (CWHSSA) also provides that covered employees who work more than 40 hours in the workweek must receive at least one and one-half times their regular rate of pay for the overtime hours (hours worked over 40 in a

Davis Bacon Frequently Asked Questions (FAQs)

workweek). A workweek, which can begin on any day of the week, is 7 consecutive 24-hour periods or 168 consecutive hours. The amount of pay due an employee cannot be determined without knowing the total number of hours actually worked by that employee in each workweek. A contractor must pay an employee the DBA wages for all of the hours worked on the site of the project. All time, including hours worked off the site of the project, is counted when determining whether overtime is required. Hours worked for purposes of overtime include all the time during which an employee is required or allowed to perform work for an employer, regardless of where the work is performed, whether on the employer's premises, at a designated work place, at home, or at some other location. Unless set forth on the Wage Determination from the DOL, the DBA and CWHSSA do not require employers to give their employees time off for holidays, vacations, or sick leave - either with or without pay. If the contractor allows an employee time off for a holiday, a vacation, or because he or she is sick, the time off, even though the employee is paid for the time, is not hours worked and need not be included in the total hours worked for overtime purposes. The gross wages are set forth on the certified payroll, as are deductions, but only the actual number of DBA hours worked are entered on the Certified Payroll Form. Often specific states may require pay for holidays, vacations, or sick leave and a contractor must comply with state requirements in addition to DBA requirements.

Q: When reviewing a payroll record none of the worker had any time over 40 hours on the project (CHWSSA/DBA); however, when interviewed they said they worked over 40 hours in the workweek – on other projects for the contractor. Should the agency be concerned about the payment of overtime payments? Or - if it is outside CHWSSA it would not be reviewed for DBA purposes?

A: You should be aware that apart from the CWHSSA overtime pay requirements, other overtime pay requirements may apply. The DBA hours are likely to count toward the Fair Labor Standards Act (FLSA) overtime requirements and/or overtime pay requirements under state laws. The Contract Work Hours and Safety Standards Act (CWHSSA) provides that on covered contracts (prime contract over \$150,000), each laborer and mechanic who works more than 40 hours on the covered contract in a workweek must receive at least one and one-half times the applicable basic rate of pay – the rate listed in the wage determination, excluding the fringe benefit amount listed (if any) – for all hours worked over 40 in a workweek on the covered contract (without a “site of the work” limitation on coverage). A workweek, which can begin on any day of the week, is a fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods.

If a laborer or mechanic works more than 40 hours in a workweek that includes both DBA and non-DBA work, and the work on the DBA contract does not exceed 40 hours, then the CWHSSA overtime pay would not be due them in that workweek. However, they are likely to be subject to the Fair Labor Standards Act (FLSA), the federal law of most general application concerning wages and hours

Davis Bacon Frequently Asked Questions (FAQs)

of work. The FLSA requires non-exempt employees to receive one and one-half times their regular rates of pay for all hours over 40 worked in a workweek (regardless of whether the work performed includes DBA-covered work). The DOL Wage and Hour Division is responsible for enforcement of the FLSA minimum wage and overtime pay requirements. Please notify the DOE Contracting Officer, so that enforcement may be coordinated with DOL. A list of Wage and Hour Division local district offices is available at:

<http://www.dol.gov/whd/america2.htm>.

Q: May employers take a deduction from an employee's wages if the employer purchases tools and uniforms and the employee reimburses those costs?

A: No, the employer may not take such deductions from the weekly payment of wages. In almost all such cases a deduction would not be for the benefit of the employee, but would rather be a benefit for the employer to have the employee purchase tools and uniforms. Deductions from wages for the benefit of the employer are not allowed. If the employer is able to purchase tools at a discount as a benefit to the employee, because an employee wants to buy them for his/her own personal use, it is possible that a deduction from wages may be allowed; however, since these are items not covered under DOL regulations regarding deductions, found at 29 CFR 3.5, a request must be submitted and approval received from the Department of Labor, Wage and Hour Division, Office of Enforcement Policy, Branch of Government Contracts Enforcement, in Washington, DC, before any deduction may be taken.

Q: I have a situation with a subcontractor working on a Recovery Act-funded project where a time sheet shows 39 hours regular time and 1 hour overtime on Friday. The employee worked on the project for 40 hours, but on Tuesday of that week worked 1 hour on another project. We had the subcontractor submit certified payroll sheets for the employee for both projects in order to verify the employees time. I am asking is this the correct way to track the time if an employee works on different projects within the same week?

A: A contractor is required to only enter hours the employee actually performs work on a Davis-Bacon Act (DBA) covered project. As set forth in your scenario, the employee worked on a non-covered project for one (1) hour during the week and that hour was not entered on the payroll record. The employee worked a total of 40-hours on the covered project and the employer properly entered that this employee was due 1 hour of overtime on Friday. The contractor could pay the employee overtime based upon the DBA wage rate or the "weighted average" since the employee worked both DBA and non-DBA covered hours during the week or the contractor could pay the employee overtime at the full DBA covered rate (please see U.S. Department of Labor (DOL) Regulations at 29 CFR 778.115 for additional information). The contractor must maintain good records to prove that the employee was working on two different projects during the week and the hours worked at both projects.

Davis Bacon Frequently Asked Questions (FAQs)

Q: I have several questions regarding the boxes on the certification section of the Department of Labor optional form WH-347.

(1) If the normal rate of pay for a contractor's employees on an EECBG project is greater than that required on the WD for rate of pay with fringe benefits included, does either box 4 a or b need to be checked on page 2 of form WH-347?

(2) The employer pays all of his/her employees more than \$11.00 an hour and the rate is \$10.50 + \$0.50 fringe for a total of \$10.50. Does either box 4a or 4b need to be checked?

(3) The employer pays all his/her employees more than \$11.00 an hour and also contributes fringe benefits of \$2.00 an hour into bona fide fringe benefit plans, should box 4a be checked?

(4) The employer pays all of his/her employees more than \$11 an hour except one. This employee's normal rate of pay is \$10.25 with no fringe benefits. For hours worked on the project, his rate of pay is \$10.50. In this case is box 4b checked?

(5) What information is entered in box 4c?

A(1) The contractor **MUST** check one of the boxes - either 4a or 4b. If the employer is paying cash in lieu of providing actual fringe benefits (i.e., health insurance, pension, vacation) for the benefits the contractor should check box 4b. If the employer pays into a plan for fringe benefits, the contractor should check box 4a. Where a majority of employees are paid cash rather than a fringe benefit, the contractor should check box 4b and in box 4c enters the names of the employees who receive fringe benefits. If instead most of the employees receive actual fringe benefits, but some are part time, temporary, or a probationary employee, and so do not yet qualify for the fringe benefits, the contractor would check box 4(a) and then write the employees names in box 4c who receive cash in lieu of the actual fringe benefits.

A(2) The contractor must check one of the boxes. In this example, the correct box is 4b.

A(3) The employer is paying into a bona fide fringe benefit plan and box 4a should be checked. The employer should provide a description of the fringe benefit plans and calculation explaining the \$2.00 per hour amount.

A(4) The employer is paying all employees cash in lieu of providing a fringe benefit; therefore, box 4b should be checked.

A(5) The information entered into box 4c is exceptions to 4a and 4b. As discussed above in the answer to question 1, whenever an employee receives fringe different from the majority of employees that information is entered into box 4c.

Davis Bacon Frequently Asked Questions (FAQs)

Q: A subcontractor failed to submit the certified weekly payrolls to the Recovery Act-funded project recipient. When challenged on this, the subcontractor immediately completed, signed, and submitted all of the delinquent weekly payrolls; however, all certifications are dated the same date (the date of catch-up). Is there a cost or penalty to be imposed on the subcontractor for late filing of the weekly, certified payrolls; or is the matter closed now that the subcontractor is caught up and remains in compliance?

A: The contractor has now complied with the Department of Labor (DOL) regulations requiring submission of the weekly certified payroll records (CPRs). Had the contractor failed to comply with the requirement and refused to do a catch-up, the DOL could fine the subcontractor for its failure to submit the Davis-Bacon Act and, if there were back wages owing, could also take action to debar the contractor for a period of three years. As long as the contractor remains in compliance and back wages are not owed, the issue can be closed.

Q: Once the construction work is physically completed but final payment will not be made for several more weeks are certified payrolls still required from the contractor and if yes how?

A: If no work is being performed, a contractor is not required to provide certified payrolls. DOE recommends (for audit purposes) that the contractor write on the payroll that it is the final one under the contract. If punch list or warranty work is subsequently required, a sequentially numbered payroll with a notation of the reason can be submitted, as appropriate.

Q: Could a subcontractor submit copies of pay stubs for their workers with the form WH-347 as backup proof?

A: A contractor is not required to submit pay stubs; however, the contractor should retain such documents, along with time cards, as proof should an investigation occur. Such documentation must be maintained for a period of three (3) years following the end of the contract.

Q: Do we need to require a signed statement from the employee authorizing any item in the "other" deduction category?

A: DOL instructions regarding "Column 8 - Deductions" on the WH-347 optional Payroll Form state:

Five columns are provided for showing deductions made. If more than five deduction are involved, use the first four columns and show the balance deductions under "Other" column; show actual total under "Total Deductions" column; and in the attachment to the payroll describe the deduction(s) contained in the "Other" column. All deductions must be in accordance with the provisions of the Copeland Act Regulations, 29 C.F.R., Part 3. If an individual worked on other jobs in addition to this project, show actual deductions from his/her weekly

Davis Bacon Frequently Asked Questions (FAQs)

gross wage, and state that deductions are based on his gross wages.

For payroll deductions in the “other” category, DOE recommends the employer submit a letter briefly explaining the reason for the deduction and the amount withheld (i.e., a court ordered wage garnishment or child support, savings bonds, share of health insurance premium, union dues, etc.). The reason for the detailed reporting regarding deductions is to ensure compliance with DBA and the Copeland “Anti-Kickback” Act.

Q: What if the employer takes deductions for fuel and tools (kept by the employee if they left), but still is paying above prevailing wage. Would the deduction than be allowed?

