

Department of Labor Final Rule Updating the Davis-Bacon and Related Acts Regulations

August 2023

Executive Summary: In March of 2022, the Department of Labor (DOL) published a notice of proposed rulemaking to update the Davis-Bacon and related acts regulations. Davis-Bacon prevailing wage rules apply to the construction and substantial rehabilitation of multifamily and healthcare housing under federal housing acts, including the National Housing Act. MBA joined with NAHB, NMHC and other coalition partners to [respond](#) to the proposal.

On August 8, DOL published the [final rule](#), which will become effective 60 days after publication in the Federal Register. The final rule makes very few changes to the proposed rule. DOL declined to address the issue of split wages, nor the issue around when those wages are determined. The final rule did not update the definition of residential housing to include those over 4 stories, despite that being out of date with advances in the construction of multifamily structures that have occurred since 1985. Lastly, the final rule returns to the three-step wage determination system that was used from 1938-1983, despite the fact that it is well documented that this process gives more weight to a small number of respondents, and results in inflated wages.

Below is a side by side of the provisions MBA commented on:

| Issue | MBA Ask | DOL Final Rule |
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| Split Wages | Create a policy and practice favoring a single residential wage decision. | DOL does not change requirements for split wages. (p. 153) The Department declines the suggestion to exempt multifamily housing projects from the requirement to incorporate wage determinations from multiple categories when a project has a substantial amount of work in another category of construction. Although HUD previously suggested that a single residential wage determination could be used in such circumstances, it has since issued guidance clarifying that multiple wage determinations should be incorporated into construction contracts for multifamily housing when there is a substantial amount of work in another category of construction, consistent with longstanding Department policy and this rulemaking. |

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| Threshold of work are sufficiently “substantial” to consider separate wages | Increase the threshold from \$2.5 million to \$15 million. | DOL will issue further guidance regarding the monetary threshold. (p. 152) With respect to the monetary threshold, WHD anticipates issuing an AAM or other guidance containing additional information regarding both the methodology and frequency of updates to the threshold. |
| Timing of Wage Rates | Fix the wage rates to those in effect when the date of application for firm commitment is submitted. | DOL will use initial endorsement date. (p. 170) The regulations’ use of the initial endorsement date for certain housing contracts already reflects an earlier lock-in date for the application of wage determination modifications than the date of contract award or the bid opening date, which are the lock-in dates that apply to most other types of contracts. Pushing this date back even further to the time when the housing developer first applies for Related Act funding would undermine worker protections by using even more outdated wage rates for DBRA-covered laborers and mechanics on these projects. In addition, it would not be administratively practical to use so early a date. Initial endorsement occurs when all parties have agreed upon the design and costs. Prior to initial endorsement, and certainly at so early a point as the developer’s application for a firm commitment to funding, the project design and costs may undergo significant alterations, resulting in changes to the classifications and potentially even to the categories of wage determinations that may be applicable. |
| Definition of Residential Construction | Permit multifamily properties of more than four stories to be considered residential construction. | DOL made no changes but will consider sub-regulatory guidance. (p. 109) Under AAM 130, apartment buildings of no more than four stories in height are classified as residential and apartment buildings of five or more stories are classified as building construction. The Department believes the definition of what falls under each type of construction is best addressed through sub-regulatory guidance and intends to continue with that approach. The final rule therefore adopts the proposal without any changes |
| Determination of Prevailing Wage | Do not return to three-step method. Do not use state and local wage rates as proxy. Expand sources to determine the prevailing wage. | DOL will revert to using a three-step method for wage determination that was used from 1935-1983. They will also use state and local prevailing wage determinations. DOL allow mixing of “metropolitan” and “rural” wage data. This final rule implements the Wage and Hour Division’s (WHD) original methodology for determining prevailing wages, known as the “three-step process,” that was in effect before 1983. According to the three-step process, in the absence of a wage rate paid to a majority of workers in a particular |

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| | | <p>classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. Only if no wage rate is paid to at least 30 percent of workers in a classification will a weighted average rate be used.</p> <p>This final rule also permits WHD to count wage rates that may not be exactly the same, such as escalator-clause rates, zone rates, night-shift differential, and combined hourly-fringe rates, as the same rate—for the purpose of determining the prevailing wage—if those rates are “functionally equivalent.”</p> <p>The final rule adds a new provision which permits the WHD Administrator, under specified circumstances, to determine DBRA wage rates by adopting wage rates set by state and local governments.</p> <p>Under the rule, most wage determinations will continue to use the county as the basic geographic unit for determining the prevailing wage. In the event that there is not sufficient wage data for a given county, this final rule permits WHD to use data from nearby counties, even if one county could be characterized as “metropolitan” and the other as “rural.” Eliminating the strict bar on mixing metropolitan and rural county data will result in geographic groupings that better account for the realities of relevant construction labor markets.</p> |
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