November 30, 2023

DOL Issues Final Rule Updating Davis-Bacon Regulations

The Department of Labor (DOL) has issued a final rule updating the Davis-Bacon Act (DBA) and the Davis-Bacon Related Acts (together "DBRA") nearly 40 years after the Department last completed a comprehensive revision of the guidelines. The DOL re-incorporated the "30 percent rule" in part to decrease reliance on the use of survey responses to determine wage rates. The final rule affirms the requirement that contractors annualize contributions to fringe benefit plans and also provides a safe harbor for defined contribution pension plans (DCPPs) from the annualization requirement without the need to request and have the exception approved by the DOL's Wage and Hour Division (WHD). The final rule also details specific examples of circumstances under which a contractor may take credit for costs directly related to the administration of a fringe benefit plan.

Background

Originally passed in 1931, the DBA requires payment of locally prevailing wages and fringe benefits on federal construction contracts. Over the years, Congress has also incorporated DBA prevailing wage requirements into numerous statutes, referred to as ''Related Acts'' under which federal agencies assist construction projects through grants, loans, loan guarantees, insurance, and other methods. Multiple factors contributed to the DOL's decision to complete a comprehensive review of the regulations including the significantly expanded reach of the standards that relate to more than 70 active Related Acts that collectively apply to more than $200 billion in annual federal and federally-assisted construction spending. In addition, the DOL also considered the fact that the federal contracting system has dramatically changed over the past four decades with court and agency administrative decisions clarifying a variety of aspects that govern the federal procurement process.

Return of 30 Percent Rule

The DOL eliminated the "30 percent rule" from the prevailing wage determination process in 1982, creating a two-step process. The DOL has found that this change resulted in more employers using the weighted average rate from online surveys to determine a prevailing wage. The reliance on the weighted average method is inconsistent with the DOL's long-held interpretation that the definition of first choice to determine a prevailing wage should be the current and most predominant actual rate paid - and that an average wage rate should only be used as a last resort. The DOL intends to decrease reliance on the use of the weighted average rate that is calculated using online surveys to determine local prevailing wage rates by re-establishing the three-step method which incorporates the "30 percent rule," effective as of October 23, 2023.

- **Wage Survey Data.** The DOL also returns to using the delineators "metropolitan" and "rural" counties for wage survey data submitted. The DOL believes these delineations will more accurately reflect the realities of the contemporary labor force, permit more wage rates to be determined in small geographical increments, and will increase the sufficiency of data at the statewide level.

Annualization Requirement Finalized

The final rule confirms the requirement that contractors must annualize all contributions to fringe benefit plans (or the reasonably anticipated costs of an unfunded benefit plan) to determine the hourly equivalent for which they may take credit against their fringe benefit obligation. The annualization principle stipulates that credit for contributions made to bona fide fringe benefit plans is allowed based on the effective rate of contributions or costs incurred for total hours worked during the year (or a shorter time period) by a laborer or mechanic. It is important to note that the annualization principle, and exceptions to that principle, apply only to the contributions made to fringe benefit plans, not to the plan that is receiving the contributions as a fringe benefit.

- **Method of computation.** The final rule identifies the method used to annualize the cost of providing a fringe benefit. A contractor must divide the total cost of the fringe benefit contribution (or the reasonably anticipated costs of an unfunded benefit plan) by the total number of hours worked on both private (non-DBRA) work and work covered by the DBRA during the time period to which the cost is attributable to determine the rate of contribution per hour. If the amount of contribution varies per worker, credit must be determined separately for the amount contributed on behalf of each worker.
- **Benefit Plan Annualization Exemption (Application Required).** Contractors, plans, and other interested parties may request an exception from the annualization requirement by submitting a request to the WHD Administrator. A request for an exception may be granted only if certain requirements are met. This application process will generally not be necessary for DCPPs to be excepted from the annualization requirement, as discussed below.
- **DCPP Annualization Exemption (No Application).** The final rule provides that contributions to DCPPs will be exempt from the annualization requirement without the need to apply for an exception if the plan provides for immediate participation and benefits vest after a worker completes 500 or fewer hours and the plan meets the following two requirements.
    - **The benefit provided is not continuous in nature.** A benefit is not continuous in nature when it is unavailable to a participant without penalty throughout the year or other time period to which the cost of the benefit is attributable; and
    - **The benefit does not compensate both private work and DBRA-covered work.** A benefit does not compensate both private and DBRA-covered work if any benefits attributable to periods of private work are wholly paid for by compensation for private work.

