

**HAYNES BOONE**



ASSOCIATION OF CORPORATE COUNSEL  
NATIONAL CAPITAL REGION

# Service Contract Act and Davis Bacon Act



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# Panelists

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Service Contract Act (SCA)

aka Service Contract Labor Standards Statute (SCLS)

# McNamara- O'Hara Service Contract Act

The Service Contract Act applies to “any contract” that:

- (1) “is made by the Federal Government or District of Columbia,”
- (2) “involves an amount exceeding \$2,500,”
- (3) “has as its ***principal purpose the furnishing of services*** in the United States”
- (4) “through the use of ***service employees.***”

41 U.S.C. § 6702(a).

\*United States, includes District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, Canton Island, and the Northern Marianas.\*



## Requirements for SCA covered contracts

Contracts in excess of **\$2,500** must contain:

- Labor standard clauses
- Minimum prevailing wages and fringe benefits determined by Department of Labor (DOL) via the incorporated Wage Determination
- Posting requirements for WD and SCA Poster
- Statement of rates paid to federal employees

# What is a “service employee” under SCA?

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Section 8(b) of SCA defines service employee as:

Any person engaged in performance of the contract, except

- Employees who qualify for exemption as bona fide executive, administrative or professional employees under the FLSA (29 C.F.R. Part 541)
- Employee coverage does **not** depend on contractual relationship (29 C.F.R. § 4.155)



## SCA Exempted Employees = FLSA Exemptions

Must meet the primary duties and salary tests under the FLSA exemptions:

- Executive
- Administrative
- Learned Professional
- Computer Employee
- Creative Professional
- Outside Salesperson

# What contracts are not covered?

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- Contracts primarily for something other than services (e.g., construction or commercial products)
- Contracts for leasing of space (although government cannot use leases as a means to avoid SCA)
- Contracts for *professional* services
- Contracts for operation of postal contract stations or public utilities
- Federally-assisted contracts for services entered into by state governments, e.g., Medicaid and Medicare programs





# Contracts for “furnishing of services”

The SCA does not limit the types of services—essentially includes nearly all services under the Contract with few exceptions.

- Security and guard services
- Janitorial services
- Cafeteria and food services
- Maintenance and Support services at Government installations
- Non-exempt professionals providing non-manual support services

# What services are not covered?

- Commercial Services Exceptions
  - Automotive or other vehicle maintenance services. This exemption does not apply where the volume of the government work is such that the contractor could perform the work with a workforce dedicated to the government contract.
  - Maintenance, calibration, repair and/or installation services where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis (i.e., typically required due to manufacturer warranty or proprietary information).

# What services are not covered?

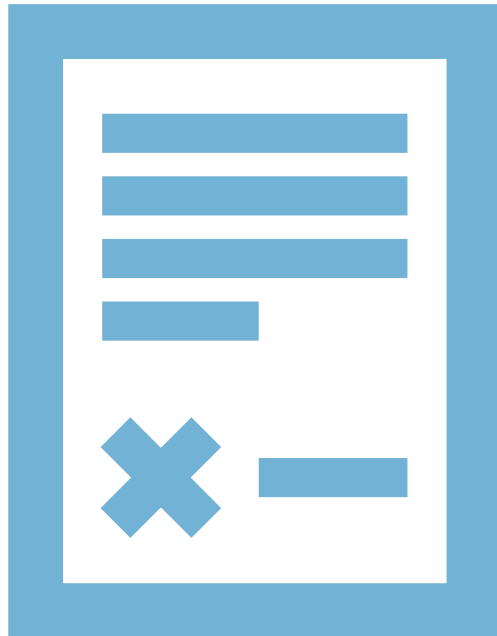
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- Commercial Services Exceptions – very narrow
  - Financial services (e.g., the issuance and servicing of cards, such as credit, debit, purchase, smart cards, and similar card services).
  - Lodging and meals at hotels/motels if for limited duration (e.g., one to five days). This exemption does not apply to contracts for lodging to fulfill continuing lodging needs (e.g., lodging recruits or government employees for long periods of time).
  - Transportation of persons by common carrier by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or by standard commercial services (not charter services).
  - Real estate services related to housing federal agencies or disposal of real property owned by the federal government (e.g., real property appraisal, broker, space planning, lease acquisition, lease negotiation, tax abatement, and real property disposal).
  - Relocation services to assist federal employees or military personnel in buying and selling homes.

## Subcontractor Risk

- Labor subcontractors providing covered services (at any tier) under a SCA contract are covered by the SCA requirements and must pay the prevailing wages and fringe benefits in the WD.
- Prime contractors are responsible for subcontractor compliance and may be **jointly and severally liable** for back wages and fringe benefits.
- DOL may issue findings against prime contractors for the failures of labor subcontractors to meet the SCA requirements—
  - Must do more than simply flow down labor clauses to avoid liability
  - Should audit subcontractors for compliance with SCA from time-to-time

# Government Contracts – FAR Requirements



- FAR Subpart 22.10 - Service Contract Labor Standards
- Should confirm whether the following FAR clauses are included in the contract:
  - FAR 52.222-41, Service Contract Labor Standards
  - FAR 52.222-43 Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment (Multiple Year and Option Contracts)
  - FAR 52.222-48, Exemption from Application of the Service Contract Labor Standards Statute to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Certification
  - FAR 52.222-52, Exemption from Application of the Service Contract Labor Standards Statute to Contracts for Certain Services-Certification

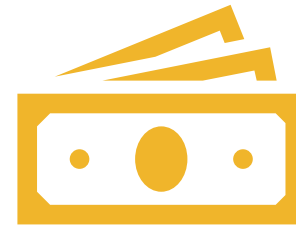
# What governs wages and benefits?



## Must pay the prevailing wages contained in either:

Area Wage Determination (WD) in the Geographic locality of place of performance governs

Collective Bargaining Agreement (serves as WD when incorporated into Contract for the covered CBA workers)



## Must pay fringe benefits provided by:

Issuing cash payment at the health and welfare rate

Providing Bona fide benefits

Combination of the two

Fringe payments must be noted separately and **cannot be combined** with hourly wages

# What are “bona fide” benefits under SCA?

- Specified in writing and communicated to the employee
- Provided for benefits to employees on death, disability, retirement, medical expenses, unemployment, etc.
- There is a definite formula for determining contributions and payouts
- Contributions are paid irrevocably to third party trust
- Benefits are not otherwise required by law (e.g., workers comp, unemployment)



# SCA related “credits”

- WHD investigators are being directed to review permissible credits during SCA investigations.
  - Permissible to credit certain administrative costs in meeting the fringe benefit obligations for third party plans or self-funded plan using ERISA compliant trusts.
  - WHD has been making investigation determinations that disallow in whole or in part administrative fees as creditable toward contractors’ fringe obligations and issuing substantial backpay orders.
  - Recent changes under the new DBA Rulemaking are likely to be applicable under SCA—resulting in potential exposure for administrative costs normally borne through the trust and credited in meeting fringe benefit obligations.



