

## **Davis-Bacon Webinar April 26, 2023**

### **Attendee Questions**

The following are questions asked by participants during the U.S. Department of Education's webinar addressing the Davis-Bacon and Related Acts (DBRA) requirements, as they were in effect on April 26, 2023. The responses to the following questions were provided by the U.S. Department of Labor representative who presented during the webinar. Grantees with questions about specific situations related to the Davis-Bacon requirements should reach out to their State mailbox at [State].oese@ed.gov.

**1. How do I know if my funding is Davis Bacon?**

Davis-Bacon applies to all construction, repair, or alteration (including painting or minor remodeling) contracts over \$2,000 using laborers and mechanics financed by funds administered by the U.S. Department of Education.

**2. State of California has separate Prevailing Wage rates and stated trades that have higher rates than Federal Requirements. Does the State of California DIR certified payroll satisfy Federal certified wage reporting requirements?**

[29 CFR 5.5\(a\)\(3\)\(ii\)\(A\)](#) specifies that certified payroll information may be submitted in any format, and that it is not necessary to use the optional WH-347 form, so long as the format used contains all of the required information and is accompanied by the signed Statement of Compliance exactly as written on the [WH-347](#). The California certified payroll form does not have the identical Statement of Compliance and is therefore not sufficient to meet the DBRA certified payroll requirements. However, to the extent that the California certified payroll form includes all of the information required to be included on the certified payrolls and is submitted on a weekly basis, it would be permissible to submit a copy of the California certified payroll form with the signed Statement of Compliance attached. However, the local educational agency, State educational agency, or the U.S. Department of Education may establish their own submission requirements (such as, for example, an electronic submission platform).

**3. What if the wages are not paid weekly? What is our next step?**

If prevailing wages are not paid weekly, the contractor is in violation of the Davis-Bacon labor standards and the terms of their contract (assuming the contract is compliant). [29 CFR 5.5\(a\)\(2\)](#) authorizes the contracting agency to withhold contract funds until violations have ceased.

**4. Question on statement that weekly payments are required – scope of work timelines may not be completed within the week and don't always align with progress payments**

Contractors must pay workers who perform laborer or mechanic work on the site of work at least the applicable prevailing wages due to them on a weekly basis, as set forth in the Davis-Bacon Act itself at [40 U.S.C. 3142\(c\)\(1\)](#) and in the regulations at [29 CFR 5.5\(a\)\(1\)\(i\)](#). Because [29 CFR 5.5\(a\)](#) also has the contract clauses that must be included in all Davis-Bacon contracts (including subcontracts), this requirement will also have been specifically included in all Davis-Bacon contracts that the contractors sign. Contractors must therefore pay their laborers or mechanics at least the applicable prevailing wages weekly, regardless of whether they have completed an allocated portion of the scope of work or whether the contractor is due payment yet for that work.

**5. What if the prime does not adhere to weekly certified payrolls and submits them either late or bi-weekly?**

The contracting agency/funding recipient has the authority to withhold contract payments due to the prime contractor until all certified payrolls (including the certified payrolls for their subcontractors) are submitted correctly and timely.

**6. How is a project defined?**

A project consists of all construction necessary to complete the project regardless of the number of contracts involved so long as all contracts awarded are closely related in purpose, time, and place. See [All Agency Memorandum 207](#), page 5.

**7. We had a school that was funded 100% through RDA, which waived Davis Bacon for the county during their negotiations. Does ESSER or CARES apply to the rest of the school if they are used for a small portion. *Follow up clarification:* I reread my question and it is not clear. The county built the school with federal dollars and Davis-Bacon was raised. As an administration, we wanted to add a project near the end of the construction. Does Davis Bacon still apply to the entire RDA construction cost? Thanks**

Davis-Bacon coverage applies to a project funded in whole or in part with assistance from a Davis-Bacon Related Act. A project consists of all construction necessary to complete the project regardless of the number of contracts involved so long as all contracts awarded are closely related in purpose, time, and place. It's still not entirely clear from this question whether the scope of work is for the construction/renovation of the school and its associated grounds, outbuildings, etc., or whether it really is a separate project that is not related in purpose, time, and place that is merely being performed by the same contractor for contracting convenience. Please note that these issues tend to be very fact-specific and as a result, answers may often have to be determined on a case-by-case basis.

**8. Is Davis Bacon still required even if we only use the grant money on the purchase of equipment outside of the construction contract?**

Generally, yes. (There are a few Related Acts with specific language that would be an exception, but the U.S. Department of Education's Related Act is not among them.)