A: If the employer is paying above the prevailing wage, after the deductions, the deductions would be allowed. Generally, the employer may not take such deductions as, in almost all such cases, such deductions are not for the benefit of the employee, but rather benefit the employer. The rules regarding allowable payroll deductions are published at 29 CFR Part 3, sections 3.5 and 3.6. Deductions from wages for the benefit of the employer are not allowed, unless the employer is paying the prevailing wage after the deduction. If the employer is able to purchase tools at a discount as a benefit to the employee, because an employee wants to buy them for his/her own personal use, it is possible that a deduction from wages may be allowed; however, such a deduction is not among the “Payroll deductions permissible without application to or approval of the Secretary of Labor” listed in 29 CFR 3.5. Thus, a request must be submitted and approval received from the Department of Labor, Wage and Hour Division, Branch of Government Contracts Enforcement in Washington, D.C., in accordance with 29 CFR 3.6, before such a deduction can be taken.

Q: May we allow contractors to use a certified electronic payroll system?

A: Yes. The Department of Labor allows the filing of certified payrolls via electronic payroll systems that meet certain requirements. The main requirement is that the contractor submitting the payroll uses an official digital signature, typically a unique PIN number that verifies the identity of the contractor. Certified electronic payroll systems allow for electronic submissions of both payroll documents and certification statements.

Q: When you say digital signatures are you talking about adding a digital signature in a completed pdf form of WH-347 or the electronic payroll form?

A: A digital signature is only available through an electronic payroll system. If you complete the WH-347 on line, it must be printed out and hand signed. Once the WH-347 is in paper form, it remains in paper form and the original certified payroll must be sent to the Agency.

Q: What if certified payroll lists the classification as "laborer"? Shouldn't it have an actual title listed in the wage determinations?

Davis Bacon Frequently Asked Questions (FAQs)

A: You will need to refer to the Wage Determination that applies to the project in question. Often Wage Determinations do include a classification of “laborer.” Care should be taken to determine the correctness of classifications and to determine whether there is a disproportionate employment of “laborers.” You should conduct employee interviews to determine exactly what work the “laborer” is performing. The actual work performed is the basis for determining the proper classification, and the scope of work for a job classification is determined according to the locally prevailing practice.

Q: Are there reduced trainee wages for a period of time (i.e., 90 days) that can be used while new laborers are becoming familiar with the work process or while they are in training?

A: The DBA applies to laborers and mechanics employed by contractors and subcontractors at a DBA-covered construction work site. Apprentices and trainees are laborers and mechanics, as defined under the DBA. See 29 CFR 5.2(m) and (n). The DBA contract clauses set forth in the Special Terms and Conditions of the DOE grant Agreement, which must be used by the Recipient in any Requests for Proposals or Requests for Bids and subsequent contracts, include specific rules that apply to apprentices and trainees on covered projects.

Workers must be paid the full Davis-Bacon hourly wage even if the workers are in training, if the training is not in an approved DOL program (or a properly approved apprenticeship program) in accordance with the rules stated in the DBA contract clauses. For further information on establishing approved trainee and apprenticeship programs, DOL contacts are available at:

<http://www.doleta.gov/oa/regdirlist.cfm>

Q: Please confirm that the Davis Bacon reporting is for construction workers. I have a project that has a consultant to perform evaluations and a trainer. I assume renewable energy installers would be included under DBA?

A: Davis-Bacon applies to “all laborers and mechanics” on construction projects funded directly by or assisted in whole or in part with financial assistance from an Act with a DBRA prevailing wage requirement. Consultants and energy auditors are not considered laborers and mechanics and would not be covered by DBA. Trainers who do not perform laborer or mechanic work on the job site would not be subject to the DBA requirements. Workers installing renewable energy systems generally would be laborers or mechanics covered by DBA. The applicable definition of laborers and mechanics is stated in DOL regulations at 29 CFR 5.2(m), as follows:

“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

Davis Bacon Frequently Asked Questions (FAQs)

managerial. The term *laborer* or *mechanic* includes apprentices, trainees, helpers. . . . The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent.”

Q: How aggressive do we need to be about "checking the math" on these payroll reports? Many times the number of hours of DB work does not easily correlate to gross wages, because the workers have worked on other DB and non-DB jobs in the same week.

A: The primary thing is to check the math on the form and make sure there are no errors, that only legal deductions are taken, and that everything computes properly. If the employee worked DB and non-DB covered jobs, look at overtime payments. Look at the number of hours of DB covered work and the gross paid for DB work and subtract that number from the total gross wages, does it appear that the employee is being paid properly or would the amount left be low for an individual working 40 hours? If there are questions, contact the contractor for additional clarification.

Q: I heard that installation of equipment is not covered by DBA. Is that correct?

A: A blanket statement that installation of equipment is not DBA covered cannot be made. Each specific contract/loan/grant must be reviewed on a case-by-case basis for a determination as to whether the DBA applies and this also goes for installation of equipment. In some cases installation of equipment may not be covered by the Davis-Bacon Act, but such a decision has to be made on a case-by-case basis.

The Davis-Bacon Act includes “altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site.” 29 C.F.R. 5.2(j)(1)(i). Where a contract or DBRA grant includes funding for both the purchase of equipment and installation, and installation requires substantial amounts of construction, reconstruction, alteration, or repair work (as compared to being incidental to the purchase of equipment), the DBA would be applicable. Factors to be considered in determining whether installation requires substantial amounts of construction include the extent to which structural modifications to buildings are needed to accommodate the equipment (i.e., widening entrances, relocating walls, or installing electrical wiring), and the cost of the installation work - either in terms of absolute amount or in relation to the cost of the equipment and the total project cost.

The Department of Labor (DOL) has repeatedly held that bolting furniture, equipment, or other fixtures to the floors, walls and/or ceilings is installation

Davis Bacon Frequently Asked Questions (FAQs)

covered by the DBA. It may be there will be no structural modifications to a building, where there will be bolting equipment to the floors and running electrical wiring for the equipment, the installation is covered. The cost of the installation must also be considered and the time required completing the installation.

The actual decision as to whether the DBA is applicable to a specific award/grant is made on a case-by-case basis by the Contracting Officer (CO) for that specific award/grant.

Wage Determinations

Q: Do Project Wage Determinations (WDs) expire?

A: The effective and expiration dates that appear on a Project Wage Determination are dates established by DOL and only apply to the agency Contracting Officer. The DOE Contracting Officer (CO) is required to award/incorporate the wage determination into a contract or financial assistance agreement by the expiration date set on the Wage determination. If the CO does not award or modify a contract by the expiration date, the CO must request an extension of the issued WD or a new WD. A General Wage Determination does not expire and, once incorporated into a contract or financial assistance agreement, is valid for the entire length of the contract.

Q: If a wage determination is modified or superseded during a contract period must the contractor change his/her rate of pay to conform to the newer wage determination?

A: Once incorporated in a contract that calls for construction work, a wage determination generally remains effective for the life of the contract (except, for example, if a clearly wrong determination was applied, if the contract is amended to require significant additional construction requirements, (or where a term contract provides an option for its term to be extended and such an option is exercised. DOL modifications to a wage determination published after award of the contract do not apply to the project. Therefore, the contractor and subcontractors on the project would continue to use the wage determination included in the prime contract. The DBA contract clauses require the prime contractor and all subcontractors to flow down the wage determination, along with the contract clauses, to their subcontractors.

Q: If a new wage determination is issued while out to bid, what is the guidance for issuing an addendum to include the new wage determination? In other words what is the cut off for including a new wage determination in a bid package that is out to bid, how many days? When does the wage determination "lock in?"

A: The DOL Regulations provide the following information at 29 CFR 1.6(c)(3):

Davis Bacon Frequently Asked Questions (FAQs)

All actions modifying a general wage determination received by the agency before contract award (or the start of construction where there is no contract award) shall be effective except as follows:

- (i) In the case of contracts entered into pursuant to competitive bidding procedures, a modification, notice of which is published less than 10 days before the opening of bids, shall be effective unless the agency finds that there is not a reasonable time still available before bid opening, to notify bidders of the modification and a report of the finding is inserted in the contract file. A copy of such report shall be made available to the Administrator [of Labor] upon request. No such report shall be required if the modification is received after bid opening.
- (ii) If under paragraph (c)(3)(i) of this section the contract has not been awarded within 90 days after bid opening, . . . any modification, notice of which is published on WDOL prior to award of the contract or the beginning of construction as appropriate, shall be effective with respect to that contract unless the head of the agency or his or her designee requests and obtains an extension of the 90-day period from the Administrator

Therefore, if a modification occurs between the 10 day point and the opening of the bids you will be required to make a determination as to whether there is reasonable time to notify the bidders of the modification so that they may adjust their bids. If a decision is made there is no time, put a report into the contract file. After the bids are opened, the wage determination in the Bid request remains in effect - providing the contract is awarded within 90 days from the date of bid opening.

Q: Is the Residential Construction the correct construction category for multi-family building construction/alteration/repair?

A: The answer depends upon the number of levels in the building. If the contractor will be working on a DBA covered project where the residential housing unit is 4 stories or less, the “residential construction” category is correct; however, where the multi-family building is 5 stories or more, the appropriate category is “building construction.”

Q: We have several job classifications not listed on the WD table for our project from the WDOL website. It is my understanding that the contractor requests the additional classification following award. Is this correct or is there another way to get this completed?

A: The contractor completes the standard form (SF) 1444 detailing the classification(s) needed and proposed wage rate(s). The contractor submits the form to the Prime (if there is one) who forwards to the DOE Contracting Officer (CO). The DOE CO will agree or disagree with the requests for an additional classification. If the CO agrees, the CO will submit the form to the DOL. The process reverses when DOL makes a determination as to the proper

Davis Bacon Frequently Asked Questions (FAQs)

classification and wage rate. The CO will forward to the new classification(s) and wage rate(s) to the Prime along with any needed modifications to the contract. This is called a Conformance.

The DOL provides copies of the SF-1444 on their website at this link:

<http://www.wdol.gov/docs/sf1444.pdf> and directions are at http://www.wdol.gov/db_conformance.aspx.

Q: It is my understanding that Line 16 on the SF-1444 should be signed by an employee working in the Job Classification that is being requested. Is this your understanding?

