

CHAPTER 16: LABOR STANDARDS

CHAPTER PURPOSE & CONTENTS

This chapter provides grantees with general information on labor standards as these requirements apply to CDBG-funded construction work. The following topics are covered:

SECTION	TOPIC
16.1	Overview of the Labor Standards Requirements

16.1 Overview of the Labor Standards Requirements

Construction work that is financed in whole or in part with CDBG funds must adhere to certain Federal labor standards requirements. This chapter describes the policies and procedures that must be followed when undertaking construction projects with CDBG funds to ensure compliance with the labor laws and requirements.

Key Topics in This Section: Overview of requirements and responsibilities of the grantee
Applicable laws and regulations, Other resources

Regulatory/Statutory Citations: Section 110; §570.603; 40 USC, Chapter 3, Section 276a-276a-5; 29 CFR Part 1, 3, 5, 6 and 7; 40 USC, Chapter 3 Section 276c; 18 USC, Part 1, Chapter 41, Section 874; 29 CFR Part 3; 40 USC Chapter 5, Sections 326-332; 29 CFR Part 4, 5, 6 and 8; 29 CFR Part 70 to 240

Other Reference Materials on This Topic: “Making Davis-Bacon Work: A Practical Guide for States, Indian Tribes and Local Agencies”, “Making Davis-Bacon Work: A Contractor’s Guide to Prevailing Wage Requirements for Federally-Assisted Construction Projects”

Under the labor laws, the prime or general contractor is responsible for full compliance with applicable requirements, including all employers/subcontractors on the project. The CDBG grantee is responsible for the administration and enforcement of the requirements to ensure compliance.

16.1.1 Labor Laws and Requirements

The labor laws that may apply to CDBG-funded construction work include the following:

The **Davis-Bacon Act** (40 USC, Chapter 3, Section 276a-276a-5; and 29 CFR Parts 1, 3, 5, 6 and 7) is triggered when construction work over \$2,000 is financed in whole or in part with CDBG funds. It requires that workers receive no less than the prevailing wages being paid for similar work in the same area. Davis-Bacon does not apply to the rehabilitation of residential structures containing less than eight units or force account labor (construction carried out by employees of the grantee). HUD should be contacted if there is any situation where the applicability of Davis-Bacon is in question.

The **Copeland Anti-Kickback Act** (40 USC, Chapter 3, Section 276c and 18 USC, Part 1, Chapter 41, Section 874; and 29 CFR Part 3) requires that workers be paid weekly, that deductions from workers’ pay be permissible, and that contractors maintain and submit weekly payrolls.

The **Contract Work Hours and Safety Standards Act** (40 USC, Chapter 5, Sections 326-332; and 29 CFR Part 4, 5, 6 and 8; 29 CFR Part 70 to 240) applies to contracts over \$100,000 and requires that workers receive overtime compensation (time and one-half pay) for hours they have worked in excess of 40 hours in one week. Violations under this Act carry a liquidated damages penalty (\$10 per day per violation).

Section 3 of the Housing and Urban Development Act of 1968, as amended requires the provision of opportunities for training and employment that arise through HUD-financed projects to lower-income residents of the project area. Also required is that contracts be awarded to businesses that provide economic opportunities for low- and very low-income persons residing in the area. Please see the Fair Housing chapter of this manual for more information.

NOTE: Some states have labor laws that may also apply to CDBG-funded construction projects. If Federal and State laws differ, grantees must comply with the more stringent of the two.

HUD has published two guides that are available for downloading from its web site on labor standards requirements. These documents are “Making Davis Bacon Work: A Practical Guide for States, Indian Tribes and Local Agencies” and “Contractor’s Guide to Davis-Bacon: Prevailing Wage Requirements for Federally-Assisted Construction Projects.”

Additional information is available on HUD’s Office of Labor Relations web site at www.hud.gov/offices/olr and the forms referenced herein are available at HUDClips at www.hudclips.org.

16.1.2 Bidding and Contracting Requirements

Once it is determined that a construction project is subject to Federal labor standards requirements, certain steps must be taken to ensure compliance. Specifically, grantees must include all applicable labor standards language and the appropriate wage decision in construction bid and contract documents.

Wage Rate Decisions

The Davis-Bacon wage decision that applies to a project contains a schedule of work/job classifications and the minimum wage rates that must be paid to persons performing particular jobs. Some wage decisions cover several counties and/or types of construction work.

The grantee may access Federal wage rate decisions through the internet at www.wdol.gov. Federal wage determinations are generally issued for four categories: Building, Residential, Heavy, and Highway. It is important to understand the differences when determining which rate category to request to avoid paying wages from an inappropriate determination.