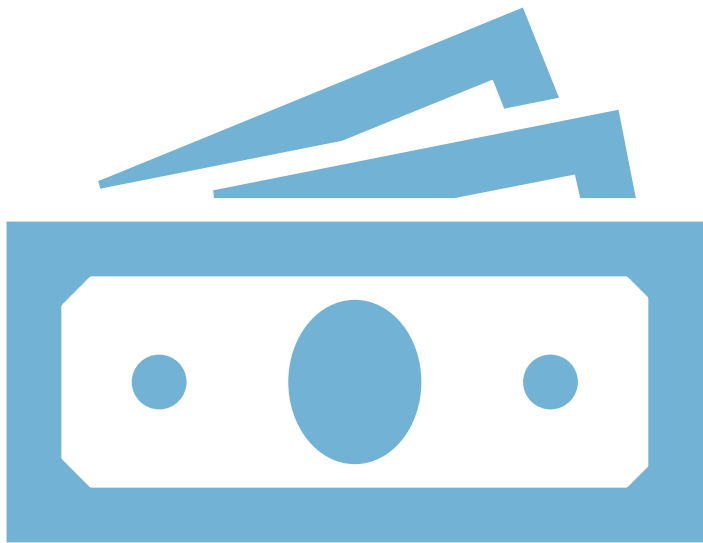
# Labor Classification Mapping

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- Workers must be “mapped” to the labor classifications in the Wage Determination and the SCA Directory of Occupations.
  - WHD will interview employees and may conclude that employees should have been mapped to a different labor category or higher labor classification.
- Must identify the **specific job duties** each employee will perform and map those duties to an **appropriate WD labor category**
  - Analyze job duties in relevant documents
  - Determine which employees are service employees or an exemption applies
  - Review WDs and SCA Directory of Occupations to locate and map each service employee to appropriate labor category
  - If no match can be found, will need to file a conformance and request that DOL add a labor classification and proposed wage to the contract within 30 days

*Innovative  
Techs., Inc.,  
ASBCA No.  
61686, 2023 WL  
5322866 (July  
26, 2023)*

- Contract missing FAR Clause 52.222-41 but other clues indicated SCA might apply
- Contractor performed from 2006 to 2013, without the contractor or DMA appearing to acknowledge the contract was subject to the SCA or seeking to incorporate new WDs
- Contractor settles with DOL then seeks equitable adjustment
- SCA applies and claim ***did not fit criteria*** for request for equitable adjustment

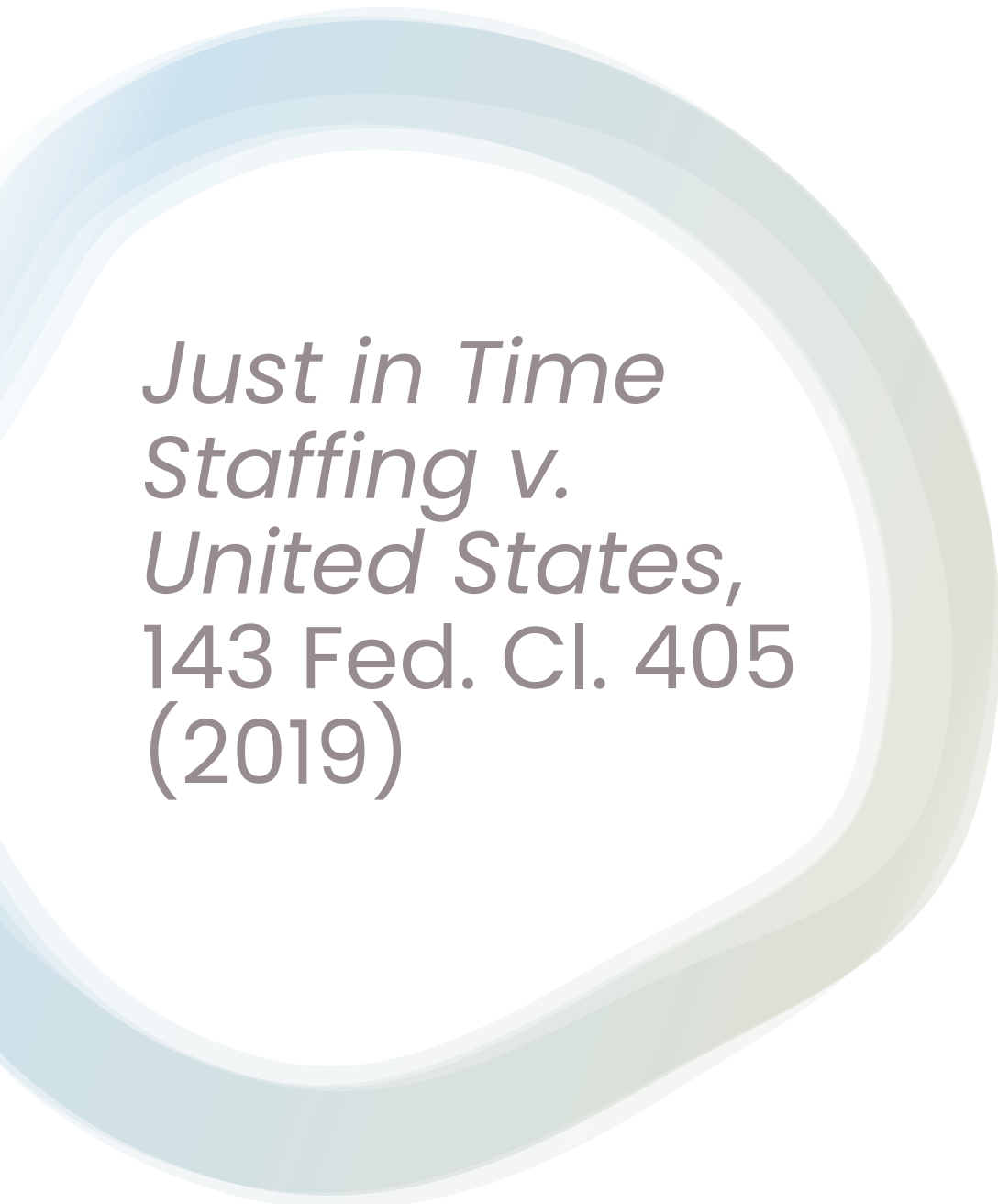


## *Dynamic Sys. Tech., Inc., ASBCA No. 63037, 23-1 BCA ¶ 38,274*

- Contractor submits bid based on incorrect DOL determination of exempt position
- ASBCA held that contractor was responsible for the increased costs after it knowingly failed to utilize and price the proper labor category in its offer, anticipating that it would submit a claim for an equitable adjustment after award
- Burden of determining application of the SCA ***fell solely on the contractor***

