

Q&As Regarding Workers Who Perform Work Activities Involved in Surveying

1. What determines whether or not federal Davis-Bacon prevailing wage requirements apply to a construction project?

Prevailing wage requirements of the Davis-Bacon and related Acts (DBRA) apply to laborers and mechanics on federal construction and most federally assisted construction projects. The Davis-Bacon Act (DBA) applies to each contract over \$2,000 “to which the Federal Government or the District of Columbia is a party for construction, alteration or repair, including painting and decorating, of public buildings and public works” and requires the Secretary of Labor to determine prevailing wage rates for inclusion in covered contracts. In addition to the DBA itself, Congress has added Davis-Bacon prevailing wage provisions to numerous laws – “related Acts” – under which federal agencies assist construction projects through grants, loans, loan guarantees, and insurance.

Rules governing DBRA administration and enforcement are set forth in Title 29 of the Code of Federal Regulations (CFR) at 29 CFR Parts 1, 3 and 5. Davis-Bacon contract clauses required to be included in covered contracts are set forth at 29 CFR § 5.5 and regulatory definitions that apply in the administration and enforcement of DBRA labor standards are set forth at 29 CFR § 5.2.

2. What is the U.S. Department of Labor, Wage and Hour Division (WHD) policy concerning the applicability of Davis-Bacon prevailing wage requirements to workers who do survey work on a federal or federally assisted project to which Davis-Bacon labor standards apply?

A survey crew member who performs primarily physical and/or manual duties while employed by a contractor or subcontractor in work performed immediately prior to or during actual construction in direct support of construction crew(s) on the site of the work will be considered a laborer or mechanic covered by DBRA labor standards. Survey crew members who do not satisfy all of these conditions will not be covered by DBRA requirements (unless, as noted below with respect to certain HUD-assisted projects, a particular DBRA provides for broader coverage).

3. Are individuals who perform surveying work for a construction project covered by Davis-Bacon prevailing wage requirements always subject to the Davis-Bacon labor standards?

No. However, some workers involved in surveying activities on a Davis-Bacon project site may be covered by Davis-Bacon labor standards. Applicability of the Davis-Bacon requirements depends on the worker’s duties and other considerations, as discussed in Question #2 above and in more detail below.

4. When is surveying not subject to Davis-Bacon requirements?

Generally, workers engaged in surveying work during the design phase for a construction project, whose work is used by the architect or engineering firm responsible for developing design plans and specifications for the project before the construction contract is awarded are not subject to Davis-Bacon requirements; as such preliminary survey work is not a part of construction.*

Similarly, on a design-build contract, workers engaged in surveying work that is conducted to serve the project design work being conducted by the architect or engineering firm would not be covered by the Davis-Bacon labor standards.

On the other hand, workers who perform surveying work **immediately prior to or during actual construction** may be subject to Davis-Bacon requirements if they satisfy all of the conditions of coverage identified under Question #2 above.

* Note regarding certain HUD-assisted projects: Due to specific language in the Davis-Bacon related Act provisions in the United States Housing Act of 1937 and the Housing Act of 1949, application of a “development of the project” coverage test to construction projects assisted under these laws can be broader and may also result in DBRA coverage of preliminary survey work.

5. Where is work by surveyors and their crews not subject to Davis-Bacon requirements?

The Davis-Bacon labor standards apply only to workers employed on the construction project “site of the work.” Workers not employed on the “site of the work” are not covered by the Davis-Bacon requirements. The Davis-Bacon prevailing wage requirements in a covered contract do not apply to time that workers spend performing contract work off the “site of the work.”** Specifically, the Davis-Bacon Act provides that “the contractor or subcontractor shall pay all mechanics and laborers employed directly **on the site of the work** ... at least once a week” at wage rates not less than those stated in a covered contract. (Emphasis added. 40 U.S.C. § 3142.)

** Note: A very narrow exception exists with respect to the United States Housing Act of 1937 and the Housing Act of 1949 (mentioned above). As reflected at 29 CFR 5.5(a)(1), these laws do not reflect the DBA’s “site of the work” limitation.

