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**Chapter 2    PREVAILING WAGE REQUIREMENTS IN HUD PROGRAMS**

- 2-1    **Introduction.** There are three types of prevailing wage requirements operable in HUD programs: (1) Davis-Bacon Act prevailing wages payable to laborers and mechanics employed on covered construction work; (2) HUD-determined prevailing wages payable to laborers and mechanics relating to maintenance work (including non-routine maintenance work) in Public, Indian and Hawaiian housing operations, and architects, technical engineers, draftsmen and technicians employed in Public, Indian, and Hawaiian housing development; and (3) Service Contract Act prevailing wages relating to contracts for maintenance and other services (for direct HUD contracts only). Davis-Bacon Act wage requirements are made applicable to HUD programs by statutory provisions in the Davis-Bacon Act, itself (for direct HUD contracts *only*) but most often in HUD Related Acts. HUD-determined wage rates are made applicable to Public, Indian, and Hawaiian housing activities by the U.S. Housing Act of 1937, as amended, and the Native American Housing Assistance and Self-determination Act of 1996, as amended. Service Contract Act wage requirements are made applicable by statutory provisions within the Service Contract Act, itself (for direct HUD contracts *only*).

The Office of Labor Relations (OLR) is responsible for certain Davis-Bacon prevailing wage activity and for HUD-determined prevailing wage standards. In addition, there are other Federal laws that contain labor requirements associated with prevailing wages such as overtime and weekly payroll certification and submission. This chapter discusses the Federal laws and regulations for which the Office of Labor Relations is responsible.

**Note:** Davis-Bacon Act (DBA) and Service Contract Act (SCA) activities for direct HUD contracts are managed by the HUD Office of the Chief Procurement Officer.

2-2    **Basic labor and labor-related statutory provisions.**

- A.    **Davis-Bacon Act (DBA).** The Davis-Bacon Act (DBA), enacted in 1931, applies to contracts in excess of \$2,000, for construction, alteration and/or repair of public buildings or public works, including painting and decorating, to which the United States or the District of Columbia is a party. The DBA requires that the advertised specifications for such contracts contain a provision stating the minimum wages to be paid to various classes of laborers and mechanics be based upon the wages found to be prevailing by the Secretary of Labor. The DBA includes provisions that:
1.    Require the contractor or subcontractor to pay all mechanics and laborers not less often than once a week;
  2.    Prohibit deductions or rebates from wages earned by laborers and mechanics;
  3.    Require the contractor or subcontractor to pay Davis-Bacon wages to all laborers and mechanics employed on the site of the work regardless

- of any contractual relationship alleged to exist between the laborers and mechanics and the contractor or subcontractor;
4. Require that the scale of wages to be paid (i.e., the applicable Davis-Bacon wage decision) be posted in a prominent and accessible place at the work site;
5. Define prevailing wages to include fringe benefits;
6. Permit withholding from payments due to the contractor on account of wage restitution which may be found due to the laborers and mechanics;
7. Permit the payment of wage restitution from amounts withheld from contract payments;
8. Permit the termination of the contract where it is found that that any laborer or mechanic is underpaid;
9. Permit the debarment of persons or firms found to have disregarded their obligations to employees and subcontractors.

The Davis-Bacon Act is applicable where the Federal Government or the District of Columbia is a party to a contract for construction and the value of the contract exceeds \$2,000. This type of applicability is referred to as *direct Davis-Bacon Act or DBA coverage*. One example is repairs to HUD-owned properties where HUD contracts directly for the repairs. Such DBA contracts are managed under the auspices of HUD's Office of the Chief Procurement Officer. A copy of the DBA is provided in Appendix II-2.

Most HUD- construction work is *not* covered by the DBA since HUD usually does not contract directly for construction work. Rather, Davis-Bacon wage rates apply to HUD programs because of prevailing wage requirements expressed in HUD "Related Acts" such as the U. S. Housing Act of 1937 and the Housing and Community Development Act of 1974, as amended. The *Related Acts* (referred to throughout this Handbook as the Davis-Bacon and Related Acts or *DBRA*) are discussed further in paragraph 2-3 of this chapter.

- B. **Contract Work Hours and Safety Standards Act (CWHSSA).** The CWHSSA applies to both direct Federal contracts and to Federally-assisted contracts where those contracts require or involve the employment of laborers and mechanics and where Federal wage standards (e.g., Davis-Bacon or HUD-determined prevailing wage rates) are applicable. CWHSSA provisions apply to all laborers and mechanics, including watchmen and guards, employed by any contractor or subcontractor. CWHSSA also applies to maintenance laborers and mechanics employed by contractors or subcontractors engaged in the operation of PHA/TDHE/IHA developments.

**Note:** CWHSSA overtime provisions do not apply to laborers and mechanics employed directly by Public or Indian housing agencies.

