



The Impact of the New Davis Bacon Rule

Presenter:
Andrew J. Martone
President & CEO
Hesse Martone, P.C.



The basic premise of Davis Bacon

Davis Bacon requires that prevailing wages must be paid to “all mechanics and laborers employed on the site of the work” and defines laborers and mechanics as those workers whose duties are manual or physical in nature. The “site of work” is generally defined as the physical place or places where the building or work will remain.

The DOL released its new Davis Bacon Rule

On August 8, 2023, the United States Department of Labor finally published its long-awaited Davis Bacon rule. The DOL's 812 pages of rule justifications and explanations contain many substantial changes which will both expand the scope of work covered by Davis Bacon and which will change the way that the DOL administers the Act. Unless blocked by legal action, the new rule will take effect around October 23, 2023.

These changes fall within 1 of 3 general categories:

1. Changes that expand the scope of Davis Bacon to cover locations and workers not previously covered.
2. Changes that will affect the way the prevailing wage is calculated and applied.
3. Changes that will increase employer's responsibilities with regard to complying with Davis Bacon and increase the severity of failing to comply.

The new rule defines “subcontractor” as “any contractor that agrees to perform or to be responsible for the performance of **any** part of a contract that is subject wholly or in part to the labor standards provisions of Davis Bacon and Davis Bacon related Acts.

Many survey workers will be covered by Davis Bacon.

The new rule attempts to resolve the long-standing dispute as to whether or not survey workers are “laborers and mechanics” covered by Davis Bacon.

Noting much disagreement on this subject, the Department concluded that “whether or not a specific survey crew member is covered by Davis Bacon is a question of fact which takes into account the actual duties performed by the worker and whether the duties are manual or physical in nature, including the use of tools or work of a trade”.

The test for survey workers

A survey crew member who spends most of their time taking or assisting in taking measurements would likely be covered by Davis Bacon (if they do not meet the test for an exempt professional) if:

1. Their work is performed on site.
2. Their work is performed immediately prior to or during construction.
3. Their work is performed in direct support of construction crews.
4. The duties are manual/physical in nature and include the use of tools or work of a trade.

Given the broad definition of subcontractor, it does not seem to matter whether they are performing these duties as an employee of a construction contractor or as the employee of a professional survey company.

The Learned Professional Exception

Licensed surveyors may be exempt as “learned professionals,” depending on the licensure requirements.

- To qualify as a learned professional, one must have an “advanced type of knowledge” gained through “a prolonged course of specialized intellectual instruction and study”.
- This means specialized academic training.
- Experience and on-the-job training are not sufficient.

Caveats and explanations

1. Covered work is covered work, regardless of who performs it.
2. Survey workers who work under the supervision of a licensed individual are still covered if they perform covered work.
3. Covered work includes construction layout, construction staking, reestablishing land boundary monuments and control points during construction.
4. Off site work not covered.

Best Practices

1. Where workers will be doing covered and non-covered work, keep accurate track of their time spend in each category and report covered work on certified payroll.
2. Try not to mix workers – if some survey crew members are doing covered work and some are not, interchanging the crews will make recordkeeping more complicated.
3. If there is covered work and non-covered work on the same project, try to have separate contracts and contract directly with the owner for the non-covered work.
4. Minimize on site time when possible.

Unless blocked by a federal court, the new Davis Bacon rule will go into effect on or about October 23, 2023. However, it is likely that several interested parties will challenge various aspects of this new rule in court. As part of these challenges, the challengers will ask the federal court to enjoin (or block) the enforcement of the new rule until the court processes are resolved.

Questions?