**9. What if projects were funded and started prior to the Davis Bacon wage requirements. If the project is still ongoing, does it still fall into this new requirement?**

[29 CFR 1.6\(g\)](#) states that if Federal funding is not approved prior to contract award (or the beginning of construction where there is no contract award), the Davis-Bacon prevailing wage requirements must be incorporated into the contract(s) retroactively to the date of contract award (or the beginning of construction where appropriate) and shall be incorporated in the contract specifications retroactively to that date. It also permits DOL to approve a waiver allowing Davis-Bacon requirements to apply as of the date that Federal funding was approved, when the Administrator finds that it is necessary and proper in the public interest to prevent injustice or undue hardship and the Administrator finds no evidence of intent to apply for Federal funding prior to contract award or the start of construction, as appropriate.

**10. When referring to the recipient is a school district a sub-recipient if receiving the money from our State?**

If Federal education funds, such as ESSER, are supporting a recipient or subrecipient's construction, remodeling, renovation, or repair contract over \$2,000, then Davis-Bacon applies.

**11. What if a district is using their own employees to install the equipment, do they have to pay their employees the DB wage rate?**

Governmental agencies, including State and local educational agencies, generally are not considered to be contractors or subcontractors subject to Davis-Bacon prevailing wage requirements. Therefore, when a State or local educational agency (LEA) receives funding covered under a Davis-Bacon Related Act, such as ESSER and GEER funds, but chooses to perform the work with its own employees, it does not have to pay agency employees Davis-Bacon prevailing wages. However, if the State or LEA contracts the work out, those contracts would be subject to Davis-Bacon prevailing wage requirements, even if the State or LEA regularly contracts with that contractor.

**12. Are sole proprietors on federal projects subject to the Davis Bacon & labor standards requirements?**

If sole proprietors are performing laborer or mechanic work on the site of work and Federal education funds are used, the Davis-Bacon and labor standards requirements apply, unless they meet the requirements of the executive, administrative, or professional exemptions at [29 CFR 541](#). While a business owner may meet the requirements of the exemption even if they have remained a sole proprietorship rather than incorporating, if the sole proprietor is primarily performing laborer and mechanic work, they will generally not meet the requirements of the exemption.

**13. So a sole proprietor who manages all the aspects of the businesses but also does all the work themselves (no employees)?**

If the sole proprietor is primarily performing laborer and mechanic work, they will generally not meet the duties requirements of the business owner exemption at [29 CFR 54.101](#).

**14. We installed a playground with federal funds. There was approximately \$21,000 for "installation" that included tools, labor, and materials needed to complete the project. Would this be considered a construction project and would we need certified payroll for their labor?**

Yes, it would be considered a construction project and Davis-Bacon would apply.

**15. Is there standard language defining "Injustice" or "undue hardship"? Something that gives a benchmark?**

No, in the context of the Davis-Bacon waivers, there is no definition of "injustice" or "undue hardship" because each situation is unique and fact-specific.

**16. If the contracting agency has failed to include the appropriate contract clauses in the original contract, can the clauses be added by amendment to gain compliance?**

Yes, if the contracting agency fails to include the appropriate contract clauses or the applicable wage determination(s), the contracting agency should incorporate them retroactively to the date of contract award.

**17. We are applying for a Federal School Violence Protection Program (SVPP) Community Oriented Policing Services (COPS) Grant for Security Equipment only (no installation) for our Combined High School/Middle School facility. This grant does not allow for construction costs to be funded under the scope of the grant (construction is specifically listed as an unallowed cost). If we are awarded the COPS grant and we install the COPS Grant-funded equipment into our High School as part of a yet-to-be-awarded major renovation project that involves some new construction, would Davis-Bacon prevailing wage provisions apply to the full scope of the renovation/new construction project? Please note that there will be no Federal funds used for the renovation/new construction project, including installation of the equipment.**

The SVPP COPS grants are authorized by the STOP School Violence Act of 2018, which is not a Davis-Bacon Related Act, and it is administered by the U.S. Department of Justice, not the U.S. Department of Education, so it would not fall under the Related Act provisions applicable to U.S. Department of Education funding programs. If none of the other funding for the project is from a Related Act source, then the project would not be covered. Please reach out to the U.S. Department of Justice to learn about Federal requirements that may apply to your project supported by SVPP COPS grants.