*Stone v. Sec'y of  
Veterans Affs.,  
No. 2020-1732,  
2021 WL  
4851262, at \*1  
(Fed. Cir. Oct. 19,  
2021)*

- Stone has contract to provide janitorial and food support services for VA inpatient living program
- DOL finds Stone failed to pay wages and fringe under SCA
- Stone seeks reimbursement and is denied
- Contractor failed to present evidence of the **actual increase** of applicable wages and fringe benefits that it had made to comply with the applicable DOL Labor wage determination, as required by FAR 52.222-43



*Just in Time  
Staffing v.  
United States,*  
143 Fed. Cl. 405  
(2019)

- Just in Time spends \$105K negotiating CBA
- Contracts are not to be used for the performance of “inherently governmental functions”
- Government **not liable** for any costs contractor incurred in negotiating a collective bargaining agreement with its own employees who were attempting to unionize
- Just In Time did **not undertake a governmental function** and had the duty to “confer in good faith” with the labor union, nor did the government order the additional work.

# SCA v. DBA

<b>SCA = Maintenance</b>	<b>DBA = Construction</b>
<p data-bbox="1039 247 1615 379">➤ Scheduled, regular, and recurring maintenance actions (not one-off fixes)</p> <p data-bbox="1039 436 1679 569">Routine activities/maintenance to keep something operational (not a repair to restore function)</p> <p data-bbox="1039 626 1475 901">Examples: Filter changes Oil and greasing machinery Fluid replacement or loading Cleaning Scheduled maintenance</p>	<p data-bbox="1732 247 2275 334">➤ Construction, alteration, repair, painting, and decorating</p> <p data-bbox="1732 391 2402 569">Rehabilitation/restoration of a facility or parts of a facility by replacement, overhaul, or reprocessing of constituent parts or materials</p> <p data-bbox="1732 626 2359 712">One-time replacement or fix to something not functioning</p> <p data-bbox="1732 769 2351 1186">Examples: Building structural repair Hanging wallpaper Refinishing floors Renovations Roof shingling Paving repairs Replacing or fixing nonfunctional HVAC unit(s)</p>

# Compliance Tips

- Consider whether SCA applies even if Government has failed to identify the Contract as SCA.
- Ensure relevant SCA FAR clauses are incorporated
- Ensure applicable wage determination or CBA is incorporated and is flowed down to any labor subcontractors.
- Map employees to the right labor classification under Wage Determination/CBA or seek a conformance
- Pay covered employees the SCA prevailing wages and fringe benefit rates for their job classifications.
- Pay attention to what “credits” you are taking for fringe benefits.
- Ensure that subcontractor (at all tiers) employees are paid SCA prevailing wages and fringe benefits.
- Ensure the SCA poster and wage determination are posted in a prominent location where the work is performed and that employees have received notice of wages and fringe benefits.
- Ensure SCA wage determinations are updated (e.g., each option year/extension or when there are substantial changes/increases in the scope of work).

# Common SCA Pitfalls

- Pay stubs that commingle pay and benefits
- Benefits included are not “bona-fide” and/or impermissible credits for certain costs
- Inadequate records for cash payments made to satisfy fringe benefit requirements
- Contracts contain SCA clause but no WDs
- Failing to implement and pay timely updated WD rates
- Employees classified based on contract description and not actual work performed
- Employees mapped to job titles and not the duties contained in the Directory of Occupations
- Failing to apply for conformance with classification missing on WD
- Failing to properly flow down SCA clause and WDs to labor subcontractors or monitor subcontractors



# Executive Order – Minimum Wages

# Federal Minimum Wage



E.O. 14026 increases minimum wage for SCA and DBA contracts

\$17.20 as of January 1, 2024

Notice of increase issued in October for next CY



The minimum wage requirements of E.O. 14026 applies to:

A “new contract” entered on or after January 30, 2022

A contract that is entered into prior to January 30, 2022, if extended or an option year is exercised on or after January 30, 2022

# Federal Minimum Wage



Republican-led states and a recreational company have separately argued that the wage hike exceeds the president's authority under the Procurement Act and violates the Administrative Procedure Act and the major questions doctrine.



Based on an order issued by the U.S. District Court for the Southern District of Texas on September 26, 2023, the minimum wage requirements are not currently being enforced in Texas, Louisiana, or Mississippi (when the state and their agencies are a party).



Appeals pending in several circuit courts.

# Non-Displacement of Qualified Workers

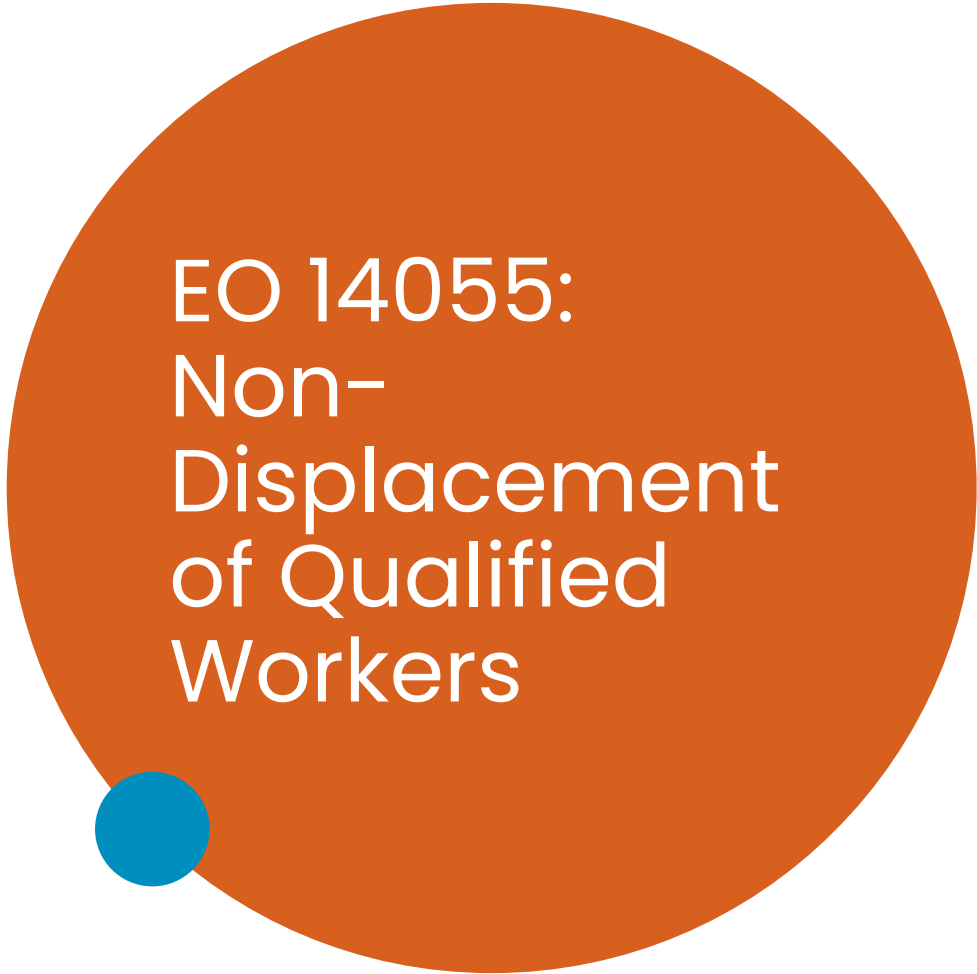
EO 14055:  
Non-  
Displacement  
of Qualified  
Workers,  
88 Fed. Reg.  
86,760 (Dec.  
14, 2023)