For purposes of delineating the scope of DBRA coverage, the term “site of the work” is defined at 29 CFR 5.2(1), by the following provisions:

5.2(I)(1) – “Site of the work” is the physical place or places where the building or work called for in the contract will remain, and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project;

5.2(I)(2) - Except as provided in paragraph 5.2(1)(3), batch plants, borrow pits, job headquarters, tool yards, etc., are part of the “site,” provided they are dedicated

exclusively, or nearly so, to the contract or project, and are adjacent or virtually adjacent to the site of the work as defined in paragraph 5.2(1)(1);

5.2(1)(3) - Not included in the “site of work” are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular federal or federally assisted project. In addition fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (1)(1) of this section, are not included in the *site of the work*,.... even where [the operations of s]uch permanent, previously established facilities for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

6. Who is obligated to pay prevailing wages, as determined by the Secretary of Labor, for various job classifications in accordance with Davis-Bacon labor standards requirements on covered projects?

Generally, under the terms of DBRA-covered contracts “contractors and subcontractors” who perform contract work must pay at least the locally prevailing wages, determined by the U.S. Department of Labor’s Wage and Hour Division (WHD) to apply, according to the type(s) of construction involved in a project, to laborers and mechanics they employ on the site of the work. (In a few instances, under specific HUD-administered related Acts, coverage is not limited to “contractors and subcontractors.” In particular, under the United States Housing Act of 1937, employees of public housing authorities are also subject to Davis-Bacon requirements.)

Generally, a business engaged by a prime contractor to perform a portion of work called for under the prime contractor’s contract for construction may be considered a “subcontractor” obligated to meet the Davis-Bacon requirements with regard to laborers and mechanics the subcontractor employs to perform such contract work.

If the owner of a facility (not the construction contractor) contracts for independent inspection services, separate and independent from the construction contract, survey work performed under the facility owner’s contract for such inspection services would not be subject to the Davis-Bacon requirements in the construction contract. Thus, if survey work is performed as part of such an independent inspection not contemplated in the construction contract, the workers performing such survey work would not be subject to the DBRA requirements.

On the other hand, an individual who is employed by the prime contractor or a subcontractor to perform a portion of work called for under the prime or general contractor’s contract for construction may be a laborer or mechanic to whom the Davis-Bacon labor standards may apply, depending on whether or not the individual is a “laborer or mechanic” within the meaning of the DBA. As discussed below, the individual’s primary duties are important in determining whether an individual is a laborer or mechanic covered by the Davis-Bacon prevailing wage requirements.

7. What does it mean to be “employed” within the meaning of the DBRA?

Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or guarantees from the United States, is *employed* for purposes of the DBRA regardless of any contractual relationship alleged to exist between the contractor and such person. 29 CFR § 5.2(o).

8. Within the meaning of the DBRA, who are “laborers and mechanics” covered by the Davis-Bacon prevailing wage requirements?

The applicable regulatory definition of “*laborer or mechanic*” is set forth in 29 CFR § 5.2(m):

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 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.

(Underscore added.) The regulations at 29 CFR part 541 set forth the rules for determining whether an employee is exempt from the minimum wage and overtime pay requirements under section 13(a)(1) of the Fair Labor Standards Act (FLSA), the federal law of most general application regarding minimum wage and overtime pay standards nationwide. Section 13(a)(1) of the FLSA exempts “employees employed in a bona fide executive, administrative, or professional capacity” from the minimum wage and overtime requirements of that law.

9. In view of the definition of the term “*laborer or mechanic*” stated above, what information should be considered in determining whether or not Davis-Bacon prevailing wage requirements apply to an individual who is employed by a contractor or subcontractor to perform activities involved in surveying work on a project subject to Davis-Bacon labor standards immediately prior to or during actual construction in direct support of construction crew(s) on the site of the work?

In determining whether a worker (including a member of a survey crew) is a “*laborer or mechanic*” as defined under the DBRA, the touchstone is whether the worker’s duties “are manual or physical in nature (including those workers who use tools or who are performing the work of a trade).”

Certain workers are explicitly excluded from coverage by the regulatory definition of “*laborer or mechanic*.” An individual’s work duties are central to determining whether he or she is excluded from the definition of “*laborer or mechanic*” within the meaning of the DBRA. This is clearly stated in the definition that “[t]he term [*laborer or mechanic*] does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual.” 29 CFR § 5.2(m) (emphasis added).

The result of the reference, in the definition of “*laborer or mechanic*” at 29 CFR § 5.2(m), to the FLSA exemption status of some workers is that individuals who, within the meaning of the FLSA, are “employees employed in a bona fide executive, administrative, or professional capacity” in accordance with the rules established in 29 CFR Part 541 are also excluded from DBRA coverage.