Funded and Unfunded Plans

There are two types of fringe benefit plans that employers may use to meet the prevailing wage requirement: funded and unfunded plans.

- **Funded Plans.** Under a funded fringe benefit plan, employers make regular irrevocable contributions (at least quarterly) to a third-party trustee or issuer. This can be accomplished without prior DOL approval. Examples of funded fringe benefit plans include pension plans, insured health plans, or life insurance plans.
- **Unfunded Plans.** With an unfunded fringe benefit plan, an employer may pay for certain benefits out of its general assets (in lieu of making payments to a third-party trustee or issuer). Examples include health reimbursement arrangements, health flexible spending accounts, or vacation plans.

  For unfunded plans, the final regulations require that the DOL verify the plan's compliance with the DBRA in order to be approved as a bona fide fringe benefit plan. The final rule also provides procedural details on how to obtain the DOL's approval. Employers would need to submit a written approval request to the DOL before they could offer the plan to employees or claim DBRA credit for the reasonably anticipated costs of the unfunded plan. Unfunded plans that have not received approval are not creditable against the fringe benefit obligations under the DBRA. Additionally, employers may be required to establish separate accounts to meet the plan's funding obligations.

For both funded and unfunded plans, the final regulations require an employer to pay any amount that an employee has been underpaid (including earnings) to an employee. In addition, employers would need to notify employees of the fringe benefits being paid and would need to ensure that the plans are properly funded.

Identifying Creditable Administration Costs

The final rule also identifies circumstances under which a contractor may take credit for costs directly related to the administration of a fringe benefit plan. The guidance distinguishes the differences between “creditable” and “noncreditable” administrative costs by providing specific examples.

- **Creditable costs.** A contractor may take credit for payments to an insurance carrier or trust fund that are used to pay for both benefits and the administration and delivery of benefits, such as evaluating benefit claims, deciding whether they should be paid, approving referrals to specialists, and other reasonable costs of administering the plan. Additional examples of creditable expenses include the reasonable costs of administering the plan, such as the cost of recordkeeping related to benefit processing and payment in the case of a healthcare plan, or expenses associated with managing plan investments in the case of a 401(k) plan. Additionally, to clarify that these expenses are also creditable in the case of an unfunded plan, the final rule states that a contractor may take credit for the fees paid to a third-party administrator to perform similar tasks directly related to the administration and delivery of benefits, including under an unfunded plan.
- **Noncreditable costs.** A contractor may not take credit for its own administrative costs when it incurs them directly. In addition, the final rule states that a contractor may not take credit for its own administrative expenses even when the contractor pays a third party to perform its administrative tasks rather than incurring the expenses internally. The final rule includes examples of such noncreditable administrative expenses, including the cost of filling out medical insurance claim forms for submission to an insurance carrier, paying and tracking invoices from insurance carriers or plan administrators, updating the contractor's personnel records when laborers or mechanics are hired or separate from employment, sending lists of new hires to insurance carriers or plan administrators, or sending out tax documents to the contractor's laborers or mechanics.

By making creditability of administrative costs depend on the type and purpose of the expense, rather than on whether it is paid by the contractor directly or through a third party, the DOL believes that the final rule addresses commenters' concerns that the proposed rule might have discouraged the use of bona fide third-party plan administrators or provided an advantage to contractors that make payments directly to insurers and other benefit providers. The final rule does not preclude contractors from taking credit for reasonable costs incurred or charged by these entities to administer bona fide fringe benefit plans.

Effective Date and Related Guidance

The final rule updating the DBRA took effect on October 23, 2023.To support the final rule, the DOL also published related guidance, including a set of frequently asked questions, a comparison chart, a small entity compliance guide, DBRA webinar and related slide presentation, and *All Agency Memorandum Number 244* (AAM No. 244).

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