CWHSSA provides that all overtime (O/T) hours (defined as hours worked in excess of 40 during any workweek on the CWHSSA-covered project site) must be compensated at a rate not less than one and one half times the regular basic rate of pay (i.e., premium pay). Where CWHSSA O/T provisions are applicable, compensatory time in lieu of premium pay for O/T hours is not permissible. In the event of O/T violations, the CWHSSA renders the contractor liable to the underpaid workers for wage restitution and to the United States for liquidated damages computed at the rate of \$10 per violation. Intentional violations of CWHSSA standards are considered a Federal criminal misdemeanor.

**Exemptions:**

1. CWHSSA overtime provisions do not apply where the Federal assistance is only in the nature of a loan guarantee or insurance.
2. CWHSSA overtime provisions do not apply to prime contracts of \$100,000 or less.

C. **Copeland Act (Anti-Kickback Act).** The Copeland Act concerns three facets of prevailing wage compliance:

1. The “anti-kickback” provision makes it a criminal offense for any person to induce, by any manner whatsoever, any person employed in the construction, prosecution, completion, or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he/she is entitled under his/her contract of employment. Violations of the anti-kickback provision are punishable by a fine or by imprisonment up to 5 years, or both.
2. Associated DOL regulations restrict payroll deductions to those that are permissible without DOL approval as explained at 29 CFR §3.5; deductions that require advance DOL approval are explained at 29 CFR §3.6.
3. The Act also requires the submission of weekly payroll reports and statements of compliance (certified payroll report = CPR) by all contractors and subcontractors engaged in such construction, prosecution, completion or repair. The willful falsification of a payroll report or Statement of Compliance may subject the employer to civil or criminal prosecution under §101 of Title 18 and §3729 of Title 31 of the U.S.C. and may also be a cause for debarment.

**Exemptions:**

1. Copeland Act CPR requirements are applicable *only* where Davis-Bacon (DBA or DBRA) prevailing wage provisions are applicable.

2. Copeland Act *anti-kickback* provisions do not apply where the Federal assistance is only in the nature of loan guarantee.
- D. **Fair Labor Standards Act (FLSA)**. The FLSA governs such matters as Federal minimum wage rates and overtime (O/T). These standards are generally applicable to any labor performed and may be *pre-empted* by other (often more stringent) Federal standards such as the DBRA prevailing wage requirements and CWHSSA O/T provisions. The authority to administer and enforce FLSA provisions resides solely with DOL.
- E. **Portal-to-Portal Act (PA)**. The PA applies to the DBA and prevents the commencement of any court suit for unpaid straight-time (S/T) wages more than two years after performance of the work (three years in case of willful violations), where permissible under the law. *However*, it is the position of DOL that the PA does not apply to *administrative* actions initiated through Administrative Law Judge (ALJ) hearing procedures; thus, the PA does not preclude corrective administrative action after two (or three) years.

The PA *does not* apply to Federally-assisted (DBRA) projects. Instead, the various state statutes of limitations would apply to such projects in private actions where they are judicially determined to be permissible under the law. The Federal six-year statute of limitations would apply in government enforcement actions.

- F. **McNamara-O’Hara Service Contract Act (SCA)**. The SCA governs maintenance and other service work and applies when the Federal government (or the District of Columbia) contracts directly for such services and the value of the contract exceeds \$2,500. SCA-coverage in HUD programs is limited because HUD infrequently enters into direct contracts for services in the administration of its programs. By way of an example, however, a contract for maintenance service at a HUD-owned multifamily property would be covered by the SCA. Like DBA contracts, SCA contracts are managed under the auspices of HUD’s Office of the Chief Procurement Officer. SCA enforcement authority resides *solely* with DOL.

2-3 **HUD Davis-Bacon Related Acts**. Related Acts are program statutes that contain a provision(s) requiring compliance with the wages found to be prevailing by the Secretary of Labor pursuant to the Davis-Bacon Act. These are commonly referred to as the *Davis-Bacon and Related Acts* or *DBRA*. HUD Related Acts include (but are not limited to):

- A. the National Housing Act;
- B. the U. S. Housing Act of 1937;
- C. the Housing and Community Development Act of 1974;
- D. the National Affordable Housing Act of 1990; and
- E. the Native American Housing Assistance and Self-determination Act of 1996, each as amended.

Many of the labor provisions in HUD Related Acts contain applicability thresholds based upon the number of dwelling units involved. Some thresholds are based upon the amount of HUD assistance or the use of HUD funds or assistance. In addition, most HUD Related Acts contain exemptions from prevailing wage coverage for bona-fide volunteers. It is important for OLR and LCA staff to be familiar with the statutory provisions and how these are interpreted. The labor provisions found in current HUD Related Acts are excerpted for reference in Appendix II-1 to this Handbook along with applicability factors relating to specific HUD Related Acts (Appendix II-6).