A: If present, employees or their designated representative **must sign block 16** noting their concurrence or disagreement with the contractor's proposed wage and benefit rate. If the employee disagrees with the contractor's proposal, he must provide a statement supporting a recommendation for different rates. "Designated representative" is generally a union representative. It is not the contractor's personnel officer or other contractor representative.

Q: Regarding the Conformance request, if a State has a prevailing wage rate for a classification can that rate be used or do we still have to submit a conformance request to the DOE.

A: If there is no DBA wage rate for a specific classification, a conformance request must be submitted (SF-1444). The State wage rate may be suggested as the correct wage rate and until the DOL responds to the conformance request, that wage rate may be used. If, however, the DOL returns the conformance request with a higher wage rate, then an adjustment must be made retroactive to the date the individuals in that classification began work on the project. Always make a comparison between the DBA and the State prevailing wage rates (unless the State prevailing wage law defers from the DBA) to make sure that DBA-covered workers are paid the appropriate wages.

Q: If a state has a prevailing wage requirement that has wage rates higher than the corresponding Davis-Bacon federal prevailing wage rates, does a contractor have to pay the higher of the two on a project funded by both state and federal dollars?

A: If a project involves financially funded construction, and the financial funding has a prevailing wage clause, the DBA is applicable. Assuming the project at issue is for construction, the Recipient of a grant should review the applicable state prevailing wage statute to determine whether the project is subject to the State's prevailing wage rates. If the State's prevailing wage is applicable to the project, the State's wage rate is higher than the corresponding Davis-Bacon prevailing wage, and the project is funded by both federal and State funds, the contractor must pay the higher of the two wage rates (in this case the State's wage rate).

Davis Bacon Frequently Asked Questions (FAQs)

Q: I have read that the purpose of the Davis Bacon Wage Act is to ensure that local prevailing wage rates are met or exceeded on federally funded contracts over \$2,000.00. If the local prevailing wage rate is less than the Davis Bacon rates, wouldn't that allow a contractor to pay the lesser local prevailing wage rate?

A: The Davis-Bacon Act requires all contractors and subcontractors to pay laborers and mechanics employed on a covered contract (and financial assistance agreements funded by an Act containing a Davis-Bacon prevailing wage requirement) wages and fringe benefits determined by the Secretary of Labor to be prevailing for corresponding classes of employees engaged on similar projects in the locality. The Secretary of the Department of Labor (DOL) is the only one with the authority to determine the locally prevailing wage to be used on federally funded projects. No other agency has such authority and contractors have no authority to pay a wage different than what is determined by DOL. Contractors shall pay laborers and mechanics the wage rates set forth by DOL.

Q: A contractor is being hired for asbestos abatement and demolition in residential construction in two counties. There are DBA WDs for "Laborers" who are specifically engaged in asbestos abatement, but not under the "construction type" "Residential." Can the wage rates listed for laborers that are engaged in asbestos abatement under another "construction type" ("Building" or "Highway") be used for comparison with the state's prevailing wage rates (higher of the 2) for that labor?

A: You may not use the wage rates found under another construction category; however, the rates found under another construction type (such a Building Construction) may be helpful in determining the appropriate wage rate for a new proposed classification. If you are missing a classification of worker needed in the performance of the contract, the contractor initiates a request for the missing classification by preparing an SF-1444, Request for Authorization of Additional Classification and Rate, at the time of employment of the unlisted classification. (See FAR 22.406-3 and 52.222-6(c), and 29 CFR 5, Section 5.5(a)).

The Contractor submits the request to the DOE Contracting Officer who reviews the request for completeness and necessity. The Contracting Officer will review the form deciding the Department's concurrence or disagreement with regard to the contractor's proposal. The Contracting Officer reviews the SF-1444 to determine whether the proposed classification is performed by a classification in the wage determination and the proposed wage rate bears a "reasonable relationship" to the wage rates in the wage determination. (See DOL All Agency Memorandum 213.) The Contracting Officer signs signaling Agency concurrence and submits the proposal with all attachments to DOL for approval via WHD-CBACONFORMANCE_INCOMING@dol.gov.

The Contractor is obligated to pay the proposed wage and benefit rates pending a response from DOL. The conformance request will be reviewed by DOL. If the

Davis Bacon Frequently Asked Questions (FAQs)

proposed rate is found to bear a reasonable relationship to the other rates listed on the decision, DOL will approve the requested classification and the proposed rate of pay or DOL will provide a conformed rate that can be paid. Where DOL provides a conformed rate, the DOL rate must be paid retroactive to the beginning of the project.

Q: I was told that 10-days prior to opening bids, I need to check the WDOL.gov website and issue an addendum to the solicitation advising what wage determination general decision number will apply to the project if there has been a modification of the wage determination. Please tell me where I can find this 10-day requirement.

A: The 10-day requirement applies where the wage determination incorporated in the Invitation for Bid or Request for Proposals changes between the time the competitive announcement was made and 10-days prior to the opening of the bids. The DOL Regulations provide the following information at 29 CFR 1.6(c)(3):

(3) All actions modifying a general wage determination shall be effective with respect to any project to which the determination applies, if notice of such action is published before contract award (or the start of construction where there is no contract award), except as follows:

(i) In the case of contracts entered into pursuant to competitive bidding procedures, a modification, notice of which is published less than 10 days before the opening of bids, shall be effective unless the agency finds that there is not a reasonable time still available before bid opening, to notify bidders of the modification and a report of the finding is inserted in the contract file. A copy of such report shall be made available to the Administrator [of Labor] upon request. No such report shall be required if the modification is published after bid opening.

(iv) If under paragraph (c)(3)(i) of this section the contract has not been awarded within 90 days after bid opening, . . . any modification, notice of which is published on WDOL prior to award of the contract or the beginning of construction, as appropriate, shall be effective with respect to that contract unless the head of the agency or his or her designee requests and obtains an extension of the 90-day period from the Administrator. . .

Therefore, if a modification occurs between the 10 day point and the opening of the bids you will be required to make a determination as to whether there is reasonable time to notify the bidders of the modification so that they may adjust their bids. If a decision is made there is no time, put a report into the contract file. After the bids are opened, the wage determination in the solicitation at bid opening is effective for the length of the contract.

Q: Must the Agency post the wage rate in the Solicitation or simply list the link to the DOL Wage Determinations Online? Is it the Public Agency's responsibility or the Contractors?

Davis Bacon Frequently Asked Questions (FAQs)

A: The Public Agency must inform the potential bidders/proposers that the work will be subject to the DBA and may either attach the wage decision in the bid documents or incorporate it by reference to the appropriate website at www.wdol.gov.

Q: My question is for a Recovery Act-funded grant project, what date should we choose a WD to apply to the project? Also, what is the proper way of getting these dates, should the developer or contractor sign off on this date?

A: If the contract for construction results from a closed/sealed bidding process, the WD is first chosen on the date the solicitation is released requesting bids. Then ten days prior to the date bids will be opened, the soliciting entity must check the www.wdol.gov website to see if the WD has been modified by the Department of Labor (DOL). In cases where the WD has not been modified, the soliciting entity will use the WD that was in the solicitation; however, if the WD has been modified, the soliciting entity notifies all potential bidders that a new modified WD is to be used in their bids. The WD in effect ten days prior to the opening of bids must be used for contracts that are awarded in a bidding process. There is a caveat to this answer - the award must be made within 90 days of opening bids to use the WD in the solicitation. If the contracting entity fails to award a contract within 90 days of opening the bids, the contracting entity must update the WD on the date of award of the contract or the date construction begins.

For contracts that result from negotiations, and construction will start within 90 days of signing the contract, the WD in effect on the date the contract is signed is the appropriate WD; however, if construction will not begin within 90 days of the signing of the contract, then the WD in effect on the date construction begins is the appropriate WD. A contracting entity may use the most current WD on the date construction begins. The DOL regulations at 10 CFR 1.6 sets forth the information for the use and effectiveness of wage determinations.

As to the question regarding obtaining the dates construction begins, the contractor should be tasked with notifying the contracting entity with the date construction begins to enable the contracting entity to ensure the use of the proper WD.

Q: A wage determination states that workers should receive 10 paid holidays each year (and names the holidays). The contractor has made provisions to allow workers to exchange a non-holiday work day for a holiday, but the question is, if a worker works on a designated holiday, is not given another day off with pay for the holiday worked, but is instead paid at a rate of either time and 1/2 or double time for working that holiday, does that meet the requirements of the wage determination with regard to paid holidays? If not, what is the penalty to the employer?

A: The employer is required to either allow the employee an 8 hour day off with pay or pay the employee 8 hours plus regular time for working the holiday. The

Davis Bacon Frequently Asked Questions (FAQs)

employee must be paid for the holiday. If the employee wishes to take another day in lieu of the actual holiday day that is acceptable. However, if the employee works the holiday and is not given another day off with pay, then the employer must pay the employee for the holiday day plus pay the employee for the hours worked on the holiday. For example: The employee should have the Presidents' Day Holiday off, but due to work scheduling the employer needs the employee to work. The employee works 6 hours on the Holiday. The employer may offer the employee another day off, the employee may choose to accept the other day off or decide on pay in lieu of the holiday. If the employee chooses pay, then the employer must pay the employee 8 hours of straight time for the holiday plus an additional 6 hours of time for the hours worked that day. If working on the holiday results in the employee working more than 40 hours during the week, then the employee would be entitled to overtime for the number of hours actually worked over 40 in the work week. The employer must make these payments to the employees or DOL may fine the employer. If the DOL finds the employer acted willfully the DOL may levy fines plus take action to debar the contractor from performing work on government contracts for a period of up to 3 years.

Q: If a wage determination is modified or superseded during the period of a contract, must the contractor change his/her rate of pay to conform to the newer wage determination?

A: Once incorporated in a contract that calls for construction work, a wage determination generally remains effective for the life of the contract. An exception, for example, where an incorrect wage determination was applied, where the contract is amended to require significant additional construction requirements, or where a term contract provides an option for its term to be extended and such an option is exercised. The contractor and subcontractors on the project would use the wage determination included in the prime contract. The DBA contract clauses require the prime contractor and all subcontractors to flow down the wage determination, along with the contract clauses, to their subcontractors.

Q: We received a Wage Determination but there is not a Fringe Benefit figure. What fringe benefit must be paid?