Building construction generally includes construction of sheltered enclosures with walk-in access for housing persons, machinery, equipment or supplies. This includes all construction within and including the exterior walls, both above and below grade.

Residential projects involve the construction, alteration or repair of single-family houses or apartment buildings no more than four stories tall.

Heavy construction is generally considered for all construction not properly classified as highway, residential, or building. Water and sewer line construction will typically be categorized as heavy construction.

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Highway projects include construction, alteration or repair of roads.

HUD should be consulted if there are questions about properly identifying the type of wage determination and/or modifications.

If a work classification that is needed for the project does not appear on the wage decision that will be used, the grantee must request an additional classification and wage rate from HUD. Requests must be made in writing through the grantee and must meet certain criteria to be approved. Requests which fail to meet HUD approval are forwarded to DOL for final determination.

Labor Clauses and Wage Decisions in Bid and Contract Documents

The labor clauses, which are contained in HUD-4010, and the applicable wage rate decision (and any additional classifications) must be a physical part of the bid package. The labor clauses obligate the contractor to comply with the Davis-Bacon wage and reporting requirements and provide remedies and sanctions should violations occur.

Ten days prior to bid opening, the grantee must check to see if the wage decision has been modified. If so, grantees should notify all potential bidders appropriately in conformance with local procurement procedures.

If a contract has been awarded but construction has not yet begun within 90 days of the award, the grantee must also determine if any modifications have been issued to the wage decision. If so, the contractor must adhere to the modified wage decision.

16.1.3 Enforcement of Requirements during Construction

During construction, the grantee is responsible for enforcing the labor standards requirements described in this chapter. This includes good construction management techniques (e.g., pre-construction conferences, issuance of notices to proceed and payments tied to compliance with the labor requirements), in addition to payroll reviews and worker interviews.

Pre-construction Conference

Pre-construction conferences are no longer required in order to comply with Federal labor standards requirements. However it is recommended that grantees hold them prior to the start of work to review contractual requirements, including labor, and performance schedules.

The grantee can use this opportunity to clearly present the Federal statutory compliance requirements as well as performance expectations. Items that should be covered at the pre-construction conference include, but are not limited to:

Provide and review with the contractor with a copy of the "Contractor's Guide to Prevailing Wage Requirements for Federally-Assisted Construction Projects." This guide can be downloaded from at: <http://www.hud.gov/offices/olr/library.cfm>.

Explain that the contractor must submit weekly payrolls and Statements of Compliance signed by an officer of the company, and that the prime contractor is responsible for obtaining and reviewing payrolls and Statements of Compliance from all subcontractors.

Explain that wages paid must conform to those included in the wage rate decision included in the contract. Discuss the classifications to be used. If additional classifications are needed, contact HUD immediately.

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Explain that employee interviews will be conducted periodically during the project.

Emphasize that a copy of the wage rate decision must be posted at the job site.

Explain that apprentice or trainee rates cannot be paid unless the apprentice or training program is certified by the State Bureau of Apprenticeship and Training. If apprentices or trainees are to be used, the contractor must provide the grantee with a copy of the State certification of his/her program.

If the contract is \$100,000 or greater, explain that workers must be paid overtime if they work more than 40 hours in one week, and that failure to pay workers at least time and a half whenever overtime violates the Contract Work Hours and Safety Standards law. In addition to restitution, noncompliance with this law makes the contractor liable for liquidated damages of \$10 per day for every day each worker exceeded 40 hours a week without being paid time and a half.

Explain that no payroll deductions can be made that are not specifically listed in the Copeland Anti-kickback Act provisions unless the contractor has obtained written permission of the employee. Unspecified payroll deductions are a serious discrepancy and must be resolved prior to further contractor payments.

Provide contractor with posters for the job site, such as the "Notice to All Employees Working on Federal or Federally Financed Construction Projects." These posters and others that are required are available at:

<http://www.dol.gov/elaws/asp/posters/posters.htm>.

The grantee should also describe the compliance monitoring that will be conducted during the project, and indicate that discrepancies and underpayments discovered as a result of compliance monitoring must be resolved prior to making further payment to the contractor. Remind the contractor that labor standards provisions are as legally binding as the technical specifications, and failure to pay specified wages will result in contractor payments being withheld until all such discrepancies are resolved and potentially restitution, liquidated damages and/or recommendation for debarment.