- The Final Rule is effective February 12, 2024.
- Requirements will apply to solicitations issued on or after the effective date of final regulations issued by the FAR Council. It is not known when the FAR Council will issue final regulations but, contracting agencies are “strongly encouraged” to include nondisplacement clauses in solicitations and contracts.
- Applies to contracts valued at or above \$250,000 covered by the SCA.

# EO 14055: Non-Displacement of Qualified Workers

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- Covered successor contractors and subcontractors at any tier must offer employment on a “first right of refusal” basis to service employees employed under the predecessor contract.
- Employers are not required to offer a right of first refusal to any employee(s) of the predecessor contractor for whom the contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employee’s past performance, that there would be just cause to discharge the employee(s) if employed by the contractor or any subcontractors.
- Covered successor contractors and subcontractors must make a written offer of employment to all covered incumbent employees provided there is a position available, and the incumbent employees must have at least 10 business days to accept the offer. Covered successor contractors and subcontractors must not fill any positions subject to the SCA before making a written offer of employment to an incumbent.
- The employment offer may include different employment terms and conditions, including changes to pay, benefits, title, and position, as long as the different terms are not offered to discourage the employee from accepting the offer.



## EO 14055: Non- Displacement of Qualified Workers

- Covered successor contractors and subcontractors may elect to employ fewer workers than its predecessor, although in those instances where all employees of the former contractor are not offered employment on the new contract, the requirement to extend a “right of first refusal” may continue for up to 90 days.
- Predecessor contractors and subcontractors must provide a certified list of service employees, with their anniversary dates, to the contracting agency at least 30 business days prior to the contract completion date, and an updated list within 10 business days prior to the contract completion date (if there were any changes to the original list).
- Predecessor contractors and subcontractors must also notify their employees in writing of the possible right to a job offer on the successor contract or subcontract.

# New Feature of EO 14055/DOL Final Rule: Coverage of New Locations; Location Continuity

- Coverage of Successor Contracts in New Locations:
  - Old Nondisplacement of Qualified Workers rule applied only to contracts “that succeed contracts for performance of the same or similar work at **the same location.**” FAR 22.1207 (reserved effective June 5, 2020) (mirroring former EO 13495)
  - EO 14055 Nondisplacement of Qualified Worker requirements **apply even if the successor contract is not performed at the same location as the predecessor contract.**
- Location Continuity:
  - EO 14055 Sec. 4 requires agencies to “consider whether performance of the work in the same locality or localities in which the contract is currently being performed is reasonably necessary to ensure economical and efficient provision of services”; if so, “the agency shall, to the extent consistent with law, include a requirement or preference in the solicitation for the successor contract that it be performed in the same locality or localities”
  - DOL implemented this section in 29 C.F.R. 9.11(c), which prescribes factors and a process for mandatory location-continuity analysis that agencies must perform before issuing a solicitation if there is a possibility a successor contract could be performed at a new locality.



# Compliance Tips

- Ensure that FAR clause is incorporated into the contract.
- If predecessor contractor, ensure that you provide written notice to your employees of their rights.
- If successor contractor, ensure that you give workers 10 business days to consider offer.
- If successor contract, keep a list of successor employees who were not made an offer to ensure the right of first refusal is made available over the first 90 days.

# Davis-Bacon Act (DBA) and Related Acts aka Construction Wage Rate Requirements Statute (CWRR)

# Davis- Bacon Act of 1931, 40 U.S.C. §§ 3141-3148

The Davis-Bacon Act applies to “every contract in excess of \$2,000 to which the Federal Government or the District of Columbia is a party”:

- (1) “for **construction, alteration, or repair**, including painting and decorating, **of public buildings and public works** of the Government or the District of Columbia”
- (2) “located in a State or the District of Columbia” and
- (3) “which requires or involves the employment of **mechanics or laborers**” 40 U.S.C. 3142(a)

# Davis- Bacon Related Acts (DBRA)

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The “Davis-Bacon Related Acts” are laws authorizing federal grants and other federal assistance (loans, loan guarantees, etc.) that require compliance with Davis-Bacon.

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Since the enactment of the Davis-Bacon Act in the 1930s, Congress has extended Davis-Bacon requirements to nearly 80 “Related Acts.”

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As a result, Davis-Bacon requirements apply to most federally assisted construction projects (e.g., state construction projects funded in part with federal grants).

# Davis-Bacon and Related Acts Implementing Regulations

<b>Federal Procurement Regulations (Federal Government Contracts Only)</b>	<b>Department of Labor Regulations (Federal Contracts, Grants, and Assistance)</b>
FAR Subpart 22.4 – Labor Standards for Contracts Involving Construction (48 C.F.R. Subpart 22.4)	29 C.F.R. Part 1, Procedures for Predetermination of Wage Rates 29 C.F.R. Part 3, Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States 29 C.F.R. Part 5, Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)

