February 9, 2024

Dear Grantees:

We are following up on the December 7, 2023, Davis-Bacon and Related Acts webinar that highlighted some of the important October 2023 regulatory changes associated with those requirements. The webinar recording, transcript, and presentation are available here:

- Recording – English
- Transcript – English
- Transcript – Spanish
- Presentation

We did not have enough time to answer all of your questions during the webinar. Below are those questions and related responses. We hope you find this information helpful.

If I have a Davis-Bacon question, who do I contact?

Your best point of contact will depend on the kind of Davis-Bacon question you have.

If you have a question about conformances, project wage determinations, or other similar issues, you should contact the Department of Labor (DOL) Division of Wage Determinations analyst who covers the State where your project is located. The list of analysts can be found here.

If you have general questions about the application of Davis-Bacon coverage and compliance principles or would like to set up a virtual training on Davis-Bacon and Related Acts requirements, please email dgceinquiries@dol.gov or colllins.natalie@dol.gov.

If you need DOL enforcement assistance with getting a contractor to comply with the Davis-Bacon requirements on a particular project, need to refer a withholding or debarment case to DOL, or would like to coordinate an in-person training event on the Davis-Bacon requirements, please contact your DOL Regional Enforcement Coordinator from the list below:

- Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Puerto Rico: Ashley Swopes, swopes.ashley@dol.gov
- Pennsylvania, New Jersey, Delaware, Maryland, District of Columbia, Virginia, West Virginia: Ben Searle, searle.ben@dol.gov
- Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Florida: Beverly Kitchen, kitchen.beverly@dol.gov
- Michigan, Ohio, Indiana, Wisconsin, Illinois, Minnesota, Iowa, Missouri, Nebraska, Kansas: Matthew Visnick, visnick.matthew@dol.gov
- North Dakota, South Dakota, Montana, Wyoming, Utah, Colorado, New Mexico, Oklahoma, Texas, Arkansas, Louisiana: Sharon Holt, holt.sharon@dol.gov or Robert Burris, burris.robert@dol.gov
- Alaska, Washington, Idaho, Oregon, California, Nevada, Arizona, Hawaii: Becky Clark, clark.rebecca@dol.gov

Who is responsible for ensuring compliance with Davis-Bacon requirements and what are the possible remedies when errors occur?

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, local educational agencies (LEAs) are responsible for including the applicable provisions in their contracts and for collecting the payroll data from the contractors. 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 (Department) and Labor (DOL) will also spot monitor to ensure that SEAs, LEAs, and contractors are following the applicable provisions.

We understand that some States may have limited time and resources to monitor all aspects of the ESSER grants. When monitoring for Davis-Bacon compliance, we suggest that the SEA first focus on open projects or contracts that are not yet finalized prior to the ARP ESSER September 30, 2024, obligation deadline.

If an SEA finds that an LEA did not include the applicable contract clauses found in 29 CFR 5.5 for construction, repair, or alteration (including painting) contracts over $2,000 using laborers and mechanics financed by Federal education funds and the project is still open, the LEA must incorporate the required clauses into the contract (or ensure they are so incorporated) through supplemental agreement, change order, or any and all authority that may be needed.

If an SEA determines that an LEA did not include Davis-Bacon clauses or wage determinations in a contract, but the prevailing wages rates were paid, the SEA should contact its program officer for additional guidance (*[StateName].oese@ed.gov*). The Department of Labor may be able to waive retroactive application of the remaining, unmet requirements (such as certified payrolls) where payment of the prevailing wage rate is otherwise sufficiently documented (see below).

If an LEA is unable to seek a waiver from the Department of Labor or amend the contracts to comply with the Davis-Bacon requirements, the LEA might consider an accounting adjustment and substitute non-Federal funds to pay for these contracts.

When there are issues of noncompliance, remedies may include ensuring that a contractor corrects its practices; ensuring that an LEA improves its contract practices; audit findings; the Secretary of Education 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 contractor did not follow the appropriate requirements.

What are the Davis-Bacon-related clauses that must be included in contracts over $2,000 for construction, repair, or alteration (including painting) using laborers and mechanics financed by Federal education funds, such as ESSER or GEER?

According to 29 CFR 5.6(a)(2) and 29 CFR 1.6(f) a Davis-Bacon-covered contract must include the required labor standards clauses. The following requirements must also be met:

- Unless the DOL directs otherwise, the incorporation of the clauses and applicable wage determination(s) must be retroactive to the date of contract award or start of construction if there is no award.
- If the incorporation takes place due to a request from DOL, it must take place within 30 days of the date of that request, unless an extension has been received from DOL.
- If the LEA does not incorporate the clauses and/or wage determination(s) within thirty days as required, the labor standards clauses and/or wage determinations will be applied to the contract by operation of law retroactive to the start of construction, as required by 29 CFR 5.5(e).
- The contractor must be compensated for any increases in wages resulting from the incorporation in accordance with applicable law.
- If the LEA chooses to terminate and re-solicit the contract rather than retroactively incorporate the clauses and/or applicable wage determination(s), the LEA must withhold (or cross-withhold) sufficient funds to remedy any back wage liability to workers resulting from the failure to incorporate the clauses and/or applicable wage determination or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism.
- If the LEA refuses to make the required retroactive incorporation (or termination and re-solicitation, if that is the preferred method), the SEA must make no further payment, advance, grant, loan, or guarantee of funds in connection with the contract until the recipient incorporates the required clauses into its contract, and must promptly refer the dispute to the Administrator of DOL's Wage and Hour Division for further proceedings.

Can an LEA seek a waiver of the Davis-Bacon requirements?

Yes, under some limited circumstances, DOL may grant a waiver of the Davis-Bacon requirements. For example, there may be a circumstance where an LEA did not include contract clauses and/or applicable wage determinations when the contract was awarded because at that time the Federal education funds had not yet been approved for that project. In this situation, an LEA may want to seek a waiver from the DOL from the retroactive application of the Davis-Bacon requirements (see 29 CFR 1.6 https://www.ecfr.gov/current/title-29/section-1.6).

An LEA seeking a waiver should work with its SEA to develop a letter describing the situation and the reasons why the LEA believes a waiver should be granted. This letter should include information explaining any specific injustice or undue hardship that may result from the retroactive application (beyond increased costs for the project in question), as well as any factors that mitigate the potential harm that would be caused by waiving retroactive incorporation, such as documentation that workers were paid at least the application prevailing wage rates during the construction. The letter should be submitted to the State mailbox (*[StateName].oese@ed.gov*). Once the Department receives the letter, the Department will forward the letter to DOL for its consideration, along with the Department's recommendation.