**18. Can you share the CFR again relating to the retroactive waiver? Our school district in Washington is needing to consider this for HVAC work done during COVID, where expenditures were coded to federal ESSER funding after the work was completed.**

[29 CFR 1.6\(g\)](#) – “If Federal funding or assistance under a statute requiring payment of wages determined in accordance with the Davis-Bacon Act is not approved prior to contract award (or the beginning of construction where there is no contract award), the agency shall request a wage determination prior to approval of such funds. Such a wage determination shall be issued based upon the wages and fringe benefits found to be prevailing on the date of award or the beginning of construction (under the National Housing Act, under section 8 of the U.S. Housing Act of 1937 or where there is no contract award), as appropriate, and shall be incorporated in the contract specifications retroactively to that date, Provided, That upon the request of the head of the agency in individual cases the Administrator may issue such a wage determination to be effective on the date of approval of Federal funds or assistance whenever the Administrator finds that it is necessary and proper in the public interest to prevent injustice or undue hardship, Provided further That the Administrator finds no evidence of intent to apply for Federal funding or assistance prior to contract award or the start of construction, as appropriate.”

**19. Does "Force Account" work apply to state government agencies?**

Generally speaking, yes. Governmental agencies, including State and local educational agencies, generally are not considered to be contractors or subcontractors subject to Davis-Bacon prevailing wage requirements. Therefore, (with the exception of a few specific Related Acts), when a State or local educational agency (LEA) receives funding covered under a Davis-Bacon Related Act but chooses to perform the work with its own employees, it does not have to pay agency employees Davis-Bacon prevailing wages. However, if the State or LEA contracts the work out, those contracts would be subject to Davis-Bacon prevailing wage requirements, even if the State or LEA regularly contracts with that contractor.

**20. Can you explain ACC and Non ACC?**

Thank you for your question, but we do not know what “ACC” means. Please reach out to your State mailbox ([State].oese@ed.gov) with more information so that we can answer your question.

**21. If we state Federal Davis-Bacon requirements in bid documents and refer to bid documents in our contracts, is this sufficient or do we need to restate again in the contracts?**

Restating the Davis-Bacon requirements in the contracts is a best practice (i.e., the Davis-Bacon contract clauses and applicable wage determination should be included in the contract), especially as the wage determination may also need to be updated. However, if the contract specifically states that all the solicitation and all of its attachments, terms, etc. are incorporated into the contract and all requirements from the solicitation apply, and the solicitation contained or incorporated by reference the Davis-Bacon contract clauses and applicable wage determination, DOL can generally manage to work with that.

**22. What if the contractor "monitored" rates on sam.gov but only utilized an equivalent wage rather than obtaining a determination?**

The contractor should not be obtaining the wage determination. The contracting entity, for example, a local educational agency, is responsible for incorporating the applicable wage determination into the prime contract. See, for example, [29 CFR 1.6\(b\)](#) – “Contracting agencies are responsible for ensuring that only the appropriate wage determination(s) are incorporated in bid solicitations and contract specifications and for designating specifically the work to which such wage determinations will apply” and [29 CFR 5.6\(a\)](#) – “Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to require the recipient of the Federal assistance to insert in its contracts the provisions of § 5.5. No payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency unless the agency ensures that the clauses required by § 5.5 and the appropriate wage determination of the Secretary of Labor are contained in such contracts.”

**23. Is that called a Wage Conformance?**

We do not know what this question is referencing. Please reach out to your State mailbox [[State.oese@ed.gov](mailto:State.oese@ed.gov)] with more information so that we can answer your question.

**24. How long does a project wage determination take?**

Although the Branch of Construction Wage Determinations does try to get them issued as quickly as possible, it does of course depend on the size and complexity of the project, whether it involves multiple categories of construction, multiple localities, etc.

**25. We have a number of schools building "outside shelters" that are just four posts and a roof. Is that a building?**

If it's literally just four posts and a roof (for example, covered parking to keep hail off cars in a parking lot, or to shade a picnic area), that would be more of a “mere covering for the elements” and would generally be in the heavy category. Additional information on the heavy category of construction can be found in All Agency Memorandum 130, but Davis-Bacon applies if U.S. Department of Education funding was used to build the outside shelters, and if the construction contracts were over \$2,000.