# Davis-Bacon and Related Acts

## Implementing FAR Clauses and Labor Regulations

Federal Procurement Regulations (Federal Government Contracts Only)	Department of Labor Regulations (Federal Grants and Assistance)
<p>FAR 52.222-6 Construction Wage Rate Requirements</p> <p>FAR 52.222-7 Withholding of Funds</p> <p>FAR 52.222-8, Payrolls and Basic Records</p> <p>FAR 52.222-9, Apprentices and Trainees</p> <p>FAR 52.222-10, Compliance with Copeland Act Requirements</p> <p>FAR 52.222-11 Subcontracts (Labor Standards)</p> <p>FAR 52.222-12 Contract Termination-Debarment</p> <p>FAR 52.222-13 Compliance with Construction Wage Rate Requirements and Related Regulations</p> <p>FAR 52.222-14 Disputes Concerning Labor Standards</p> <p>FAR 52.222-15 Certification of Eligibility</p> <p><i>See also</i> Construction Wage Rate Requirements-Price Adjustment clauses: FAR 52.222-30 (None or Separately Specified Pricing), 52.222-31 (Percentage Method), and 52.222 (Actual Method)</p>	<p>29 C.F.R. § 5.5, Contract Provisions and Related Matters</p> <p>Paragraph (a) :</p> <ol style="list-style-type: none"> <li>(1) Minimum wages</li> <li>(2) Withholding</li> <li>(3) Records and certified payrolls</li> <li>(4) Apprentices and equal employment opportunity</li> <li>(5) Compliance with Copeland Act requirements</li> <li>(6) Subcontracts</li> <li>(7) Contract termination: debarment</li> <li>(8) Compliance with DBRA requirements</li> <li>(9) Disputes concerning labor standards</li> <li>(10) Certification of eligibility</li> <li>(11) Anti-retaliation</li> </ol>

# Overview of Davis-Bacon Requirements

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Labor Standard Clauses

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Laborers and mechanics working at the site of the work must be paid at least the locally prevailing wages and fringe benefits as listed in the applicable Davis-Bacon Wage Determination for the appropriate job classification

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Pay covered workers weekly and submit weekly certified payroll records to the contracting agency

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Post the Davis-Bacon wage determination and poster (WH-1321) in a visible location at the job site

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Flow down requirements in subcontracts

# Update to the Davis-Bacon and Related Acts Regulations 88 Fed. Reg. 57,526 (Aug. 23, 2023)

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- DOL issued a final rule amending the Davis Bacon and Related Acts implementing regulations, the most comprehensive revision to the regulations since the early 1980s
- With some exceptions, the final rule applies only to contracts entered into after October 23, 2023
- Perhaps the most-discussed aspect of the final rule is the amendments to DOL's methodology for determining prevailing wages, which is anticipated to affect contractors over time by increasing the mandated wage rates
- Other changes will affect contractors more directly

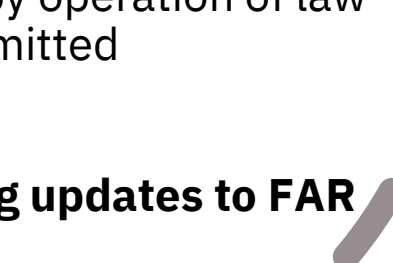


# DBRA Regulations Update – Highlights

29 C.F.R.  
Parts 1, 3,  
and 5

- Imposes new requirements for updating wage determinations in existing contracts
- Expands coverage at secondary worksites
- Clarifies (generally broadens) coverage of flaggers, survey crew members, and truck drivers
- Establishes new standards for the material supplier exemption
- Increases contractor recordkeeping obligations

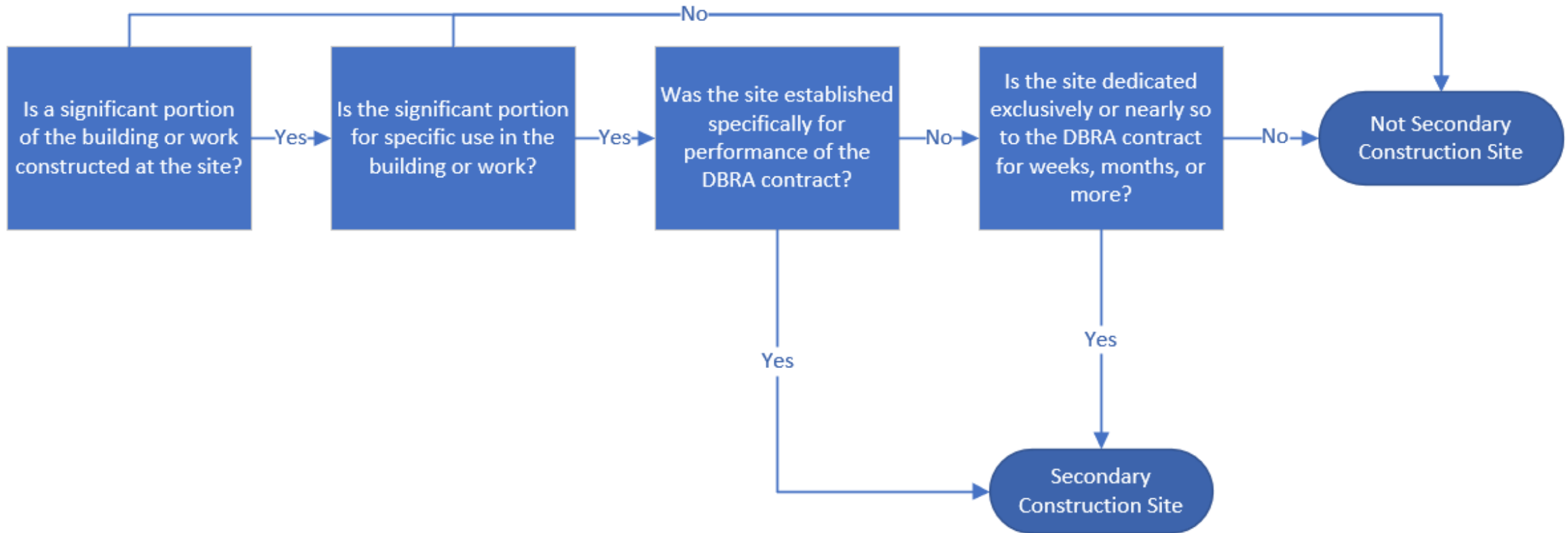
## More:

- Formalizes certain policies for calculating fringe benefits
  - Confirms that energy infrastructure and related activities are covered by the DBA
  - Provides for incorporation of DBA requirements by operation of law when DBA clauses or wage determinations are omitted
  - Enhances enforcement provisions
  - **Requires use of DOL regulatory clauses pending updates to FAR clauses**
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# DBRA Regulations Update: New Requirements for Updating Wage Determinations in Existing Contracts

- Wage determinations usually apply for the life of a contract.
- However . . . Wage Determinations now should be updated when:
  - (1) if a contract is changed to add “substantial” covered work not within the original contract scope;
  - (2) if the contracting agency exercises an option to extend the contract term; or
  - (3) for long- term contracts not tied to the completion of a particular project, such as indefinite-delivery, indefinite-quantity (IDIQ) contracts
    - **IDIQ contract wage determinations must be updated annually.**

# DBRA Regulations Update: Expansion of Coverage for Secondary Construction Sites



# Examples of Secondary Construction Sites

## Braddock Dam



Plate 37. Braddock Dam, Monongahela River. Construction of dam segment in casting basin.

## Dallas Fort Worth International Airport Expansion



Six prefabricated sections of a new passenger concourse have been placed at DFW airport, a first for the domestic industry.