A: If the Wage Determination has no fringe benefit rate for some (or all) classifications listed, DOL did not find fringe benefits prevailing in the area for such classifications on the given type of construction in the area. In these cases, the contractor would not need to add a fringe benefit amount to the basic hourly rate to compute the total prevailing wage that the contractor is required to pay to workers performing the work of such classifications. (The DBA defines the "prevailing wage" as including both the basic hourly rate of pay and any bona fide fringe benefits. Thus, even where the applicable wage determination does not list fringe benefits for a given classification, the employer's contributions/costs for providing bona fide fringe benefits may be credited towards meeting the

Davis Bacon Frequently Asked Questions (FAQs)

prevailing wage requirement – the combined basic hourly rate and fringe benefits listed in the wage determination – for the listed classification).

Q: If an employer pays DB in wages and fringe benefits, but deducts a portion of the cost of medical from employees, is the employer still in compliance with Davis/Bacon?

A: Wages under the DBA include both the cash wages and “bona fide” fringe benefits provided to laborers and mechanics. A contractor may discharge its prevailing wage obligation by any combination of cash wages and creditable “bona fide” fringe benefits. The total prevailing wage for a given classification, including any amount listed for fringe benefits, (1) may be paid entirely as cash wages, (2) payments made or costs incurred for “bona fide” fringe benefits may be credited towards fulfilling the requirement, or (3) a combination of cash wages paid and “bona fide” fringe benefits may be used together to meet the total required prevailing wage. Examples of fringe benefits include health insurance, pension contributions, and paid time off.

An employer may provide for employees, on a voluntary basis (or as agreed by the terms of their collective bargaining agreement), to pay a portion of the premium for health insurance through payroll deductions. Such employee contributions to the fringe benefit plan can be by payroll deductions from their wages on their behalf; however, the employer may not count the amount the employee pays for the benefits toward the prevailing wage the employer is required to pay to the employee. The contractor may only count the employer contributions for health insurance as credit towards fulfilling the prevailing wage requirement. (In the applicable rules regarding deductions, set forth in 29 CFR 3.5; “Payroll deductions permissible without application to or approval of the Secretary of Labor,” see paragraph 3.5(d)).

Q: Can any combination of pay and fringes be used to meet the D-B base rate? For example, if a D-B classification is \$10.00/hr base rate + \$1.00 in fringes = \$11.00, can the contractor \$9.00/hr + \$2.00 in fringes = \$11.00?

A: Yes, a combination of cash wages and bona fide fringe benefits can be used to meet the DBA rate. (The relevant DBA provision is set forth at 40 U.S.C. 3141, available at <http://www.dol.gov/whd/regs/statutes/dbra.htm>. In your example above, the DBA wage determination rate is \$10/hr wage + \$1/hr fringe = \$11/hr DBA rate. The contractor can pay \$9/hr wage + \$2/hr fringe, as that equals \$11/hr in total compensation. As long as the total compensation meets or exceeds the DBA rate of \$11/hr, then the contractor is paying in compliance with the DBA. Please note that the CWHSSA overtime pay requirement, if applicable, is based on the \$10.00 “basic hourly rate” listed in the wage determination. Thus, in this example, under CWHSSA, the worker would be due \$11.00 + \$5.00 = \$16.00 per hour worked over 40 in a workweek on the contract.

Q: Can a contractor ask for a fringe benefit amount when requesting a conformance without having a fringe benefit plan available to their employees?

Davis Bacon Frequently Asked Questions (FAQs)

A: The contractor may propose a fringe benefit amount when submitting a request for an additional classification. This is appropriate if the contractor provides the worker with bona fide fringe benefits as part of their compensation. However, if the contractor does not provide fringe benefits to workers in a requested classification, the request for an additional classification should reflect the minimum wage rate that the contractor proposes to pay workers in the proposed classification. Where the rates on the wage determination include fringe benefit amounts, the total rates listed – including fringe benefits, if any – should be considered in determining whether the requested rate is reasonable in relation to the rates already listed in the wage determination, as required by the contract clause criteria for approval of additional classifications.

Q: If a health plan is based on 40 hours a week, will the fringe benefit for overtime require payment of the fringe in cash?

A: Employees must be paid the total prevailing wage, including fringe benefits (if any), listed in the applicable Davis-Bacon wage determination for all hours worked in a given classification, including overtime hours. If a contractor computes the credit for fringe benefits on a 40-hours-per-week basis, then a separate computation may be necessary to ensure payment of the full prevailing wage for each hour worked over 40 in a week (as well as any applicable premium overtime pay required under CWHSSA, the Fair Labor Standards Act, and/or applicable State law). It is not required that fringe benefits be paid in cash for overtime hours, but in the situation described in this instance, it may be that additional cash will have to be paid to ensure that both the prevailing wage and any applicable overtime pay requirements are met for any overtime hours worked.

Q: Where is the best place to find a list of fringe benefits that may count toward the prevailing wage rate paid?

A: The language in the Davis-Bacon Act regarding fringe benefits that can be counted as part of the Davis-Bacon prevailing wage, is set forth in Title 40 of the United States Code at 40 U.S.C. § 3141 (available at <http://www.dol.gov/whd/regs/statutes/dbra.htm>), and is also described in DOL regulations at 29 CFR 5.23. Fringe benefits to be considered include employer contributions/costs for life insurance, health insurance, pensions, disability and sickness insurance, vacation and holiday pay, sick leave, and for defraying the costs of apprenticeship. The costs for fringe benefits are incurred by the contractor/employer; they are not payroll deductions from employee pay. Allowable payroll deductions are a separate matter, addressed separately in applicable rules in 29 CFR 3.5 and 3.6, available at <http://www.dol.gov/whd/reg-library.htm>.

Note: The use of a truck is not a fringe benefit; the use of tools, uniforms, or cellular phones are not fringe benefits; a Thanksgiving turkey or Christmas bonus is not a fringe benefit.

Davis Bacon Frequently Asked Questions (FAQs)

Q: Can payments into the State Unemployment Compensation fund be counted as a fringe benefit to meet the wage determination rate?

A: Credit may NOT be taken for any benefit required by federal, state, or local law, such as workers compensation, unemployment compensation, or Social Security contributions. These are generally considered taxes, and are the employer's responsibility, not a fringe benefit that the employer may have discretion in providing to the workers.

Q: Because I don't see it identified on the Wage Decision, are computer programmers who work on the site making final configurations/adjustments considered a laborers or mechanics?

A: Computer programmers are not laborers or mechanics and are not subject to the DBA.

Q: Just to clarify, DB Act only pertains to labor/mechanics on a construction/renovation work site. It does not pertain to an engineer doing design work before construction begins. Correct?

A: Yes, correct. Engineers performing design work whether before or during the construction are not laborers or mechanics and are not subject to the DBA.

Q: Does prevailing wage pertain to consultants, architects or engineers?

A: DBA does not apply to energy auditors, consultants, architects, or engineers working on a project.

Q: Do professional and technical expertise vendors or subrecipients fall under Davis Bacon? For example: A non-construction organization helps implement part of a grant-funded transportation trip reduction program?

A: DBA does not apply to professional and technical expertise vendors or subrecipients.

Q: Does DBA apply to non-construction work? For example: A subcontractor is developing a plan for an energy efficiency building retrofit program (for all types of buildings – residential, commercial, etc).

A: DBA does not apply to individuals developing an energy efficiency building retrofit program.

Q: Is it true that a driver of a truck delivering equipment to a DBA jobsite is covered under DBA? What if the truck delivering equipment to jobsite is not owned by the contractor?

A: The DBA requirements apply to laborers and mechanics employed on the site of work. Time spent at the home office, picking up supplies, traveling to the work site, etc., are not DBA hours. A truck driver who only delivers equipment to the work site and who spends a minimal/incidental amount of time at the site

Davis Bacon Frequently Asked Questions (FAQs)

unloading the materials is not covered by DBA. Material suppliers are not DBA-covered if they spend only an incidental amount of time performing work at the construction site.

Q: We have a cooling tower that we (City) purchased (with EECBG funds), but we will hire a contractor to install this piece of equipment. Installation will require a crane. Duration of work is about 15 days. Would this selected contractor be required to comply with DBA requirements? Or is this considered “incidental”?

A: Installation of a cooling tower would be covered by the DBA and the contractor will be required to comply with all DBA requirements. Incidental work is usually less than 32 hours. Work requiring about 15 days to complete is far from incidental.

Q: How does the DBA apply to labor performed by local government employees? For example, does the DBA apply if Town or City employees are doing the installation of a solar array?

A: Local units of government are not considered by DOL to be contractors or subcontractors, and their workers are not covered by DBA. Any contracts awarded by the local government, however, must include the DBA labor clauses and applicable wage determination(s) for the contractor’s employees.

Q: Can you address free/volunteer labor? We heard subgrantees will be using volunteer laborers in order to get around reporting/applying DB wages. Can you address this?

A: The subgrantee is required to pay the “volunteers” the prevailing wage rate. The Department of Labor states in its Field Operations Handbook (§15e23): “There are no exceptions to Davis-Bacon coverage for volunteer labor unless an exception is specifically provided for in the particular Davis-Bacon Related Act under which the project funds are derived.” The Davis-Bacon Related Act in this case is the American Recovery and Reinvestment Act of 2009 (Recovery Act) and it is silent on the subject of an exception for volunteer labor. Therefore, on Recovery Act-funded projects subject to Davis-Bacon coverage, the grantee/subgrantees must pay all workers the prevailing wage – no exceptions for volunteers.

Q: Do AmeriCorps volunteers need to have Davis-Bacon wages or be registered as apprentices or should they be exempt as they're government employees?

A: The DBA provides that it does not supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates. The authorizing statutes for the Youth Conservation Corps, 16 U.S.C. 1703(a)(3), and the Public Land Corps, 16 U.S.C. 1726, for example, specifically require the Secretaries of Interior and Agriculture to set the rates of pay or living allowances for the Corps' participants. Other youth programs, such as the American Conservation and Youth Service Corps (AmeriCorps), 42 U.S.C. 126551, and Volunteers in Service to America (VISTA), 42 U.S.C. 4955, specify in the

Davis Bacon Frequently Asked Questions (FAQs)

statutory language the living allowances and other benefits that must be provided to each participant. Therefore, since these Federal youth programs have established specific compensation to be paid to participants, such participants would not be covered by Davis-Bacon labor standards.