**26. Ultimately who is the responsible party for compliance with the Davis Bacon Act? The awarded contract notes the Davis Bacon compliance contractor agrees to comply with the requirements of the Davis-Bacon Act, 40 U.S.C. 3141-3148, as amended, which are incorporated herein by reference. In accordance with the statute, the contractor agrees to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, wages shall be paid not less than once a week. The contractor agrees that it will not induce, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. Is it the owner or the contractor?**

The U.S. Department of Labor is primarily responsible for the implementation and enforcement of Davis-Bacon requirements. As the grantor of funds that are subject to Davis-Bacon requirements, the U.S. Department of Education should also be informed by States when they discover that a grantee, subgrantee, or a contractor did not follow the appropriate requirements. These issues tend to be very fact-specific and as a result, answers may often have to be determined on a case-by-case basis.

Ensuring compliance with the Davis-Bacon requirements is a shared responsibility. State grantees and their subgrantees are responsible for ensuring that the applicable provisions are followed when using Federal education funds for eligible projects. For example, districts are responsible for including the applicable provisions in their contracts and for collecting the payroll data from the contractors. Local educational agencies (LEAs) should be spot monitoring to ensure contractors are doing what they said they would do. State educational agencies (SEAs) should also monitor to ensure LEAs are fulfilling their responsibilities. Contractors are responsible for doing what they said they would do in their contracts. The U.S. Departments of Education and Labor will also spot monitor to ensure that contractors, SEAs, and LEAs are following the applicable provisions.

When there are issues of noncompliance, remedies may include ensuring that a contractor correct its practices; that an LEA improve its contract practices, audit findings, the Secretary imposing special conditions, and other enforcement action such as partly suspending or terminating the award. The U.S. Department of Education should also be informed by States when they discover that a grantee, subgrantee, or a contractor did not follow the appropriate requirements.

**27. I spoke with at least 2 different people at the Department of Labor's Wage and Hour Division about paying weekly and they both said the paperwork must be submitted weekly, but payroll can be paid on the normal pay cycle with the contractor (example bi-weekly). They are complying with the DBRA. However, instead of changing their entire payroll system, I was told they could complete the WH-347 form weekly with the information, but include the details from processing payroll (taxes, etc.) on the pay week. Therefore, every other week would show the tax & benefit information due to payroll processing bi-weekly. can you please confirm? I did. That is why i called WHD to speak with someone personally. I will check the link you just included to see if that says the same. This is a critical piece so I was hoping we could cover it on this call.**

Weekly payment of prevailing wages is required on Davis-Bacon covered projects. [40 U.S.C. 3142\(c\)\(1\)](#) and [29 CFR 5.5\(a\)\(1\)](#) expressly state that contractors must pay prevailing wages to all mechanics and laborers on the site of the work at least once a week. In addition, when contractors sign the Statement of Compliance they are affirming that all workers listed on the certified payroll have been paid the full weekly wages earned. If in fact the workers have not been paid yet, the payroll certification would be false. Although the contractor could of course still continue to pay workers for their non-Davis-Bacon work on a biweekly, semi-monthly, etc. basis, workers would have to be paid at least the applicable prevailing wages due to them for their Davis-Bacon work each week. Please note, however, that regular contributions made or costs incurred in connection with a bona fide fringe benefit plan for more than a weekly period (but not less often than quarterly) under plans, funds, or programs that cover the particular weekly period are deemed to be constructively made or incurred during such weekly period.

**28. What is the name of the payroll form?**

[WH-347](#) is the optional certified payroll form provided by WHD, which is available from our website or [sam.gov](#). Other formats may be used but must include the identical signed statement of compliance from that form.

**29. Under a covid grant is there an amount over 40k or 2k something like that for a small repair job that certified payroll become a requirement?**

Davis-Bacon applies to all construction, repair, or alteration (including painting) contracts over \$2,000 using laborers and mechanics financed by Federal education funds. There is no exception to the certified payroll requirements for smaller Davis-Bacon covered projects.

**30. Should the construction or service determination be used for maintenance projects like replacing floors?**

Construction work covered by Davis-Bacon includes alterations or repairs (assuming that the alteration or repair work is funded in whole or in part under a Related Act). Alterations or repairs include work that will generally improve the building or other structure, either by fixing something that is broken or by improving upon the building or work's existing condition (upgrades, etc.). Davis-Bacon requirements do not apply to maintenance work that is routinely and regularly performed to keep the building or work functioning in its current condition. The table below provides more factors to consider in determining whether work is an alteration/repair or whether it is maintenance. (Note that although minor patching, polishing, and possibly even re-surfacing of a floor could be considered maintenance, replacing an entire floor would generally be considered a repair or alteration and hence subject to Davis-Bacon labor standards.) In addition, certain work that might normally be considered maintenance will be considered construction when it takes place during the construction of a building or work prior to its completion and acceptance. For example, janitorial work and general landscaping after the construction of a building is complete is generally considered maintenance, but if it is performed during the construction or renovation of the building (for example, cleaning up all of the construction debris, sawdust, etc. before the building is accepted as complete) it will be covered under the Davis-Bacon labor standards.

