



November 22, 2021

Industry Notice No. 187

To: Interested Parties Under the Defense Base Act including Agency Heads, Contracting Agencies, Contractors, Employers, and Brokers

Subject: Defense Base Act (DBA) Waivers

DBA Background

DBA Coverage: The DBA covers all employees, regardless of nationality, engaged in employment activities:

- for private employers on U.S. military bases or on any lands used by the U.S. for military purposes outside of the United States, including U.S. Territories and possessions;
- on public work contracts with any U.S. government agency to be performed outside the U.S.;
- on contracts approved and funded by the U.S. under the Foreign Assistance Act; and
- for American employers providing welfare or similar services outside of the United States for the benefit of the Armed Forces, e.g. the USO.

However, the DOL may waive the application of the DBA upon the request of an agency head. Only the head of a United States department or other federal agency (or an official duly delegated or authorized by the head of an agency) may submit a written request for waiver of the DBA to the Secretary of Labor (and to the Director of DFELHWC by delegation).

DBA Insurance Requirements: By law and the Federal Acquisitions Regulations (FAR), every contract coming within the purview of the Act:

“shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract): (1) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in such Public work under such contract the payment of compensation and other benefits under the provisions of this Act; and (2) shall maintain in full force and effect during the term of such contract, subcontract, or subordinate contract, or while employees are engaged in work performed thereunder, the said security for the payment of such compensation and benefits.”

DBA Sections 1(a)(4) and (5), 42 U.S.C. §§ 1651(a)(4) - (5). These requirements are also stated in the FAR at 48 C.F.R. §§ 28.309, 52.228-3.

If there is any doubt as to whether any of an employer's employees are covered by the DBA, the employer/prospectively contracted or actively contracted entity may wish to purchase

insurance or apply for self-insurance authorization for its own protection. DOL's Office of Workers' Compensation does not determine whether an employee is entitled to compensation benefits – any employee may claim benefits and independent administrative adjudicators determine entitlement in formal proceedings at which legal representation is advisable. Moreover, if an employer fails to secure the payment of benefits as required by LHWCA sections 4(a) and 32, 33 U.S.C. §§ 904(a), 932, the employer may be exposed to civil suit under LHWCA section 5(a), 33 U.S.C. § 905(a) and is potentially subject to the imposition of penalties under LHWCA section 38, 33 U.S.C. § 938. If a corporation fails to secure the payment of compensation, under the LHWCA, the president, secretary, and treasurer shall be severally and personally liable, jointly with the corporation, for any compensation or other benefits payable under the Act with respect to any injury or death which may occur to any of its employees. LHWCA section 38, 33 U.S.C. 938. Insurance brokers may face E & O claims exposure if an employer who has DBA-covered employees is not advised to procure appropriate insurance.

DBA Waivers

Background and Policies. Under the DBA, DOL has discretion to waive the application of the DBA "with respect to any contract, subcontract, or subordinate contract, work location under such contracts or classification of employees," upon the request of an agency head. DBA section 1(e), 42 U.S.C. § 1651(e).

Once DOL has granted a waiver, employees who fall within the scope of the waiver are not covered by the DBA. Thus, their employer is not required to pay those particular employees benefits under the DBA and the employer is not required to secure payment of those benefits by purchasing commercial insurance or obtaining authorization from DOL to self-insure.

However, it is crucial for employers and contracting agencies to understand that if the same employer also has DBA-covered employees who fall outside the scope of the waiver, the employer would still be required to pay and secure benefits for those DBA-covered employees. See DBA section 1(a)(4)-(5); 42 U.S.C. § 1651(a)(4)-(5); LHWCA section 4(a), 932, 33 U.S.C. 904(a), 932.

Further, under longstanding DOL policy, waivers only exclude foreign workers hired outside of the United States from DBA coverage. Waivers do not exclude citizens or legal residents of the United States or employees hired in the United States from DBA coverage. **Thus, if an employer has any United States citizens or residents working overseas on a contract covered by the DBA, that employer must secure the payment of compensation under the DBA notwithstanding the fact that DOL has waived the application of the DBA for foreign workers.**

Also note that the DOL may issue several different types of waivers; geographic, contract, or class of employees. A geographic waiver applies to all agencies and contracts, not just the requesting agency and their contractors. Other more specific waivers apply on their terms and may not be universal.

Waiver Requests and Renewals: The request for waiver must be made by the government agency to the Department of Labor (DOL), OWCP. Procedures for submitting a waiver request can be found in the [Procedure Manual, Chapter 7-0600, DBA Waivers](#). Waivers are granted by DOL's Director, DFELHWC.

DBA waivers typically have a duration period of five years from the date the waiver is signed by the Director, DFELHWC. The waiver will expire on the listed expiration date, absent a request from a government agency for a waiver renewal. The procedures for waiver renewal are the same as those for granting an initial waiver.

All current active waivers are listed on DOL's website, both by geographic area and by expiration date. It is the responsibility of the department or agency heads to monitor the expiration dates for the various waivers, so that waiver renewal requests may be timely submitted to DOL for evaluation. DOL will not grant or renew a waiver absent a request from a department or agency head. The absence of a waiver from the DOL website means that no waiver is in effect.