To determine whether any other Volunteer Organizations may be exempt, a written request for a determination should be accompanied with appropriate supporting documentation and must be sent to The Administrator, Wage and Hour Division, 200 Constitution Avenue, N.W., Room S-3502, Washington, D.C. 20210.

Contract Work Hours and Safety Standards Act (CWHSSA) Questions

Q: What does CWHSSA require from DOE Contractors or grantees?

A: CWHSSA requires payment of overtime (1.5 times the normal wage rate) for work in excess of 40 hours in a workweek. See 40 U.S.C. 3703.

Q: What contracts are subject to CWHSSA?

A: CWHSSA is applicable only to contracts and subcontracts that are \$150,000 or greater. CWHSSA applies to government contracts and to contracts for work financed at least in part by loans or grants from the Government under any federal law providing for payment of prevailing wages.

Q: How are CWHSSA liquidated damages computed?

A: Computation of CWHSSA Liquidated damages is made for EACH individual employed as a laborer or mechanic in violation of the requirement to pay overtime and shall be equal to \$10 for EACH calendar day for which the individual was required or permitted to work in excess of 40 hours in the workweek without payment of the appropriate overtime wages. See 40 U.S.C. 3702(c).

Q: Is there a minimum threshold for collection of CWHSSA liquidated damages?

A: As a matter of DOL administrative policy, liquidated damages are not computed for employees whose CWHSSA back wages are less than \$20.

Q: Does the DOE have the ability to waive a small amount of CWHSSA liquidated damages?

The Department of Energy has authority to waive liquidated damages under \$500, upon an appeal from a Contractor to the Department of Energy. Requests for such action are forwarded to the Department of Energy Labor Advisors. The Agency head or designee can waive liquidated damages under \$500 providing the violation was inadvertent. If a contractor requests a reduction or rescission of liquidated damages over \$500, DOE must review and determine whether to

Davis Bacon Frequently Asked Questions (FAQs)

request permission from the Department of Labor. CWHSSA liquidated damages are submitted to the U.S. Treasury.

Q: Who reports the violation of CWHSSA on the DBA Semi-Annual Enforcement Report?

A: The DOE Contracting Officer (DOE-CO) will make the report to the DOE Office of General Counsel (GC-63). The report includes the number of CWHSSA violations, the number of employees for whom the appropriate overtime wages were not paid, the total amount of overtime payments made to those employees, and the amount of liquidated damages collected.

Q: If a mistake is found concerning underpayment to a worker, and the employer has provided evidence that the underpayment has been rectified via the payment of retroactive wages, is it still necessary to collect liquidated damages?

A: The collection of liquidated damages is for the failure to pay proper overtime under the Contract Work Hours and Safety Standards Act (CWHSSA). On DBA covered contracts where the prime contract exceeds \$150,000, CWHSSA requires overtime pay for laborers and mechanics at a rate of one and one-half times the basic rate of pay (the "Rate" listed in the wage determination, apart from the fringe benefits listed, if any) for hours worked in excess of 40 in a workweek. Where liquidated damages can be assessed, the DOE Contracting Officer must be notified. The liquidated damages apply at a rate of \$10.00 per day per person for each day the employer failed to pay the proper overtime compensation per employee that the contractor fails to properly pay. The liquidated damages should be collected for all days in which the employer failed to pay the proper overtime compensation. The DOE Contracting Officer may notify DOL to determine whether additional enforcement actions should be taken.

Q: Are liquidated damages only calculated in the week the Overtime occurs? For instance, if the worker is owed overtime, do liquidated damages continue for every day it is not paid or only calculated on that week? Do you have to assess the liquidated damages if it was not willful?

A: Liquidated damages are in addition to back wages due as a result of underpayments of wages and/or proper overtime pay to covered workers. The liquidated damages are computed at \$10.00 per day per employee for CWHSSA violations (i.e., with regard to each worker, \$10 for each calendar day on which the individual laborer and mechanic worked in excess of 40 hours in a given workweek without payment of the required overtime compensation). The assessment of liquidated damages is only for the days on which overtime pay is due under CWHSSA (each day on which the covered worker worked beyond 40 hours in a given workweek and the worker was not paid the required proper overtime pay). Note that underpayment of the required prevailing wage can result in overtime pay violations, as well. Assessment of liquidated damages is a requirement; however, the contractor may appeal to DOE, through the

Davis Bacon Frequently Asked Questions (FAQs)

Contracting Officer. DOE has the authority to waive liquidated damages under \$500.00, depending upon the circumstances.

Training

Q: We have a construction Training Program (not an apprenticeship program) and want to know whether the students must be paid DBA wages if they perform some of their training on a government-funded construction site?

A: Payment of the DBA wages is required for the time spent performing work during the students training at the government-funded job-site.

Examples: (1) Students go with a construction crew to participate in the work while learning the particular skills of a classification. Pay students the wages plus fringe, as set forth in the applicable DOL DBA Wage Determination (WD), for the time spent on the work site.

(2) Students go to a DBA covered job-site for the sole purpose of observation (i.e., no tool is picked up or used). No pay for students is required. A trainer may provide students with a tour of the site, allow them to observe the workers in action and demonstrate techniques as long as the students do not participate in the activities.

(3) Students perform training work off the government-funded site after observing the workers on a DBA covered site – DBA does not apply. If students go to a training center or building procured for the sole purpose of training, the building is training prop and DBA does not apply.

(4) Students participating in an Employment Training Administration (ETA) approved program are exempt from DBA; however, students receive the wages set forth in the certified program. Unless ETA approves all program requirements, student work performed on a DBA covered project requires payment of the DBA wages plus fringe for all work performed on the DBA covered work site.

Q: One of our program areas involves workforce development for people who will work in energy efficiency and renewable energy. Part of that program is an internship/fellowship program intended to place current students in organizations performing energy efficiency and energy renewal work. Our questions are as follows:

(1) In proposing a student internship and fellowship program, is it OK to restrict eligibility to students who are either permanent residents of our state or attending an institution of higher learning in our state?

Davis Bacon Frequently Asked Questions (FAQs)

(2) In the event an intern/fellow performs work such as sealing ductwork in a home, or performing audits on commercial or industrial buildings, will this trigger Davis-Bacon reporting requirements?

A: (1) Nothing in the program prohibits restricting an internship to State residents or attendees of a State institution of higher learning.

(2) We assume the intern/fellowship is funded by a grant awarded under a statute requiring payment of DBA prevailing wages, such as the American Recovery and Reinvestment Act of 2009 (Recovery Act).

Under the Recovery Act, DBA requires contractors to pay their laborers and mechanics performing construction type activities the wages found to be prevailing in the locality. Auditors, inspectors, and other personnel not performing physical or manual work at the site of the work are not subject to DBA requirements. An intern working in a bio-fuel processing plant learning the operations would not be subject to DBA requirements and neither would others performing energy audits.

Payment of the DBA prevailing wage is required if the intern performs work on a federally-funded project (e.g., sealing ductwork in a home or installing other energy efficiency equipment on a federally funded project). It is the type of work performed that triggers the DBA requirements. If a project is DBA-covered, all DBA reporting requirements must be fulfilled. If the intern's work occurs on non-federally funded projects, such as work with a local Habitat for Humanity, DBA is not applicable.

Q: Our state is going to provide two federally-funded grants for training programs. The students will be learning about photovoltaic systems ("PV systems" or "solar power systems"). The first part of the training program involves educational theory and then there will be a hands-on workshop where students attending the class will participate in the installation of a PV system. The grant covers training and cost of the PV system materials. This is a "learning while doing" kind of training program/opportunity that we find worth funding. The first grant involves training conducted by the regional electric journeyman apprenticeship training center. The PV system will be owned by the training center and the training center is providing the cost share to the grant. The second grant involves training conducted by a private consultant and the PV systems will be installed on public school buildings. Would the students have to be paid prevailing wages for the time they are installing the PV system?

A: Under DBRAs such as the Recovery Act, the DBA applies to laborers and mechanics employed by contractors and subcontractors at a DBA-covered construction work site. The installation of a PV system paid for by ARRA funds would be subject to the DBA. Students/trainees/apprentices in a program approved by a State apprenticeship agency or DOL's Office of Employment and Training may be employed on the project in accordance with the hourly wage contained in the approved program, expressed as a percentage of the DBA

Davis Bacon Frequently Asked Questions (FAQs)

wage. If the training program is not a DOL or State approved training program, the students would have to be paid the full DBA prevailing wage while installing the PV system.

Q: A town will be using their federal grant for the purchase and installation of a new heating system in a town building. Installation is to be done by the regional vocational-technical school (a state institution). Students will perform the installation under the supervision of their instructors. All instructors are licensed by the State to perform this type of work. As the instructors and students would not receive payment for their services (it's an educational opportunity) the question is whether Davis-Bacon would apply in this situation. I was led to believe that the town would make some type of pro forma payment to the school for undertaking this work.

A: Under a DBRA statute, the DBA applies to laborers and mechanics employed by contractors and subcontractors at a DBA-covered construction work site. The installation of a new heating system paid for by ARRA funds would be subject to the DBA. Students/trainees/ apprentices in a program approved by a State apprenticeship agency or DOL's Office of Employment and Training may be employed on the project in accordance with the hourly wage contained in the approved program, expressed as a percentage of the DBA wage. If the training program is not a DOL or State approved training program, the students would have to be paid the full DBA prevailing wage while installing the new heating system.

Q: I have several questions concerning the application of the Davis-Bacon Act (DBA) to "hands-on" training programs. The training provided may occur in a classroom, warehouse, or in a productive laboratory type setting where students will receive "hands-on" training on how to install energy efficiency, water efficiency or renewable energy-related equipments. One of the proposed "hands-on" training exercises includes the installation of components for a concentrating solar power (CSP) parabolic trough.

(1) Is the community college required to pay participating students prevailing wages under the DBA if the components for the CSP parabolic trough are donated, and ARRA-SEP funds are only used to pay for the workforce training program?

(2) Is the community college required to pay participating students prevailing wages under the DBA if ARRA SEP funds are used to pay for any of the pylon design or foundation work needed to support the CSP parabolic trough, such as the construction of concrete footings? Under the facts of this question ARRA SEP funds would be used to pay for both the pylon design and foundation work and the subsequent "hands-on" student training.