<b>Factors Indicating Work Is Alteration or Repair</b>	<b>Factors Indicating Work Is Maintenance Work</b>
Correction of individual problems or defects as separate and segregable incidents	Work is performed continuously/repetitively over time
Items of work require more time to complete	Items of work are completed comparatively quickly
The work improves the facility's structural strength, stability, safety, capacity, efficiency, or usefulness	Work does not affect an integral component or system of the facility, but merely maintains it in its existing condition
Skills necessary for the work are typical of one or more construction trades	Skills necessary for the work are not typical of the construction trades



**31. Should interviews only be done when there is a suspected problem based on certified payrolls?**

No, not necessarily. Although certified payrolls are very helpful for disclosing, or at least signaling, many kinds of violations, some violations are not going to show on certified payrolls. For example, if workers are being required to work unpaid and unrecorded hours, the contractor has not realized that certain time (safety meetings, end of the day clean-up, travel between worksites, etc.) actually counts as hours worked and has therefore not recorded them. Also, some kinds of misclassification issues, and other similar violations may only be identifiable through interviews.

**32. If we have federal dollars for let's say HVAC (new or replacement) and we use the federal dollars for the materials/units, duct work etc. only and we have a contractor doing the installation only, I am understanding that we still have to follow Davis Bacon wage standards unless we use our own maintenance employees for installation.**

Assuming that the Federal funds are from a Davis-Bacon Related Act, such as ESSER or GEER funds, then yes, that is correct.

**33. Do we have to document in writing who was interviewed?**

As a practical matter, generally yes, but [29 CFR 5.6\(a\)\(5\)](#) specifies that the identity of workers interviewed is confidential.

**34. If possible, please address domestic preference thank you**

Please see FAQ A-20 from our [ESSER and GEER Use of Funds FAQs](#).

**FAQ A-20. Do the Buy American Act provisions apply to ESSER and GEER?**

The Buy American Act does not apply to the ESSER or GEER grants. However, awards made under the CRRSA Act and ARP Act (i.e., ESSER II, GEER II, and ARP ESSER awards) are subject to [2 CFR § 200.322](#), a new regulation that applies to Federal grants made after November 12, 2020. It establishes domestic preferences for procurements under Federal grants that are subject to the Uniform Guidance. The current text of the regulation follows:

[2 CFR § 200.322](#) Domestic preferences for procurements.

(a) As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.

(b) For purposes of this section:

(1) "Produced in the United States" means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(2) "Manufactured products" means items and construction materials composed in whole or in part of nonferrous metals such as aluminum; plastics and polymer-based

products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

**35. If a worker is on a federal job once a week but at different locations on other days. Do all hours need to be included on the time sheets?**

All of the worker's hours need to be recorded on timesheets, but not on certified payrolls.

**36. Stupid question, but DOL gets a copy of each certified payroll, right?**

DOL does not get a copy of all certified payrolls. LEAs and SEAs maintain the certified payrolls, and DOL will request them when they do an investigation or other compliance action.

**37. When there's a violation, what's the penalty?**

That depends on the violation. Prevailing wage and Contract Work Hours and Safety Standards Act (CWHSSA) overtime violations will require the payment of back wages and interest due to the workers. CWHSSA overtime violations will also usually involve the assessment of liquidated damages. Contract funds may be withheld to pay back wages, liquidated damages, and also until recordkeeping and certified payroll violations have been corrected. For aggravated or willful violations, contractors may be debarred from being awarded Federal or Federally funded contracts for three years. Additionally, contractors who falsify certified payrolls or require workers to kickback any portion of their wages (or back wages) may be subject to criminal penalties.

**38. Will Davis-Bacon requirements be applied to all contracts that are over \$2,000 or to just the \$2,000 portion of the contracts?**

All prime contracts for construction repair, or alterations (including painting or minor remodeling) over \$2,000 that are supported by Related Act funding, and sub-contracts of any tier under such contracts, are covered.