Notice to Proceed

Following execution of the contract documents and completion of the pre-construction conference, it is typical practice to issue a Notice to Proceed to the prime/general contractor to begin performance of the work. The Notice to Proceed establishes the construction start date and the scheduled completion date, and provides the basis for assessing liquidated damages. The construction period and basis for assessing liquidated damages must be consistent with those sections of the contract documents.

Payroll Review

Once construction is underway, the prime/general contractor should complete a weekly payroll report for its employees on the covered job and sign the Statement of Compliance. The prime/general contractor must also obtain weekly payrolls (including signed Statements of Compliance) from all subcontractors as they work on the project.

Certified payroll reports should be submitted by the prime/general contractor to the grantee within a reasonable timeframe so as to ensure compliance, typically no more than 10 working days following the end of the payroll period.

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The HUD payroll form (WH-347) does not have to be used, but alternative payroll documentation must include all of the same elements in order to determine compliance with applicable regulations. The Statement of Compliance must be completed and signed by an authorized representative of the company and submitted in conjunction with the payroll form (or alternate equivalent payroll documentation).

The payrolls should be reviewed by the general contractor to ensure that there are no discrepancies or underpayments. Remember that the prime contractor is responsible for the full compliance of all subcontractors on the project and will be held accountable for any wage restitution that may be necessary. This includes restitution for underpayments and, potentially, liquidated damages that may be assessed for overtime violations.

Grantees should review every payroll to ensure that workers are being paid no less than the prevailing Davis-Bacon wages and that there are no other falsifications.

In addition to the falsification indicators described in the HUD guidance, items to be spot-checked should include:

- The correct classification of workers;

- A comparison between the classification and the wage determination to determine whether the rate of pay is at least equal to the rate required by the determination;

- A review to ensure that work by an employee in excess of 40 hours per week is being compensated for at rates not less than one and one-half times the basic rate of pay;

- Review of deductions for any non-permissible deductions; and

- The Statement of Compliance has been signed by the owner or an officer of the firm.

Any discrepancies and/or falsification indicators must be reported to HUD, along with the steps being taken by the grantee to resolve the discrepancies. Where underpayments of wages have occurred, the grantee is responsible to make sure the correct wages are paid and that the employer will be required to pay wage restitution to the affected employees. Wage restitution must be paid promptly in the full amounts due, less permissible and authorized deductions. Grantees should contact HUD for assistance if a violation occurs.

On-Site Interviews

The labor standards requirements include periodically conducting job site interviews with workers. The purpose of the interviews is to capture observations of the work being performed and to get direct information from the laborers and mechanics on the job as to the hours they work, the type of work they perform and the wage they receive.

Interviews should occur throughout the course of the construction and include a sufficient sample of job classifications represented on the job as well as workers from various companies to allow for a reasonable judgment as to compliance.

Information gathered during an interview is recorded on the Record of Employee Interview form (HUD-11).

- The interview should take place on the job site and conducted privately (this is a one-on-one process).

- The interviewer should observe the duties of workers before initiating interviews. Employees of both the prime contractor and subcontractors should be interviewed.

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To initiate the interview, the authorized person shall:

Properly identify himself/herself;

Clearly state the purpose of interview; and

Advise the worker that information given is confidential, and his/her identity will be disclosed to the employer only with the employee's written permission.

When conducting employee interviews, the interviewer should pay particular attention to:

The employee's full name;

The employee's permanent mailing address;

The last date the employee worked on that project and number of hours worked on that day. The interviewer should make it clear that these questions relate solely to work on the project and not other work.

The employee's hourly rate of pay. The aim is to determine if the worker is being paid at least the minimum required by the wage decision.

The interviewer should be sure the worker is not quoting their net hourly rate or "take-home" pay.

If it appears the individual may be underpaid, the interviewer should closely question the worker:

(a) Ask for any records.

(b) Arrange to re-interview the employee.

Enter the worker's statement of his/her classification.

Observe duties and tools used:

If worker's statements and observations made by the interviewer indicate the individual is performing duties conforming to classification, indicate this on the Record of Employee Interview form.

If there are discrepancies, detailed statements are necessary.

Enter any comments necessary.

Enter date interview took place.

The HUD-11s must be compared to the corresponding contractor and subcontractor payroll information.

If no discrepancies appear, "None" should be written in the comment space of the Record of Employee Interview form and it should be signed by the appropriate person.

If discrepancies do appear, appropriate action should be initiated. When necessary action has been completed, the results must be noted on the interview form.

If there are wage complaints, the interviewer should complete the Federal Labor Standards Complaint Intake Form (HUD Form 4731). The complaint must be investigated and resolved. Contact HUD if necessary.

