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Milestone Changes Made to Davis–Bacon Prevailing Wage Requirements

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Last week, the Department of Labor (DOL) made one of the most significant revisions to the Davis–Bacon Act (DBA) and Davis–Bacon and Related Acts (DBRA) in over 40 years. After receiving comments from both the construction industry and labor stakeholders, on August 8, 2023, the DOL issued the Final Rule "Updating the Davis–Bacon Act and Related Acts Regulation," which will be published in the *Federal Register* and then go into effect 60 days from its publication. The DOL said that the Final Rule provides greater clarity and enhances the DBRA regulations' effectiveness in the modern economy.

These revisions come on the heels of the Bipartisan Infrastructure Law, described as "a once-in-a-generation investment in our nation's infrastructure, competitiveness, and communities." As noted by the DOL's Principal Deputy Wage and Hour Division Administrator Jessica Looman: "In light of recent investments in our nation's infrastructure, modernized regulations are more important than ever to ensure fair wages and benefits for the workers who build and repair our roads, bridges, federal buildings and energy infrastructure.… They will help set correct wage rates for workers on these federally funded construction projects that better reflect the realities of today's labor market."

1. *What is the Davis–Bacon and Related Acts?*

Under the DBRA, it is the DOL's responsibility to determine wages and issue regulations and standards to be observed by federal agencies that award or fund projects subject to Davis–Bacon labor standards and oversee the consistent enforcement of the Davis–Bacon labor standards.

The DBA imposes prevailing wage requirements for construction contracts valued over $2,000 and issued by the federal government or Washington, D.C. DBRA contractors and subcontractors must pay their laborers and mechanics no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area. The DBA directs the DOL to determine the locally prevailing wage rates. Notably, there are dozens of other federal statutes that incorporate Davis–Bacon's prevailing wage requirements where federal funds are expended in support of public construction activities, including state and local construction projects funded with federal grant funds.

2. *How does the Final Rule change the DBRA?*

Overall, the Final Rule's regulatory changes aim to improve and enhance the DOL's ability to administer and enforce DBRA labor standards more effectively and efficiently. According to the White House:

- The Final Rule restores the DOL's definition of "prevailing wage" that was used for nearly 50 years until the Reagan Administration. The Final Rule will make the prevailing wage equivalent to the wage paid to at least 30% of workers, rather than 50% of workers, in a given trade in a locality. Previously, if the majority of workers in a given trade and locality did not earn a single wage rate, then the prevailing wage was determined by the average wage. This average can pull down the prevailing wage if some employers were paying very little. By setting the prevailing wage to the wage paid to at least 30% of workers, the revised regulations make it more likely that workers are paid a true prevailing wage.

- The Final Rule makes it easier to keep prevailing wages current, which will ultimately allow the DOL to keep up with wage growth. Currently, the DOL must periodically survey contractors and other parties to update prevailing wage rates, a task that is resource intensive. The Final Rule makes this process easier now that the DOL's wage and hour administrator has been delegated the express authority to adopt prevailing wages determined by state and local governments. The DOL can also issue wage determinations for labor classifications when insufficient data was received through the wage survey process and update outdated wage rates.
- The Final Rule strengthens DOL enforcement by adding a new anti-retaliation provision protecting workers who complain of prevailing wage violations. The Final Rule also strengthens the DOL's ability to withhold money from a contractor in order to pay employees their lost wages.

3. What are the implications?

The impacts of the Final Rule will be substantial. Employers will likely see increased responsibilities and obligations for federal contract procurement and labor-related issues (i.e., record-keeping obligations and anti-retaliation provisions). And with the rise of prevailing wage rates, those employers in the private sector will need to ready themselves to compete for workers through the utilization of their own competitive rates of pay. Given the breadth of these changes and the substantial impact, there will likely be legal challenges to the Final Rule. Alston & Bird will continue to monitor further developments and keep our clients informed.

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