*Photo courtesy of Julie Ludeman/DFW*

# DBRA Regulations Update: Flaggers and Surveyors

## Surveyors

- Fact-intensive inquiry: Do the worker's actual duties involve manual or physical labor or the use of tools?
- “[S]urvey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics.”
- Licensed professional surveyors may be exempt under § 541.
- Exemption might vary by state, depending on state licensing laws.

## Flaggers and Traffic Control Workers

- Covered if working on primary construction site or sites adjacent or virtually adjacent to the primary construction site.
- Does not include companies that rent traffic control equipment to contractors if those companies qualify as material suppliers.

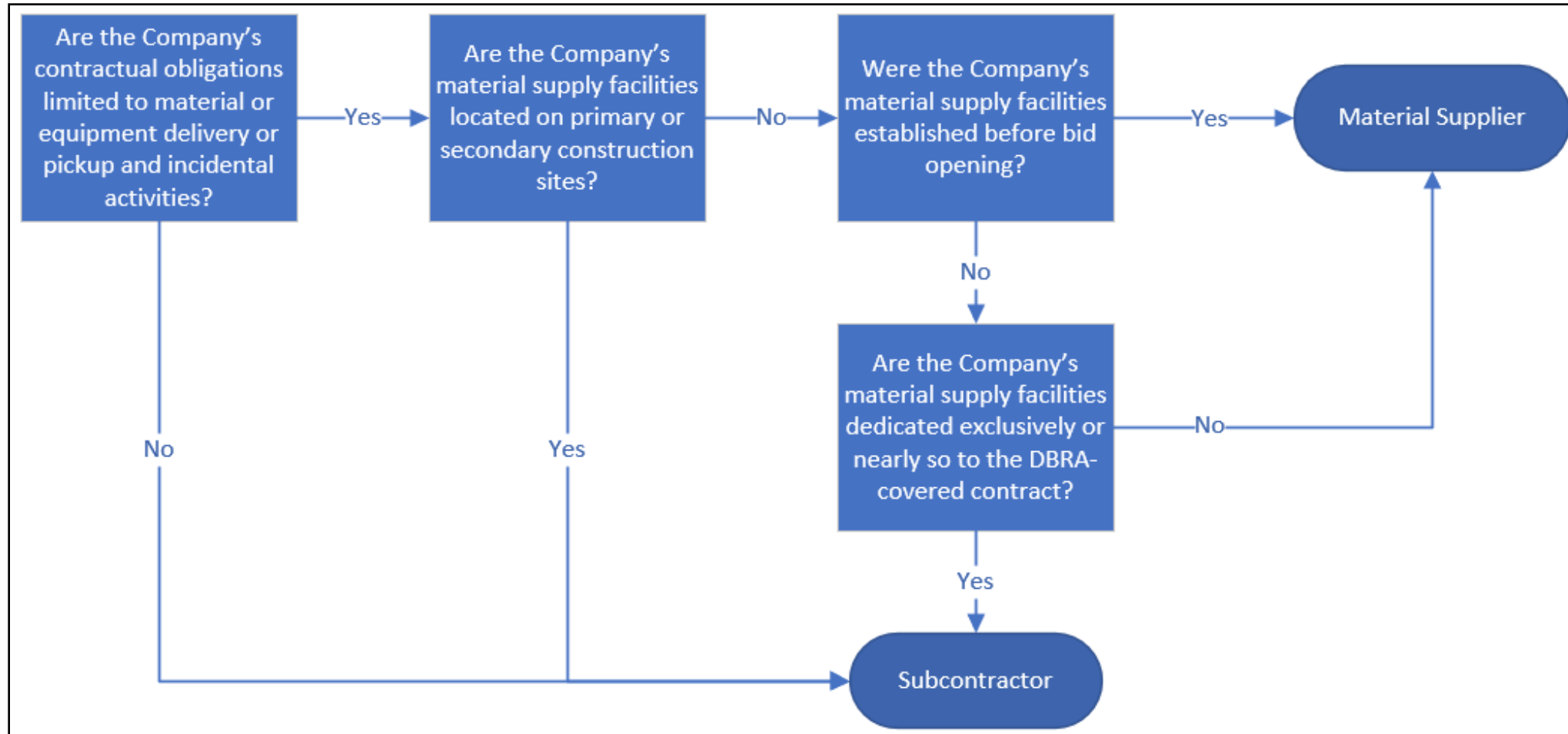




# DBRA Regulations Update: Truck Drivers and Covered Transportation

- Covered transportation:
  - (1) transportation wholly within a site of the work;
  - (2) transportation of a significant portion of a building or work between primary and secondary construction sites;
  - (3) transportation between a primary or secondary construction site and an adjacent or virtually adjacent dedicated support site;
  - (4) “onsite activities incidental to offsite transportation”; and
  - (5) transportation under a development statute.
- De minimis exception.
- Strategy to avoid coverage—if queue, have truck driver wait in designated offsite location until radioed in.

# DBRA Regulations Update: Material Supplier Exemption



# DBRA Regulations Update: Unfunded Plans



Unfunded plans must be approved by DOL to qualify as a bona fide fringe benefit plan



Contractor must seek written approval prior to claiming credit for the reasonably anticipated costs of an unfunded benefit plan towards its DBRA prevailing wage obligations, including vacation and holiday plans



# DBRA Regulations Update: New Health & Welfare – Credits

- WHD claimed that it was simply clarifying its position on which types of administrative fees/costs related to the provision of benefits can be credited toward a contractor's fringe benefit obligations, and which are considered business expenses to be born by the contractor:
  - Credit for costs incurred by a contractor's insurance carrier, third-party trust fund, or other third-party administrator that *are directly related to the administration and delivery of bona fide fringe benefits to the contractor's laborers and mechanics may be eligible for a Davis-Bacon credit.*
  - Premiums and the costs for administration and delivery of such benefits, including evaluating benefit claims, deciding whether they should be paid, approving referrals to specialists, and other reasonable costs of administering the insurance plans.