(3) Is the answer to question 1 or 2 affected by the community college's use of the CSP parabolic trough? For example, if the CSP parabolic trough is used to generate electricity, which the community college uses on-site to offset its

Davis Bacon Frequently Asked Questions (FAQs)

electrical load and thereby reduce its electrical costs, does this use affect the determination of whether DBA applies to either question 1 or 2?

A: (1) In this case, the community college received a donation of the CSP parabolic trough, which is the project the students will be assembling, and which is not funded by the Recovery Act. Therefore, the community college would not be required to pay participating students the prevailing wages under the DBA because the construction activities the students perform are not on a project funded in whole or in part by the Recovery Act. If, however, the students were taken to a project funded through the Recovery Act, the contractor for that project would be required to pay the students the prevailing wages under the DBA.

A: (2) In this case, the community college would use Recovery Act SEP funds to pay for pylon design or foundation work, such as construction of concrete footings. The engineering/design work would not be subject to DBA. However, where any of the construction work project is funded in whole or in part with Recovery Act funding, the DBA is applicable to all the construction work performed on that project. Therefore, if the foundation work such as construction of the concrete footings is funded through the SEP grant, the community college must pay all students performing construction activities/including installation of the CSP parabolic trough the appropriate DBA wages for time spent performing such work.

A: (3) The fact that the community college uses the CSP parabolic trough for other purposes does not change the answers provided above under question 1 and 2.

Native American and Alaskan Native Tribe Questions

Q: Are Section 17 corporations subject to DBA? What about Alaska Regional Corporations?

A: A Section 17 corporation is a federally chartered corporation, according to the Indian Reorganization Act of 1934, 25 U.S.C. § 477 (1993) (IRA), which permits the tribe to incorporate and obtain its corporate charter from the Secretary of the Interior. Under a Section 17 corporate umbrella, the tribe becomes a separate legal entity from the corporation created. The Section 17 Tribal Corporation has the powers to contract, to pledge assets, and to waive sovereign immunity to be sued. A Section 17 Tribal Corporation does not qualify for the "force account" exception and employees of the Section 17 Tribal Corporation must be paid the DBA prevailing wages when performing work on Recovery Act-funded projects.

Q: What about Alaska Regional Corporations?

Davis Bacon Frequently Asked Questions (FAQs)

A: Alaska Regional Corporations are also federally chartered pursuant to the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1606 (ANCSA). These regional and village corporations are now owned by Alaska Native people through privately owned shares of corporation stock. An Alaska Regional Corporation does not qualify for the "force account" exception and employees of the Alaska Regional Corporations must be paid the DBA prevailing wages when performing work on government-funded or assisted projects.

Q: Does DBA apply to a tribal corporation established for the sole purpose of benefiting the tribe, and which does not act independently from the Tribal Council?

A: Non-Section 17 Tribal corporations are also not the same as the Tribal government or Tribal governmental entity/organization. Tribal corporations are formed similarly to corporations formed under State laws. Tribal corporations are formed subject to Tribal statutes, just as corporations may be formed pursuant to State statutes. Tribal Corporations do not qualify for the "force account" exception and are subject to DBA whenever these corporations perform work for the Tribes on projects covered by DBA. Corporations that are incorporated pursuant to Tribe or State statute, including non-profits are subject to the DBA requirements when performing work on government-funded projects. Tribal corporations should assume they are covered by DBA when performing work on Recovery-Act projects. If a tribal corporation believes it is NOT subject to DBA, it may submit evidence to the DOE Contracting Officer who will seek the assistance of the Office of General Counsel for a determination.

Q: Our Tribe will be contracting with the housing authority from a neighboring Tribal village for our hot water retrofit activity. Will the Tribal employees from another village be subject to DBA when working outside their own village?

A: Tribal employees who are hired to do work for another Tribal Government (not their own), are subject to the DBA. In this case, the Tribe is contracting with the other village to perform the hot water heater retrofit. Employees on the payroll of one tribe, hired to do work for another tribe are subject to DBA.

Q: Our Tribe will be contracting with the Tribes housing authority to perform DBA covered work. Will DBA apply to the employees of the Tribes housing authority?

A: Work performed by employees of a Tribal governmental organization (political subdivisions), such as the Tribes housing authority, is not subject to DBA. An organization is considered a 'subdivision' or entity of the Tribal Government where the Tribal organization has been formed by a formal action of the Tribal Council.

Q: Is it true that any employee of a Tribal government, even one who is hired temporarily, is considered an employee of the Tribal government and not subject to the DBA requirements when performing work for the Tribal government?

Davis Bacon Frequently Asked Questions (FAQs)

A: Employees of the Tribe, even those hired on a temporary basis, are not subject to DBA when performing work for the Tribal government. DOL considers temporary tribal employees and regular full-time employees as “force account” workers. As defined by the DOL, a “force account” is essentially a “do-it-yourself” type of construction, where the governmental entity performs work using its own employees. Force account construction is not generally subject to DBA because employees of the Tribal Government are not considered “contractors.” To determine whether laborers hired by a Tribe under a force account are subject to DBA, the focus is on whether the laborer is actually an employee of the Tribal Government. In general, answering the following questions can help make this determination: 1. Are the workers paid directly through the tribal entity (i.e., listed on the tribal entity’s payroll)? 2. Are the laborers employed directly by a unit, department, or other governmental instrumentality of the tribe or village? 3. Are the laborers provided the same benefits as other tribal employees (e.g., health insurance, 401(k), vacation/sick time, etc.) and, if not, are they provided the same benefits as other temporary or “like” employees of the Tribe (e.g., all force account employees are provided X benefits, or are not provided Y benefits). If the answer to all three questions is ‘yes’, then DBA does not apply. In the case where a recipient answers ‘no’ to one of the three questions, and if the grantee feels that its force account construction work is not subject to DBA, it may submit evidence to the DOE Contracting Officer who will seek advice from the Office of the General Counsel.

NOTE: “Force account” workers hired by a contractor (as opposed to a Tribal Government) are subject to DBA as employees of the contractor.

Q: We will be hiring a non-profit Tribal owned company to do our retrofit activity. Will the DBA apply?

A: It makes no difference whether the work for the Tribe will be performed by a non-profit or a for-profit company, the Davis-Bacon Act (DBA) will apply. Both non-profit entities and for-profit entities must comply with all DBA requirements. A non-profit tribal-owned company is subject to DBA.

Q: We are a Tribe who hired a contractor who provided and installed energy efficiency materials. The contractor is an owner of his business and he completed the installation without any employees. The certified payroll records show “Owner” only. Does the Tribe have to submit certified payrolls for the matching funds it provided?

A: Where a grant required matching funds, all work covered by the grant and match con

Davis Bacon Frequently Asked Questions (FAQs)

Financial Assistance:

Q: We have received a matching grant; the grant is subject to the prevailing wage requirements (DBA). The project is the installation of a steam turbine. The installation will not occur for another 18 months; however, in the next few months, a large non-operable boiler must be demolished to allow the new turbine to occupy the same space as that old boiler. Grant funding will not be used for the boiler demolition, but the demolition costs are approved as part of our “match” in the grant agreement. Will the demolition project fall under DBA?

A: Yes, the demolition cost is part of the overall project and there will be follow-on construction to install the steam turbine where the inoperable boiler is currently located. A contract for demolition is usually not subject to DBA in a case where there is no anticipation of follow-on construction or is too remote in time; however, where the demolition is part of the “match” and/or follow-on construction is anticipated and not too removed in time, DBA is not applicable to the contract.

Q: Must a grantee go out for bid/proposal for installation costs of equipment purchased for use by a City/State/County, when the unit of government has employees to perform the work?

A: There is no requirement to compete a job that the grantee can fill in-house. Where the grantee is a unit of government and uses its own employees to perform the work, those employees are not subject to DBA requirements.

Q: Is the McNamara-O’Hara Service Contract Acct (SCA) applicable to grant programs?

A: The SCA applies only to federal contracts, not to “federally assisted” contracts. Federal Assistance includes grant programs, loans, loan guarantees, and insurance.

Q: It is our understanding that with respect to revolving loan funds set up under a Recovery Act funded State Energy Program or Energy Efficiency or Conservation Block Grant (EECBG) Program grant Federal requirements such as Davis Bacon remain for the lifetime of the revolving loan fund. In other words even though the money is considered spent once the money is loaned out for the first time, the obligations with respect Federal rules would remain in effect on subsequent loans. The way we are structuring our program a City agency is passing the money to a non-profit (a sub-recipient) that will be responsible for operating the loan fund. Is the City agency responsible for ensuring continued compliance with these Federal rules or is the sub-recipient responsible? Will there be a reporting requirement and/or will the responsible party be subject to audits of their compliance?

A: The City agency will remain responsible for ensuring continued Davis-Bacon Act (DBA) compliance. The sub-recipient will remain responsible for ensuring that the DBA clauses are flowed down to businesses receiving subsequent loans and

Davis Bacon Frequently Asked Questions (FAQs)

for receiving the original certified payrolls from the contractors and subcontractors of the businesses receiving loans. The non-profit sub-recipient must forward the original certified payroll to the City agency and the City agency will remain responsible for compliance audits and inquiries from DOE and Department of Labor (DOL).

Q: Our State agency has a policy of retaining Davis-Bacon records in its offices for a period of one year and then in an off-site secure storage area for an additional 3-years. Is the 3-year retention for the Recovery Act grants on-site or off-site?

A: Retention of work payroll records is required for a period of 3-years after the submission of the final cost report at the end of the grant. The State agency may store the records at an off-site secure storage area out of its on-site offices after it has reviewed the records for accuracy. Retention may be either on-site or off-site for the 3-year retention period. The State agency may determine how long it will retain the records in each location as part of its monitoring program. There is no need to maintain the payroll records for more than a total of 3 years following submission of the final cost report. Ease of retrieval, whether stored on-site or off-site, is an important consideration should DOE, DOL, or authorized agents require the records for an audit.