Progress Payments

Upon receipt of requests for payment during construction, the grantee should check that labor standards compliance is being met.

All weekly payrolls and Statements of Compliance have been received, reviewed and any discrepancies resolved; and

Employee interviews have been conducted as necessary, checked against payrolls and the wage rate decisions, and all discrepancies corrected.

Although retainage is not a requirement, many grantees have found it helpful to maintain 10 percent retainage from partial payments until after final inspection, in case of any unresolved problems.

Final Payment

When construction work has been completed, the contractor will submit a final request for payment. Before making final payment, the grantee must ensure that:

All weekly payrolls and Statements of Compliance have been received and any discrepancies have been resolved;

All discrepancies identified through job site interviews have been resolved; and

All files are complete.

16.1.4 Restitution for Underpayment of Wages

Where underpayments of wages have occurred, the employer will be required to pay wage restitution to the affected employees. Wage restitution must be paid promptly in the full amounts due, less permissible and authorized deductions.

Wage restitution is simply the difference between the wage rate paid to each affected employee and the wage rate required on the wage decision for all hours worked where underpayments occurred. The difference in the wage rates is called the adjustment rate. The adjustment rate times the number of hours involved equals the gross amount of restitution due.

Grantees must notify the prime contractor in writing of any underpayments that are found during payroll or other reviews. The notification should describe the underpayments and provide instructions for computing and documenting the restitution to be paid. The prime contractor is allowed 30 days to correct the underpayments.

The employer is required to report the restitution paid on a correction certified payroll. The correction payroll will reflect the period of time for which restitution is due (e.g., payrolls #1 through #6; or a beginning date and ending date). The correction payroll must list:

Each employee to whom restitution is due and their work classification;

The total number of work hours;

The adjustment wage rate (the difference between the required wage rate and the wage rate paid);

The gross amount of restitution due;

Deductions; and

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The net amount to be paid.

A signed Statement of Compliance must be attached to the corrected payroll form and each employee who has received restitution should sign the corrected payroll as evidence of their receipt of the payments.

The grantee should review the correction payroll to ensure that full restitution was paid. The prime contractor shall be notified in writing of any discrepancies and will be required to make additional payments, if needed. Additional payments must be documented on a supplemental correction payroll within 30 days.

Sometimes, wage restitution cannot be paid to an affected employee because, for example, the employee has moved and can't be located. In these cases, at the end of the project the prime contractor will be required to place in a deposit or escrow account an amount equal to the total amount of restitution that could not be paid because the employee(s) could not be located. The grantee should continue to attempt to locate the unfound workers for three years after the completion of the project. After three years, any amount remaining in the account for unfound workers should be forwarded to HUD.

Additional information is available from HUD on disputes, withholding, deposits and escrow accounts including in the publication "Making Davis-Bacon Work: A Contractor's Guide to Prevailing Wage Requirements for Federally-Assisted Construction Projects."

16.1.5 Documentation & Reporting Requirements

Documentation

Grantees must maintain documentation to demonstrate compliance with the labor standards requirements including, but not limited to:

- Bid and contract documents with the labor standards clause and wage decision;
- Payroll forms from the contractor and subcontractors, including signed statements of compliance;
- Documentation of on-site job interviews and review of the corresponding payroll to detect any discrepancies;
- Documentation of investigations and resolutions to issues that may have arisen (e.g., payments to workers for underpayments of wages or overtime); and
- Enforcement reports (see below for more information).

The labor standards compliance documents contain highly sensitive and confidential information. With the growing rise in identity theft and fraud, it is critical to carefully guard this sensitive information so that the person(s) for whom the information has been collected are not unduly exposed to financial or personal risk.

The standard compliance documents must be preserved and retained for a period of five years following the completion of work. Therefore, it is important to follow guidelines outlined in the Labor Relations Letter 2006-02 to minimize risk of improper and/or unnecessary disclosure, including:

- Keep sensitive materials secret at all times (in locked file cabinet, not left in areas accessible to the public);

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Do not include Social Security Numbers on documents and records unless it is absolutely necessary;

Do not disclose the identify of any informant unless it is necessary and only if authorized by the informant; and

Dispose of documents and records containing sensitive information responsibly.

Reporting

Grantees must report to the Department of Labor on all covered contracts awarded and on all enforcement actions taken each six months. HUD collects the reports from its client agencies and compiles a comprehensive report to DOL covering all of the Davis-Bacon construction activity.

The Semi-Annual Report form (HUD-4710) and instructions (HUD-4710i) are available on HUD's web site and HUDClips (<http://www.hudclips.org>).