# DBRA Regulations Update: New Health & Welfare – Credits



May not take credit for expenses incurred in connection with the administration of a fringe benefit plans if such expenses are *primarily for the benefit or convenience of the contractor*



Contractor may not take credit for the costs of performing tasks such as filling out medical insurance claim, paying and tracking invoices from insurance carriers or plan administrators, updating the contractor's personnel records, sending lists of new hires and separations to insurance carriers or plan administrators, or sending out tax documents to the contractor's workers, *nor can the contractor take credit for the cost of paying a third-party entity to perform these tasks*



Recordkeeping costs associated with ensuring the contractor's compliance with the Davis-Bacon fringe benefit requirements, such as the cost of tracking the amount of a contractor's fringe benefit contributions or making sure contributions are made to carriers and providers

# DBRA Regulations Update: Liability for Subcontractors



Upper-tier subcontractors (in addition to prime contractors) may be liable for lower-tier subcontractors' violations. Both prime contractors and any responsible upper-tier subcontractors are required to pay back wages on behalf of their lower-tier subcontractors



Lower-tier subcontractors' violations may subject prime and upper-tier contractors to debarment in appropriate circumstances

# DBRA Regulations Update: New Recordkeeping Requirements

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- Must retain last known telephone number and email address
- Must retain all contracts, subcontracts, and related documents
- Retain for at least three years after “all work” on the prime contract is completed
- **Note:** Contract clauses may impose longer recordkeeping requirements
  - “Payroll sheets, registers, or their equivalent, of salaries and wages paid to individual employees for each payroll period; change slips; and tax withholding statements: **Retain 4 years** [from end of the contractor’s fiscal year].” FAR 4.705-2(a)
- Certified payroll records may be requested and must be produced even with no open investigation



# Recent Contract Cases Regarding Davis-Bacon

Two board cases in the last few years addressing unavailability of contract price adjustments under FAR 52.222-30 Construction Wage Rate Requirements--Price Adjustment (None or Separately Specified Method) based on increases in prevailing wages after award:

- *Pac. Dredge & Constr. LLC*, ASBCA No. 63234, 22-1 BCA ¶ 38,184
- *Gulf Pac. Contracting, LLC*, ASBCA No. 61434, 21-1 BCA ¶ 37,928

# Davis-Bacon Compliance Tips

- **Review areas of expanded or clarified coverage.** Ensure compliance encompasses secondary worksites, energy infrastructure and related activities, and broader coverage of flaggers, survey crew members, and truck drivers
- **Consider Davis-Bacon requirements, including wage determination updates, in pricing proposals.** Contractors entering into multi-year IDIQ contracts or other contracts subject to revised wage determinations should consider at the bidding stage how price adjustments for wage increases will be handled and when wage determinations must be updated
- **Draft lower-tier agreements with the amended Davis-Bacon regulations in mind.** Contractors should structure subcontract agreements, purchase orders, joint venture agreements, etc., with the amended regulations in mind. For example, contractors should review subcontract scopes of work to ensure that material suppliers are not inadvertently covered subcontractors
- **Ensure recordkeeping systems comply with new requirements.** Contractors must now retain records for at least three years after all work on the prime contract is completed and to retain additional records like proposals, subcontractor agreements, and contract amendments. Robust recordkeeping is essential to documenting compliance and defending against enforcement actions

# Davis-Bacon Compliance Tips

- Ensure the relevant DBA FAR clauses are incorporated into the U.S. Federal contract.
- Ensure the applicable wage determination (Area or Project) is incorporated into the U.S. contract and is flowed down to any subcontractors.
- Pay covered employees the DBA prevailing wages and fringe benefit rates for their job classifications as outlined in the wage determination.
- Ensure that subcontractor employees are paid DBA prevailing wages and fringe benefits in accordance with the wage determination.
- Ensure workers are paid weekly.
- Complete certified payrolls weekly.
- Ensure DBA poster and wage determination are posted in a prominent location where the work is performed.

# Common DBA Pitfalls

- Not recognizing that the work is covered by DBA
- Misclassification of laborers and mechanics
- Failure to pay full prevailing wage, including fringe benefits, for all hours worked (including overtime hours)
- Benefits included are not “bona-fide” and/or impermissible credits for certain costs
- Incomplete or inaccurate recordkeeping
- Failure to complete certified payrolls weekly
- Failure to post the Davis-Bacon poster and applicable wage determinations at the site
- Failure to flow-down FAR clauses or monitor subcontractors (at any tier)



# Project Labor Agreements

# Project Labor Agreements Mandate

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- On February 4, 2022, President Biden issued Executive Order 14063 (EO 14063): Executive Order on Use of Project Labor Agreements For Federal Construction Projects
- EO 14063 creates a rebuttable presumption in favor of requiring PLAs on all government construction projects with a total estimated construction cost of \$35 million or more. 87 Fed. Reg. 7363 (Feb. 4, 2022)
- The presumption can be rebutted if a senior agency official determines a PLA requirement:
  1. Would not advance the Federal Government's interests in achieving economy and efficiency in Federal procurement (finding based on factors: project duration/complexity, involvement of only one trade, involvement of specialized work, and agency urgency making PLAs impracticable);
  2. Would substantially reduce the number of potential offerors such that adequate competition at a fair & reasonable price could not be achieved (finding predicated on market research); or
  3. Would otherwise be inconsistent with statutes, regulations, EOs, or Presidential Memo
- In December 2023, the FAR Council promulgated a final rule implementing the mandate after receiving more than 8,000 public comments. 88 Fed. Reg. 88,708, 88,709 (Dec. 22, 2023)

# Project Labor Agreements Mandate

- A project labor agreement (PLA) is a multi-employer, multi-union pre-hire agreement (contract) designed to systemize labor relations at a specific construction site
- PLAs typically require that all contractors and subcontractors who will work on a project subscribe to the agreement; that all contractors and subcontractors agree in advance to abide by a master collective bargaining agreement for all work on the project; and that wages, hours, and other terms of employment be coordinated or standardized pursuant to the PLA across the many different unions and companies working on the project
- The implementation of a PLA on a public construction project almost always is accomplished by making agreement to the PLA a bid specification, thereby allowing the contracting authority to ensure that firms at every level — from the general contractor to the lowest level of subcontractor — comply with the terms of the PLA

*See generally Bldg. & Const. Trades Dep't, AFLCIO v. Allbaugh, 295 F.3d 28, 30 (D.C. Cir. 2002).*



# Pay Attention to Terms in the PLAs

- PLAs include terms outside of economics with no opportunity to negotiate different terms –
  - How and when employees are paid (e.g., less than 7 days from end of pay period to payday)
  - Penalty payments for late payments or various other so-called violations (e.g., full day wages owed as penalty)
  - Hiring is not open but through union (e.g., union controls who is showing up to work)
  - Grievance procedures (e.g., requirement to go before a committee versus a neutral arbitrator)

# Enforcement, False Claims Act, Debarment





# Department of Labor Enforcement

- 29 C.F.R. Part 6 Rules of Practice for Administrative Proceedings Enforcing Labor Standards in Federal and Federally Assisted Construction Contracts and Federal Service Contracts
  - Subpart B—Enforcement Proceedings Under the Service Contract Act (and Under the Contract Work Hours and Safety Standards Act for Contracts Subject to the Service Contract Act)
  - Subpart C—Enforcement Proceedings Under the Davis–Bacon Act and Related Prevailing Wage Statutes, the Copeland Act, and the Contract Work Hours and Safety Standards Act (Except Under Contracts Subject to the Service Contract Act)