Q: My State has prevailing wage requirements. I am trying to find out if there are prevailing wage and Davis Bacon compliance forms and standard contract language that EECBG Grantees in my State can use. We are left in a position of having much higher levels of administration and confusion due to having to comply with both State and Federal law. Also, it's unclear to me how I am supposed to document this compliance for the purpose of audit.

A: For questions regarding compliance with Davis-Bacon Act (DBA) requirements regarding an EECBG award, please refer to your grant instrument. That instrument will provide DBA language and other clauses that must be flowed down to subgrantees/contractors/ subcontractors. All the required DB language is located in the Special Terms and Conditions and the applicable wage rates should be included in the official grant. The State agency or department that oversees labor standards in your state may be able to provide you with compliance information. You may contact your local DOL Wage & Hour Division, for specific assistance in complying with the DBA. The Department of Labor (DOL) also provides compliance information at:

<http://dol.gov/compliance/guide/dbra.tlm#records>.

All recipients of EECBG grants are required to follow all applicable State and Federal laws in administering their grants. The DOE Office of General Counsel (OGC) cannot provide legal advice regarding the obligations of your office concerning State prevailing wage compliance requirements. However, we provide the following for your consideration:

Davis Bacon Frequently Asked Questions (FAQs)

It is our understanding that State recipients of a Federal grant must pay State prevailing wages where those wages are higher than U.S. Department of Labor (DOL) prevailing wage rates. You must determine whether State law requires contractors and subcontractors to pay time and one-half to employees who work over 8 hours in a day or 40 hours in a week. The DOL regulations require only that time and one-half be paid for hours over 40 in a work-week (seven consecutive days).

DOL Optional Form WH-347 provides the type of information required by the DOL to be maintained for inspection. Under DOL regulations, covered contractors must maintain payroll and basic records for all laborers and mechanics during the course of the work and for a period of three years thereafter. Contractors must maintain the following records:

Name, address, and unique identifying number (i.e., last four digits of the Social Security number) of each employee. A contact person and number may also be valuable should the employee later be owed back wages and cannot be located.

Each employee's work classifications and the type of tools they use.

Hourly rates of pay, including rates of contributions made or costs anticipated for fringe benefits or their cash equivalents.

Daily and weekly numbers of hours worked.

Deductions made and the documentation requiring such deduction.

Actual wages paid

If applicable, detailed information regarding various fringe benefit plans and programs, including records showing that the plan or program was communicated in writing to the laborers and mechanics affected. If applicable, detailed information regarding approved apprenticeship or trainee programs

In many States, the record requirements are similar to those required by the DOL. Under the DBA, on a weekly basis each covered contractor and subcontractor must provide the Federal agency or its designee a copy of all payrolls providing the information listed above under for the preceding weekly payroll period. A "Statement of Compliance" must accompany each payroll submission. The contractor, subcontractor or the authorized officer or employee of the contractor or subcontractor who supervises the payment of wages must sign the weekly statement. The Optional Form WH-347 has a Statement of Compliance on the second page and the contractor need only fill in the blanks. The contractor may copy the statement and provide on a typewritten sheet or on any form with identical wording. Submit the payroll record with the Statement of Compliance within seven days after the regular pay date for the pay period.

Davis Bacon Frequently Asked Questions (FAQs)

Q: A Recovery Act grant recipient has proposed a rebate program for small businesses. The business will contract out the work and incur the actual costs. The recipient will verify the work and issue a rebate to the small business. If the recipient provides the option to redirect the payment to the contractor, will Davis-Bacon apply?

A: DBA will apply to this rebate program because it is a rebate program to a small business. For Recovery-Act funded grants, there is only one exemption from the DBA requirements. The exemption is for “individuals” receiving a grant/rebate/loan. It will not matter whether the funding/rebate goes directly to the business owner or the rebate goes to the contractor, the DBA is applicable and the small business must assure that the contractor pays the appropriate wages to its workers, and the small business must obtain the certified payroll from the contractor and forward those to the Recipient.

Q: Our State's new home program will offer after-the-fact cash incentives of \$2,000 to \$3,000 depending on the level of energy efficiency achieved. To qualify for a \$2,000 incentive the home must have a Home Energy Rating System (HERS) rating of 70 or lower. To qualify for a \$3,000 incentive the home must meet the level under the now-expired federal tax credit -- 50% or less of the energy for heating and cooling as compared to a base 2004 IECC home.

To qualify for either will require a Home Energy Rating by a Residential Energy Services Network (RESNET) certified Home Energy Rater and the homes must have first occupancy after the start of the program. The program is rewarding individuals for something already completed prior to applying for the cash incentive. The state has no involvement in the construction process, provides no input into how the HERS rating is to be achieved or what level of performance is reached, i.e., what specific materials and equipment are used. The State is simply documenting the level of performance with a mandatory Home Energy Rater by a private-sector rater.

Will builders constructing multiple homes or individual homeowners submitting multiple homes under this program fall under Davis-Bacon Act (DBA)?

A: Under ARRA, the DBA requirements apply only to laborers and mechanics employed by contractors and subcontractors on construction projects funded in whole or in part by ARRA. If a project does not involve ARRA-funded construction, the DBA is inapplicable. The DBA applies to laborers and mechanics employed at the work site. Auditors, inspectors, Home Energy Raters, and other personnel not performing physical or manual work at the site of the work are not covered by DBA. Builders constructing multiple homes would not be subject to the DBA because the incentive is based entirely upon the level of energy efficiency achieved for a residential home after it is constructed, and must achieve a specific HERS rating to receive the incentive.

Davis Bacon Frequently Asked Questions (FAQs)

Q: Our State has an existing home program. Residential building owners will receive an after-the-fact cash incentive for increasing the energy efficiency level of their existing residential buildings. The incentive is based solely on energy savings, expressed as kWh. The incentive is \$0.05 per kWh savings for 15 years up to a maximum of \$3,000. The kWh savings will be calculated using a HERS pre and post improvement rating conducted by a private-sector RESNET certified Home Energy Rater. The program is rewarding individuals for something they have already done. The state has no involvement in the home improvement process. The program will not dictate how the savings are achieved or any specific materials or equipment used. Will entities making improvements to multiple residential units under this program fall under Davis-Bacon?

A: Based upon the information provided above, the residential building owners will be receiving the federally-funded incentive payment based upon the level of energy efficiency achieved for a building. As such, the improvements the building owners make to obtain such efficiency is not subject to the DBA.

Q: Commercial building owners will be offered after-the-fact cash incentives for improving the efficiency of their commercial buildings. The incentive is based solely on energy savings, expressed as kWh. The incentive is \$0.05 per kWh savings for 15 years up to a maximum of \$5,000. The kWh savings will be calculated using a pre and post improvement energy audit conducted by either a private-sector RESNET certified Home Energy Rater or a licensed, registered Engineer or Architect. Will individual building owners who participate in this program fall under Davis-Bacon? Will entities making improvements to multiple commercial units under this program fall under Davis-Bacon?

A: Based upon the information provided above, the commercial building owners will be receiving the federally-funded incentive payment based upon the level of energy efficiency achieved for a building. As such, the improvements the building owners make to obtain such efficiency is not subject to the DBA.

Q. A town will be installing energy efficient LED street lighting. The town is using Federal Financial Assistance, that has a DBRA provision, for only the purchase of the LED lights (equipment purchase), while using other funding to pay for the actual erection of light poles and installation of the LED lights. Does Davis-bacon apply to the wages paid the laborers for the installation of the lights? It is my understanding that if the town uses municipal employees to do the installation work that this would be 'Force Account' and that Davis-Bacon would not apply to the municipal employees. However, I believe the town will be using contracted workers for the installation.

A: Under a DBRA, the DBA requirements apply only to laborers and mechanics employed by contractors and subcontractors on construction projects funded in whole or in part by the Financial Assistance. If a project does not involve construction, the DBA is not applicable. In this situation, the federally funded grant is used for the purchase of the LED lights, but the installation of those lights

Davis Bacon Frequently Asked Questions (FAQs)

will be necessary to complete the project, which is the "installation of energy efficient LED street lighting." Such installation is considered construction – where there is erection of light poles and where new fixtures are required. If the installation simply involves the removal of the old light bulbs and the installation of the new LED lights, that would not rise to the level of construction under DBA.

If the town used federal funding for the purchase of the equipment, the project will have been “assisted by” the financial assistance and DBA would be applicable to the installation. However, if the municipality uses its own employees to install the poles and lights, the work would not be subject to the DBA requirements, because State and local units of government are not considered contractors under the DBRA when their own employees perform the construction. However, the work would be subject to the DBA requirements where the State or local unit of government hires contractors to perform the work of installing the lights.

Q: Concerning our SEP ARRA-funded program whereby funds are provided for energy efficiency retrofits on multi-family public housing projects, it is clear to us that Davis-Bacon applies to all contractors working on the ARRA-funded project. However, the question remains in our mind as to whether Davis-Bacon would apply to employees of the grantee, such as maintenance workers or building supervisors, that are installing items purchased with the ARRA funds in a scenario where hiring a contractor is not necessary.

As an example, if ARRA funding is used to purchase 100 energy efficient light bulbs as part of a larger energy efficiency retrofit, can the grantee's maintenance workers screw in those light bulbs without those maintenance workers having to be paid Davis-Bacon wages for the time spent screwing in the light bulbs. Davis-Bacon would cause obvious complications in this scenario, as the grantee would have to take his maintenance workers off the regular payroll for that time spent, and instead treat them as contractors subject to Davis-Bacon for that portion of their work week. The grantee is not a government entity, so we don't believe the Davis-Bacon exemption for employees of government agencies would apply in this case. Can you please provide any guidance?

A: Where the ARRA-funded SEP/EECBG grant is providing for energy efficiency retrofits on a multi-family public housing project all the installation work will be subject to the DBA, including installation of items that are usually considered replacement/routine maintenance items. If the replacement of an old incandescent light bulb with a new energy efficient light bulb were the only work to be performed, the installation would not be subject to the DBA as such work does not rise to the level of construction. Also, changing out the light bulbs as part of regularly-recurring, routine maintenance would not be covered by the DBA.

Davis Bacon Frequently Asked Questions (FAQs)

Q: We are a State Agency with an ARRA-funded SEP grant. We are considering providing grant contracts for large capital-intensive energy efficiency and renewable energy projects. We are considering making a grant only for a percentage of the materials and equipment on a project. The information contained in one of the DBA FAQs leads us to believe that if we use the following language in our contract template we would not trigger the DBA.

