

# Prevailing Wage Laws

THE WAGE AND HOUR PRACTICE GROUP

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# Prevailing Wage Laws

Whether you are constructing a government building or rendering any of a variety of services for the public, doing business with the federal government carries heightened obligations when paying your employees who work on those contracts.

## THE DAVIS-BACON ACT

The Davis-Bacon Act (DBA) is a federal statute that imposes minimum wage and fringe benefit rates when laborers and mechanics work for private contractors on federal and federally-assisted construction contracts.

### Types of Projects

The DBA has broad application to virtually all contracts in excess of \$2,000 requiring construction or renovation of public buildings or other public works infrastructure, such as roads, bridges, public transit, water systems, and housing to which the federal government or the District of Columbia (DC) is a party. Over 70 federal laws authorizing federal financial assistance for construction incorporate DBA minimum wage and fringe benefit pay requirements, as do the Federal Acquisition Regulations. DBA coverage can be triggered by federal grants, loans, or loan guarantees. DBA pay requirements, may, for example, apply to the federally-funded renovation of a municipal housing complex, residential weatherization, and road-building projects funded by the American Recovery and Reinvestment Act, substantial environmental cleanup and soil remediation projects funded by federal appropriations, and regional redevelopment projects prompted by Hurricane Sandy.

### Compliance Requirements

Before bidding on public construction projects, contractors should educate themselves on the added compliance burdens and potentially greater direct labor costs imposed by the DBA. The U.S. Department of Labor's Wage and Hour Division (WHD) issues wage determinations requiring the payment of wages and fringe benefits for various construction job classifications found "prevailing" among the construction trades in the area. Quite often, WHD's survey process results in wage determinations that require contractors to pay their employees the rates found in local union collective bargaining agreements.

### Certified Payroll

Contractors on DBA-covered projects must inform employees of the required DBA wage rates and submit to the government weekly certified payroll reports demonstrating that they have paid their workers at (or above) the required rates. These certified payrolls become public records that are accessible upon request through the Freedom of Information Act. The contractor is subject to penalties if the payroll reports are found to be willfully inaccurate. The prudent construction contractor therefore will ascertain in advance whether the DBA applies to the project and which, if any, DBA job classifications apply to the tasks and functions it has contracted to perform before a WHD investigator appears on site and investigates an alleged wage underpayment or misclassification of laborers and mechanics.

## SERVICE CONTRACT ACT

The McNamara-O'Hara Service Contract Act (SCA) covers all contracts and bid specifications in excess of \$2,500 entered into by federal and DC agencies, where the principal purpose of the contract is to furnish services to the United States or DC through the use of service employees. One group of service employees excluded from this requirement are those falling within the regulatory definitions in Part 541 for exempt executive, administrative, professional, outside sales, or computer employees as provided in the Fair Labor Standards Act (FLSA).

### Types of Projects

Each year, the U.S. government invites private companies to submit bids or proposals to provide an endless array of services. These contracts can be valuable business opportunities, provided the contractor understands its obligations under the SCA and the Contract Work Hours and Safety Standards Act (discussed below) and takes proactive steps to assure full compliance.

*Ogletree Deakins has a team of knowledgeable attorneys skilled in counseling and training contractors regarding coverage and compliance issues under the DBA.*

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### Compliance Requirements

The SCA requires that contractors and subcontractors rendering such services pay their employees not less than the wage rates and fringe benefits found by the WHD to be prevailing in the locality where the work is performed. It also includes a provision requiring a successor contractor to pay employees the wage rates and fringe benefits contained in a collective bargaining agreement of the predecessor contractor.

### Service Employees' Right of First Refusal

Executive Order 13495 requires that qualified workers on a federal service contract, who would otherwise lose their jobs because of a transition of contractors, be given the right of first refusal for employment with the successor contractor. Our attorneys help guide our clients through issues such as what notices must be given, how long the rehire obligation applies, and what constitutes a bona fide offer of employment.

## FEDERAL OVERTIME

Another statute that applies to both federally-assisted construction projects and service contracts is the Contract Work Hours and Safety Standards Act (CWHSSA). Thus, mechanics and laborers under the DBA who work more than 40 hours per week on federally-assisted construction are entitled to one and one-half times their assigned wage rates for such overtime hours, just as under the FLSA. Similarly, the CWHSSA requires that all non-exempt employees working on government service contracts be paid one and one-half times their regular rate of pay for all hours worked in excess of 40 in a week, also like the FLSA.

## HEIGHTENED ENFORCEMENT

In recent years the WHD has made DBA and SCA enforcement one of its top priorities. Until recently, the vast majority of DBA and SCA investigations were the result of employee complaints. Now, an increasing number of DBA and SCA investigations are being undertaken solely on the DOL's own initiative, and violations can turn on whether a contractor has been complying with obscure rules governing the calculation and payment of fringe benefits.

## REMEDIES FOR VIOLATIONS

A contractor who violates the DBA, SCA, or CWHSSA will be required to make the affected employees whole. Failure to do so may cause the government to withhold progress payments on the job. Frequent or extensive violations, moreover, may prompt the DOL to initiate a legal proceeding to debar the contractor from bidding on or performing work on federal construction or service contracts.

## KNOWLEDGEABLE ADVISORS

Ogletree Deakins has a team of attorneys located around the country who are skilled in coverage and compliance issues under the DBA, SCA, and CWHSSA. Our attorneys include former officials who worked on prevailing wage matters for the government at the WHD or for various states. We understand the importance of complying with all of the legal requirements of these laws and know how to train frontline field managers and administrative personnel effectively regarding these prevailing wage obligations.

Should our clients receive notice that the government is withholding payment and/or that the WHD has commenced a prevailing wage investigation, we have the experience to dissect complex DBA and SCA compliance and coverage issues and to provide effective, cost-efficient advice and legal representation. If a fair resolution of alleged violations cannot be achieved, we are prepared to represent our clients' interests before a DOL administrative law judge, the Administrative Review Board, or in court if necessary. Our attorneys are also adept at deflecting attempts by workers asserting wage deficiencies to sidestep established administrative channels by suing directly in court.



*With offices throughout the nation, the firm represents a diverse range of clients.*

*We operate efficiently on a national scale without compromising our commitment to service.*



*Ogletree Deakins is one of the nation's largest labor and employment law firms, representing management in all types of employment-related legal matters.*

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