10. Are business owners who personally perform surveying work on the job site exempt from the Davis-Bacon prevailing wages?

Davis-Bacon prevailing wages do not apply to a business owner who personally performs surveying work on the job site to the extent that he or she does not qualify as a “*laborer or mechanic*” under 29 CFR § 5.2(m). In particular, the term “*laborer or mechanic*” “does not apply to workers [including business owners] whose duties are primarily administrative, executive, or clerical rather than manual.” In addition, “[p]ersons employed in a bona fide executive, administrative, or professional capacity as defined in [29 CFR part 541] are not deemed to be laborers or mechanics.” 29 CFR § 5.2(m).

11. Are licensed surveyors performing survey work on a Davis-Bacon job site exempt?

Licensure is not generally a basis for determining whether or not workers are subject to Davis-Bacon labor standards. For example, often local licensing requirements may apply to certain construction workers, such as electricians or plumbers. Thus, in collecting data and determining locally prevailing wages to be paid on projects subject to Davis-Bacon labor standards, the workers in such classifications (whose work is that of laborers or mechanics) are not distinguished based on whether or not they are licensed.

At 29 CFR 541.300, the “541 regulations” provide a general rule for determining whether or not an individual is an “employee employed in a bona fide professional capacity.” An individual “[w]hose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction” may be an exempt “professional employee” if he or she is compensated on a salary or fee basis at a rate of not less than \$455* per week (\$380 per week if employed in America Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities. The phrase “work requiring advanced knowledge” means work that is predominantly intellectual in character and that includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. Additional information at 29 CFR 541.301 regarding the exemption for “employees employed in a professional capacity” addresses the meaning of the term “field of science or learning” and

the phrase “customarily acquired by a prolonged course of specialized intellectual instruction” and includes examples of various occupational areas that illustrate the analysis involved in determining whether the professional exemption applies.

12. Can we assume that a "Chief of Party" is exempt due to supervisory and administrative duties?

Whether or not DBRA labor standards apply depends on the duties the individual performs in a specific situation not his or her job title. For example, if an individual’s duties normally are to direct and supervise others and to keep records for a survey crew, but on a particular job the individual does not perform such duties, a determination concerning application of Davis-Bacon labor standards would be based on the duties he or she performs on the particular job site.

Also it may be relevant to consider that, as stated in the regulatory definition of the term “*laborer or mechanic*,” “[w]orking 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.”

13. Are survey technicians who are perform support work under the supervision of a licensed surveyor subject to Davis-Bacon requirements?

Whether or not DBRA labor standards apply depends on whether an individual performs primarily physical and/or manual duties, not his or her job title, and not on the qualifications of the individual’s supervisor or employer. Further guidance for determining an individual’s primary duties is provided below.

Where a certification program for surveying technicians has been approved by the U.S. Department of Labor’s Employment and Training Administration (ETA)/Office of Apprenticeship (OA), or by a state apprenticeship agency recognized by the ETA/OA, survey technicians individually registered in such a program may be paid at rates below the rates specified in an applicable Davis-Bacon wage determination, in accordance with the Davis-Bacon contract clause requirements in the covered contract.

14. Can the exclusion of workers whose primary duties are clerical also apply to others who work on the job site and whose primary duties are not bookkeeping activities or the like?

A worker whose duties are primarily clerical rather than manual is explicitly outside the scope of the definition of “*laborer or mechanic*” stated at 29 CFR 5.2(m). An example of this principle is that generally, air balance engineers whose primary function is to take measurements and to accumulate data upon which recommendations are based to advise mechanical contractors how to rectify imperfections or imbalances in heating and air conditioning systems which may become apparent after the contractor(s) have installed such systems. (However, if such employees spend a substantial amount of their time in any workweek (*i.e.*, more than 20 percent) on the site performing manual, physical, and

mechanical functions which are those of a traditional craftsman, they would be considered laborers or mechanics for the time so spent.) [FOH 15e06]

15. Davis-Bacon requirements apply only if an individual's duties are "primarily physical and/or manual in nature (including workers who use tools or who are performing the work of a trade). How are an individual's "primary duties" determined?