# Department of Labor Enforcement

	Davis-Bacon and Related Acts (DBRA)		
	FY 2023	FY 2022	FY 2021
Concluded Compliance Actions	755	874	1,076
Employees Receiving Back Wages	4,527	4,040	5,767
Back Wages	\$17,196,989	\$17,581,435	\$14,148,954

	Service Contract Act (SCA)		
	FY 2023	FY 2022	FY 2021
Concluded Compliance Actions	436	591	775
Employees Receiving Back Wages	14,566	12,100	15,675
Back Wages	\$24,452,517	\$27,781,014	\$33,979,645

# Department of Labor Enforcement Press Releases

- US DEPARTMENT OF LABOR RECOVERS \$1.5M FOR LABORERS, MECHANICS WORKING ON MULTI-BILLION-DOLLAR FEDERAL PROGRAM AT CALIFORNIA NAVY BASE. **35 contractors violated federal labor laws, shortchanging 413 workers** (March 20, 2024) – In investigations of 35 contractors spanning a two-year period, [Wage and Hour] division investigators recovered more than \$1.5 million in back wages and \$32,291 in liquidated damages for a total of 413 workers for violations of the Davis-Bacon and Related Acts, the Contract Work Hours and Safety Standards Act, the Service Contract Act and the Fair Labor Standards Act. The division also assessed employers with \$14,020 in civil money penalties as a result.
- US DEPARTMENT OF LABOR RECOVERS \$633K IN BACK WAGES FOR 84 WORKERS FOR VIOLATIONS BY DISTRICT OF COLUMBIA DEVELOPMENT SITE'S SUBCONTRACTORS. **Investigators also find some employers falsified records at Southeast residential development** (March 20, 2023) – Subcontractor found to have violated Davis-Bacon, Contract Work Hours and Safety Standards Act, and the Fair Labor Standards Act, including by misclassifying workers as independent contractors, failing to pay prevailing wage rates and the required overtime premium, failing to provide health and welfare fringe benefits, and violating recordkeeping requirements by omitting workers from certified payroll records and falsifying certified payroll records
- US DEPARTMENT OF LABOR RECOVERS NEARLY \$200K FOR WORKERS UNDERPAID BY MASSACHUSETTS SUBCONTRACTOR AT RHODE ISLAND WORKSITE. **Stone Art Inc. debarred from certain federal contracts for 3 years** (March 20, 2024) – Subcontractor violated Davis-Bacon by falsifying certified payroll records, failing to create and maintain accurate payroll and basic records, failing to pay overtime and proper paid sick leave
- US DEPARTMENT OF LABOR RECOVERS \$783,616 IN WAGES, FRINGE BENEFITS FOR 14 CONTRACT WORKERS, THEIR UNION AT JAMAICA FEDERAL BUILDING. **Settlement with Hawaii-based maintenance contractor includes enhanced compliance terms** (October 25, 2021) – Building services contractor failed to pay workers prevailing wages and proper fringe benefits, violating SCA.



# False Claims Act

31 U.S.C. §§  
3729–3733

- *United States ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98 v. Farfield Co.*, 5 F.4th 315 (3d Cir. 2021) [DBA] – Third Circuit upheld district court finding that construction contractor “recklessly ignored its worker classification obligations under the Davis-Bacon Act, and thus acted with reckless disregard for the truth or falsity of its certified payrolls.” Specifically, the contractor was found to have **recklessly delegated to unknowledgeable individuals—forepersons—the responsibility for ensuring that employees were properly classified**, resulting in misclassification
- *Mason v. Netcom Techs., Inc.*, No. 8:20-CV-03558-PWG, 2021 WL 4286535, at \*1 (D. Md. Sept. 21, 2021) [SCA] – Court denied motion to dismiss **FCA retaliation claim** alleging employer fired employee for **asking about the prevailing wage requirement and complaining to DOL**.
- *United States v. Estepa*, 998 F.3d 898, 906 (11th Cir. 2021) [DBA-Criminal Fraud] – Eleventh Circuit affirmed conviction for conspiracy to commit wire fraud and wire fraud based on fraudulent intent with **material misrepresentations regarding intention to comply with Davis-Bacon** and not use subcontractors for repair work in federally-funded public housing projects

# Debarment for Violation of SCA or DBA

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- SCA: “The Comptroller General shall distribute to each agency of the Federal Government a list containing the names of persons or firms that a Federal agency or the Secretary has found to have **violated this chapter [SCA]** . . . . **Unless the Secretary recommends otherwise because of unusual circumstances**, a Federal Government **contract may not be awarded to a person or firm named on the list** under subsection (a), or to an entity in which the person or firm has a substantial interest, **until 3 years have elapsed** from the date of publication of the list.” 41 U.S.C. § 6706, Three-year prohibition on new contracts in case of violation
- DBA: “The Comptroller General shall distribute to all departments of the Federal Government a list of the names of persons whom the Comptroller General has found to have **disregarded their obligations to employees and subcontractors.**” 40 U.S.C. § 3144, Authority to pay wages and list contractors violating contracts. *See also* 29 C.F.R. § 5.12 (providing that when the Secretary of Labor finds a contractor or subcontractor “disregarded their obligations to workers or subcontractors” under the Davis-Bacon or Related Acts, the contractor or subcontractor and their respective officers will be **ineligible for 3 years**).

# Debarment for Violation of SCA or DBA

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Recent debarments:

- *Wage and Hour Division, U.S. DOL v. Davis-Paige Management Systems, LLC and Michael Davis*, Case No. 2019-SCA-00003, January 29, 2024 (debarment for SCA violations) – contractor and president/CEO debarred for **violating SCA by failing to timely make payroll due to financial difficulties**, in part caused by gov't customer payment delays; **no “unusual circumstances”**
- *Wage and Hour Division, U.S. DOL v. Seven Hills, Inc.*, Case No. 2018-SCA-00002, September 29, 2023 (debarment for SCA violations) – Pentagon food court services contractor and its president debarred for **failing to pay prevailing wages, overhead, and health and welfare** benefits after signing mod with SCA clause and wage determination; amounted to **“culpable disregard” of whether company was violating SCA**
- *Wage and Hour Division, U.S. DOL v. Paradigm Construction & Engineering, Inc., and Kent and Christie Glesener*, Case No. 2017-DBA-10, August 28, 2023 (debarment for DBA and CWHSSA violations) – construction contractor and owners debarred for **violating DBRA by misclassifying** skilled workers as laborers, failing to include certain laborers and mechanics on the payrolls, **paying biweekly rather than weekly as required and manipulating and presenting certified payrolls as weekly reports showing weekly payment** – ALJ found these were willful violations

# Questions?

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