DBA Waiver Request Package: The request for waiver can only be made by the head of a department or agency of the United States government (or an official duly delegated or authorized by the head of an agency) by submitting a request for DBA waiver package. The package may be sent by email to DLHWC-Public@dol.gov. The package may also be mailed to the Director, OWCP, U.S. Department of Labor, Division of Longshore and Harbor Workers' Compensation, 200 Constitution Avenue NW, Rm C-3524, Washington, DC 20210. The DBA waiver request package consists of:

- The Form BEC 565, signed by the head of a department or other agency of the United States. Form BEC 565 is available online in form-fillable PDF format.
- A comparison of the workers' compensation benefits available in the relevant country to the benefits under the DBA. A DBA Waiver Comparison Chart may be used for this requirement, filled in completely with the relevant terms of the local workers' compensation provisions. Include specific references to the provisions of the local law. The Comparison Chart is available online in the format of an Excel spreadsheet.
- English translations of the local workers' compensation provisions or other relevant law or policy.
- Website addresses if the information is obtained via the internet.
- A memo or letter explaining any differences between DBA and local workers' compensation law may also be submitted, along with any other information the agency head deems relevant to the waiver request.

Please note that DOL may also consider other pertinent factors not listed on the comparison chart and that the items on that chart are not necessarily an exhaustive list. DOL may ask follow-up questions for more information and will grant or deny the waiver after fully evaluating all of the information.

Some examples of what DOL will be looking for in its evaluation of the Comparison Chart responses are:

- that the local compensation system in place covers the workers for whom the DBA will not apply if the waiver is granted, including citizens of the local country and third-country nationals;
- that the local compensation system is not based on fault;
- that the local compensation system does not exclude coverage for war risks or chemical, biological, radiological, or nuclear exposures;
- that the local compensation system has no limits regarding the duration for which benefits are payable except as in the DBA for temporary partial disability benefits and scheduled permanent partial disability benefits;
- that the local compensation system has no aggregate maximum dollar limits on benefits;

- that the worker does not lose their benefits if they move out of the country following their injury or illness;
- that eligibility for benefits and benefit amounts are equitable with respect to gender; and
- that the injured worker does not have to pay or contribute anything into the compensation system.

Agency Responsibilities for DOL Waivers.

1. United States Department or Agency Heads:

- Submit DBA waiver request packages to DOL including all required information
- Monitor the DOL website for current active waivers and waiver expiration dates
- Submit requests for renewal of existing waivers for evaluation approximately three months before the expiration date

2. Contracting Agencies:

- Ensure all contract terms and other instruments comply with the DBA where applicable
- Include DBA insurance requirements for any procurement of services to be performed by contractors outside the United States (but not for any contract to exclusively furnish materials or supplies) by inserting FAR clauses 28.305, 28.309(a) and 52.228-3. Keep in mind that some funding instruments other than contracts may also result in employees being subject to coverage by the DBA
- Upon the issuance of a DBA waiver, if all employees have been waived, then those FAR clauses should be replaced by FAR clauses 28.309(b) and 52.228-4. If any employees remain covered by the DBA, such as US citizens and residents, FAR clauses 28.309(a) and 52.228-3 should remain in the contract
- Also, when relying on a DBA waiver, require that the employer maintain adequate local workers compensation for all waived employees with no exclusions (such as war hazards)
- Monitor the DOL website for current active waivers and waiver expiration dates
- When a DBA waiver expires, all contracts and other instruments subject to the DBA must be modified or otherwise revised to contain language reflecting the requirement that the employer secure the payment of compensation under the DBA
- Respond to questions about the application of particular waivers to specific contracts

3. DOL:

- Respond to waiver requests in a timely fashion and request further information or clarification as needed
- Grant or deny the waiver request after fully evaluating all of the information
- Post new and active waivers online
- Post notice of waiver expiration dates online

Recommendations for Insurance Companies, Employers, and Brokers Regarding DBA Waivers

1. Insurance Companies are encouraged to:

- Monitor the DOL website for current active waivers and waiver expiration dates
- Direct questions regarding the application of particular waivers to specific DBA claims or particular contracts to the contracting agency

2. Brokers are encouraged to:

- Monitor the DOL website for current active waivers and waiver expiration dates
- Direct questions regarding the application of particular waivers to specific contracts to the contracting agency
- Understand that brokers may face E & O claims exposure if an employer who has DBA-covered employees is not advised to procure appropriate insurance. For example, if there is doubt as to whether particular employees are covered by the DBA or if the application of the DBA to those employees was waived, a broker may wish to advise the employer to obtain DBA insurance so that it will not have to defend against a DBA claim itself.

3. Employers who are awarded contracts that fall under the coverage of the DBA are encouraged to:

- Monitor the DOL website for current active waivers and waiver expiration dates
- Direct questions regarding the application of particular waivers to specific employees, claims, or contracts to their insurance brokers or the contracting agency
- Understand that employers may face penalties under LHWCA section 38, 33 U.S.C. § 938, and may be exposed to civil suit under LHWCA section 5(a), 33 U.S.C. § 905(a), if they do not properly secure the payment of compensation as required under LHWCA sections 4(a) and 32, 33 U.S.C. §§ 904(a), 932. For example, if there is doubt as to whether particular employees are covered by the DBA or if they are covered by a DBA waiver, the employer may wish to purchase insurance or apply for authorization to self-insure.

Further Information - <https://www.dol.gov/agencies/owcp/dlhwc/ExplainingDBA>

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