In determining whether an individual or survey crew member performs primarily physical and/or manual duties, the principal, main, major or most important duty or duties that the individual performs are considered to be his or her "primary duty." This determination must be based on the facts in a particular case, with the major emphasis on the character of the worker's job as a whole. In this context, when determining the primary duty of a survey crew member it is appropriate to consider the relative importance of the manual and/or physical duties as compared with other types of duties performed by the workers in a particular classification.

The amount of time normally spent performing manual and/or physical duties can be a useful guide in determining whether that work is the primary duty of an employee. Thus, survey crew members who normally spend more than 50 percent of their time performing such work will generally satisfy the primary duty requirement.

Time alone, however, is not the sole test. For example, if a survey crew member meets the tests for exemption as a professional, executive or administrative employee under the rules established by 29 CFR Part 541, that survey crew member is not a "*laborer or mechanic*" as defined under 29 CFR 5.2(m).

16. How does the Department of Labor determine the prevailing wage rates issued in Davis-Bacon wage determinations?

The DBA requires the Secretary of Labor to determine prevailing wage rates for inclusion in covered contracts "based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work" in the area (usually a county) in which proposed contract work is to be performed.

The WHD collects voluntarily submitted data, principally in response to surveys conducted by the WHD regional offices.

The wages on the WD are typically determined by surveying ongoing and recently completed construction projects within an area. WHD conducts the surveys of projects under construction or completed during a specific survey time frame to gather specific wage rate data paid to workers employed in the various laborer and mechanic classifications on construction projects.

As a matter of longstanding policy, the Department of Labor recognizes four general types of construction for purposes of making prevailing wage determinations: building

construction, residential construction (not over 4 stories), highway construction, and heavy construction (a catch-all category for other projects, which is sometimes broken down into subcategories of “projects of a similar character).

As the WHD depends on the voluntary submission of wage data for the various classifications of laborers and mechanics who have been employed on construction work in an area, the classifications and wage rates issued in the Davis-Bacon wage determinations that are incorporated into covered contracts reflect data submitted. Thus, participation by contractors who have performed work on construction projects in an area is vital to enabling the WHD to accurately reflect the classifications and wages that prevail on each type of construction in counties where construction will be performed in the future. (Wage data from federal and federally assisted building and residential projects are not used in determining prevailing wages in an area if there is sufficient data to determine the prevailing wages for such construction in the area without using the data from the federally and federally assisted projects.)

17. How can contractors find out when a new survey will be conducted to determine prevailing wages for application to future contracts subject to Davis-Bacon labor standards in their areas?

Information regarding Davis-Bacon prevailing wage surveys that are planned or already underway and other information concerning the surveys is available on the WHD website at: <http://www.dol.gov/whd/programs/dbra/Survey/status.htm>.

18. Where can we see the current Davis-Bacon wage determinations that are available to the federal and other contracting agencies for use in upcoming bid solicitations and contracts?

General wage determinations issued under the Davis-Bacon Act are available by county and type of construction on the Wage Determinations On Line website at <http://www.wdol.gov/>.

19. How are wage rates established for classifications not listed on a wage determination in a contract to which the Davis-Bacon labor standards apply?

Davis-Bacon wage determinations often do not contain all of the classifications of laborers and mechanics needed for the work that will be performed on a covered project. The Davis-Bacon contract clauses specify the procedure for adding needed classifications not included in a wage determination that applies to given contract work after award of the contract. (See 29 CFR 5.5(a)(1)(ii).) (All Agency Memorandum No. 213 provides additional information on the evaluation of requests for additional classifications needed for work on a project, and is available at <http://www.wdol.gov/aam/aam213.pdf>.)

20. Where does the WHD have additional information available regarding the administration and enforcement of the DBRA?

General information and links to key documents involved in DBRA administration and enforcement are posted at <http://www.dol.gov/whd/govcontracts/dbra.htm>.

Additional information concerning the wage determinations survey process is available at <http://www.dol.gov/whd/govcontracts/dbra.htm>.

Note (added January 2018):

*The Department of Labor is undertaking rulemaking to revise the regulations located at 29 C.F.R. part 541, which govern the exemption of executive, administrative and professional employees from the Fair Labor Standards Act's minimum wage and overtime pay requirements. Until the Department issues its final rule, it will enforce the part 541 regulations in effect on November 30, 2016, including the \$455 per week standard salary level. These regulations are available at: <https://www.dol.gov/whd/overtime/regulations.pdf>