Grantee, located at _____ shall purchase and have delivered to its facility the following custom-built to specification equipment and materials. Lists the equipment and materials:

Can you confirm this understanding?

A: In all cases, the contracting officer on a case-by-case basis makes a decision as to whether the DBA applies. While the FAQs are offered as guidance, they are general in nature. In order to determine whether the DBA applies, the overall "project" must be considered. The SEP/EECBG Program grants are funded by the ARRA and all such grants are subject to the Davis-Bacon Act. The DBA requires "all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by" by the ARRA be paid the prevailing wages in the locality of the project. While the DBA is not applicable to the purchase of equipment and materials, if the purchase of the equipment and materials "assists the project" in whole or in part the DBA is applicable.

In your question you indicate that your grants will be for a percentage of the equipment and materials to be used on "capital intensive energy efficiency and renewable energy projects." Thus, it appears that the project is not the purchase of equipment and materials, but the project requires the installation of the equipment and materials purchased with an ARRA-funded grant in order to be completed. It also appears that the installation of such equipment and materials will be significant and not incidental to the purchase of the equipment and materials. As a result, in this case DBA would be applicable to the entire project.

Q: Can you please confirm the EECBG/SEP grantee's and subgrantee's Davis Bacon Act (DBA) records retention requirements. Is it from the time the grant ends? If so, what is the end date (given that the grant terms and conditions envision payment extending beyond 2012)? This question is prompted by the language in OMB Circular A-110/10CFR 600.242 that requires "all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees" to be retained for three years from the day the grantee submits its final expenditure report.

A: Grantees and subgrantees must maintain DBA records pursuant to OMB Circular A-110/10 CFR 600.242. Although the Department of Labor regulations provide the records are to be kept for 3 years from the end of the contract, the DOE grant award terms tell the grantees to follow 10 CFR 600.242 (by

Davis Bacon Frequently Asked Questions (FAQs)

reference), which requires the grantee to maintain all supporting documentation for 3 years after the submission of the final cost report - usually 90 days after the end of the Grant Project Period. Since contracts/sub-grants fall within the overall Grant Agreement Project Period, the recipient would need to maintain the DBA payroll records for the potentially longer period of the Grant award and not just 3 years after the contract/subgrant ends.

Q: If a contractor is suspected of violating Davis Bacon, is the Prime Contractor/Grantee or DOE required to withhold compensation due, or is withholding compensation optional? The only DOE "guidance" I have found concerning this issue is on page 44 of the DOE DBA Desk Guide 06-16-2010.

A: The first course of action is to immediately notify the DOE Contracting Officer/Contracting Specialist and then make an attempt to obtain payment for the employees from the employer. Do not wait to notify the DOE Contracting Officer until the employer refuses to pay. If the employer refuses to pay, then the contracting entity should withhold contract funds remaining due to the contractor in order to pay the amounts due the employees. If after withholding funds, the employer continues to refuse to pay, DOE will notify DOL of the need to perform an enforcement investigation. The Prime Contractor is ultimately responsible for payment to the employees of subcontractors.

Q: We have a proposed project that would use Recovery Act-funded SEP funds for a window replacement project in a building that is undergoing major remodeling under a contractually separate construction project. These two separately contracted projects would run concurrently from a scheduling standpoint; however, there would not be any overlap of funds for material or labor costs between them. Will Davis Bacon and Buy American provisions be applied to the entire building remodel, even though the ARRA-SEP-funded portion is contractually separate?

A: The Recovery Act provides that "all laborers and mechanics on projects funded directly by or assisted in whole or in part" with Recovery Act funding are subject to the DBA. Where the project includes the assistance of Recovery Act-funded grant, the DBA will apply to the project. Here the grantee has a building undergoing a major renovation for which the SEP project will provide window replacements for the building. Where, as in the proposed project, the Recovery Act assistance is part of a larger project, the entire project will become subject to DBA where the Recovery Act-funded work is done in conjunction/concurrently with the non-Recovery Act-funded work, so that all the work is ongoing at the same time.

Where the work could logically be segregated into two separate and distinct projects, such that one project involves the Recovery Act-funding and another totally separate project uses the non-Recovery Act money, DBA will not apply to the non-Recovery Act funded project. To meet this requirement, there must be (1) a logical separation of the two projects - one that is assisted/funded by

Davis Bacon Frequently Asked Questions (FAQs)

Recovery Act money and another that has no Recovery Act funding; (2) the work on the two separate projects is not performed together (i.e., the work using non-Recovery Act funds is completed prior to or after the Recovery Act-funded work; (3) the work crews are not working together at the same time in the same building; and (4) there are separate contracts for the two separate projects. If all these requirements are met, the project funded with other private, state, or local governmental non-Recovery Act money would not be subject to the DBA.

As currently set forth in this example, while there is separate funding and separate contracts, the non-Recovery Act funded remodeling will be subject to DBA because the work is performed at the same time and the crews will be working together in the same building. Additionally, the overall project is the major remodeling of a building and the installation of energy efficient windows would logically be part of that remodeling, so it may be difficult to logically segregate the work into two distinct projects.

Q: If the SEP funds are used specifically to fund projects that directly benefit private companies, and not on public works, does DBA apply?

A: DBA application to federal contracts is to contracts “for construction, alteration, or repair, including painting and decorating, of public buildings and public works” Under DBA, the term *public building* or *public work* is defined as including “building or work, the construction, prosecution, completion, or repair of which ... 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.” 29 CFR 5.2(k).

Since 1931, Congress has extended the application of Davis-Bacon prevailing wage requirements to numerous programs that provide federal assistance for construction through loans, grants, loan guarantees, and insurance by including Davis-Bacon requirements in laws referred to as Davis-Bacon “related Acts,” including the Recovery Act. The general Davis-Bacon provision in the Recovery Act (Division A, section 1606), which applies to DOE-assisted ARRA projects, requires “all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act . . .” to be paid at least the wages the Secretary of Labor has found prevailing on similar construction projects in the locality, in accordance with the DBA. The Copeland “Anti-Kickback” Act and Reorganization Plan No. 14 of 1950 (5 U.S.C. Appendix) give the Department of Labor responsibility for developing government-wide policies, interpretations and procedures to implement the Davis-Bacon Act and Davis-Bacon provisions in the Davis-Bacon “related Acts.” Applicable rules established in DOL regulations are published in 29 CFR Parts 1, 3, 5, 6 and 7. These include regulatory definitions of various terms that apply to the administration and enforcement of the Davis-Bacon and related Acts. See 29 CFR 1.2, 3.2, 5.2 and 6.2.)

Davis Bacon Frequently Asked Questions (FAQs)

Q: With individual home owners exempted from the DBA, what about businesses that receive a revolving loan for energy efficiency from the grantee?

A: A business receiving a revolving loan for energy efficiency improvements is subject to the DBA requirements. The business will be required to flow down the DBA requirements to its contractors/subcontractors that perform the improvement work and to forward the certified payrolls to the grantee/subgrantee.

Q: If the energy auditors and the retrofit contractors are independent contractors paid by the building owner and NOT Recovery Act funds - up front - BUT the loans are backed by a Recovery Act loan loss reserve fund, do DBA requirements apply to the auditors and contractors?

A: DBA applies to laborers and mechanics employed at the work site. Auditors, inspectors, and other personnel not performing physical or manual work at the site of the work are not covered by DBA.

A loan loss reserve fund, where the proceeds are neither loaned nor used to “buy down” interest rates, is not subject to the DBA. The project funding is provided by a third party entity. Therefore, in this example the contractors paid by the business/building owner would not be subject to the DBA because the Recovery Act proceeds are not being used to fund or assist the energy savings/renewable energy project.

Q: I have received an Energy Efficiency Grant and we are upgrading old incandescent stage lights, as well as building lighting. The first part of my question involves the replacement of the stage lighting portable equipment. These arrive ready to use with no installation required. Our unionized stagehands place them as needed for each performance. I do not see where DBA applies to these units. The others need to be installed and for that we are contracting a licensed electrician, who will be contractually obligated to meet the DBA. Have I missed anything?

A: Your analysis is correct. Where purchased equipment needs no installation, DBA is not applicable. Where the purchased equipment requires installation, DBA is applicable to the installation and the contractor must comply with the DBA requirements.

Q: Does the Davis-Bacon Act (DBA) prevailing wage requirement in the Recovery Act apply to construction work, including alteration or repair, funded in whole or in part by a Smart Grid Investment Grant (SGIG), which is (1) performed by the regular workforce employed by an investor-owned public utility or cooperative; or (2) contracted to an outside contractor?

A: The DBA prevailing wage requirement does not apply to construction work, including alteration or repair, funded in whole or in part by a Recovery Act SGIG, which is performed by the regular workforce employed by an investor-owned

Davis Bacon Frequently Asked Questions (FAQs)

public utility or cooperative. On the other hand, DBA prevailing wage requirements apply where an investor-owned public utility or cooperative either: (1) contracts out the work; or (2) hires a temporary workforce or hires additional employees it does not treat as regular employees for purposes of its wage and benefit programs, to perform any construction work, including alteration or repair, funded in whole or in part by a Recovery Act SGIG.

Q: Does “construction, alteration or repair (including painting and decorating),” for purposes of the Davis-Bacon Act (DBA) (Wage Rate Requirements Under Section 1606 of the Recover Act (As Applicable) Clause of the assistance agreement), include installation of a smart meter or energy consumption monitoring network equipment?

A: No, the DBA would not be applicable to the routine installation of a smart meter or energy consumption monitoring network equipment. The result is the same whether the investor-owned public utility or coop performs the routine installation itself or contracts out the work. Routine installation includes: speaking with the customer; taking readings from both the old and new meters; inspecting the old meter and the area; removing the meter cover by cutting or unscrewing the seal, clip, lock or other device on the meter cover; removing and inspecting the old meter; installing the new meter into the socket; and replacing the seal, clip, lock or other device on the meter cover and the meter cover itself. If the meter installation involves any rewiring or similar work beyond what is needed for a routine installation or if it is beyond the skills of the meter installer, then DBA is applicable to that work if performed by a contractor to the utility.