- 2-4 **Davis-Bacon applicability by administrative instrument.** Even if a HUD program statute does not itself impose prevailing wage requirements, HUD may decide to impose these requirements through an administrative instrument such as regulations or other directives, or by grant or contract agreements. Examples include coverage of the Capital Grant Program, Assisted Living Conversion Program for Section 202 projects, the Housing Finance Agency Risk-Sharing Demonstration Program, the FHA Housing Finance Agency Risk-Sharing Program, and the Assisted Housing Drug Elimination Program.
- 2-5 **Exemptions/exclusions from prevailing wage coverage.** Some HUD programs are not covered because no prevailing wage language is contained in the statute authorizing the program. Examples include McKinney Act programs (other than Single Room Occupancy moderate rehabilitation) and single family FHA insurance programs where there is no language in the statute imposing prevailing wage requirements. In addition, Indian CDBG is excluded from coverage because HUD has exercised statutory authority to waive prevailing wage requirements. (See also exclusions for bona fide volunteers at 2-8, below.)
- 2-6 **Economic Development Initiative/Special Purpose Grants (EDISP).** EDISP grants are activities authorized in HUD appropriations bills where specific projects are earmarked for funding. Generally, EDISP grants are not covered by prevailing wage requirements because the appropriations bills do not contain language imposing Davis-Bacon provisions. However, if other HUD assistance is utilized in conjunction with an EDISP grant, the project associated with the grant may be subject to Davis-Bacon wage provisions to the extent that such provisions are imposed under the other HUD assistance.
- 2-7 **HUD-determined prevailing wage requirements.** HUD-determined prevailing wage rates are applicable to Public, Indian and Hawaiian housing programs because of provisions in the U.S. Housing Act of 1937, as amended (USHA) and the Native American Housing and Self-Determination Act of 1996, as amended (NAHASDA). The USHA and NAHASDA are also Davis-Bacon Related Acts because both contain provisions requiring the payment of not less than Davis-Bacon prevailing wage rates to all construction laborers and mechanics employed in the development of low-income/affordable housing projects.
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- A. **U.S. Housing Act of 1937 (USHA).** The USHA contains a provision requiring that maintenance laborers and mechanics employed in the operation of low-income housing be paid wages not less than prevailing wage rates determined or adopted by HUD. The USHA also requires the payment of not less than HUD-determined or –adopted wage rates to architects, technical engineers, draftsmen and technicians employed in the development of low-income housing.
- B. **Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA).** The NAHASDA contains provisions similar to the USHA requiring the payment of not less than HUD-determined wage rates to maintenance laborers and mechanics employed in the operation of affordable housing, and to architects, technical engineers, draftsmen and technicians employed in the development of affordable housing. NAHASDA prevailing wage provisions are applicable to Indian Housing Block Grants and to Housing Assistance for Native Hawaiians. An amendment to NAHASDA allows for the preemption of Davis-Bacon and/or HUD-determined wage rates by tribally-determined prevailing wage rates for the Indian Housing Block Grant (IHBG) program. [See also *Office of Native American Programs (ONAP) Program Guidance No. 2003-04*, dated 2/5/2003]

2-8 **Volunteers.** The labor standards clauses in most HUD program statutes contain provisions allowing for the use of bona-fide volunteers on projects subject to prevailing wage requirements. The use of volunteers may be permitted by a statutory exemption or by statutory waiver authority. Volunteers are excluded from Davis-Bacon and/or HUD-determined prevailing wage coverage and receive no compensation for their labor. However, volunteers may receive expenses, reasonable benefits or nominal fees. (See also HUD Regulations 24 CFR Part 70.)

- A. **Bona-fide volunteer.** A bona-fide volunteer, for labor standards purposes, is defined as an individual who performs services for a public or private entity for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.
1. Individuals shall be considered volunteers only where their services are offered freely and without pressure and coercion, direct or implied, from an employer.
  2. An individual shall not be considered a volunteer if the individual is otherwise employed at any time in the construction or maintenance work for which the individual volunteers. For example, a person that was employed as a covered laborer or mechanic on a project cannot be a bona-fide volunteer working on the same project.
- B. **Expenses, reasonable benefits, or nominal fees.** Volunteers may receive payments for expenses, reasonable benefits or nominal fees in relation to the

work for which they volunteered without losing “volunteer” status. Payment of expenses, benefits or fees must be approved in advance by the HUD Labor Relations Specialist (LRS) responsible for the jurisdiction involved. Examples of expenses, reasonable benefits and nominal fees include such items as uniform allowances, reimbursement for cleaning expenses or wear and tear on personal clothing, and out-of-pocket costs for meals and/or transportation. Such payments are not tied to productivity and in no way are construed as wages or other paid compensation. (See also 24 CFR Part 70, §70.3(b).)

1. Entities that propose to pay expenses, reasonable benefits or nominal fees to volunteers shall request a determination from the LRS that the proposed payments meet the regulatory criteria for such payments.
2. The LRS must respond to such requests within 10 HUD-work days following receipt by the LRS of sufficient information to allow for a determination.

C. **Recordkeeping.** Entities receiving the services of volunteers must maintain records relating to any work that is performed on projects or contracts otherwise covered by Federal prevailing wage requirements.

1. For projects that utilize all-volunteer labor, these records must include the name and address of the agency sponsoring the project, a description of the project, the number of volunteers, the hours of work they performed, and where a waiver of prevailing rates is involved, the type of work performed by the volunteers (See 24 CFR, Part 70, §70.5(c)) .
2. For projects that utilize a mix of volunteer and paid workers, these records must include the items above, and the names of the volunteers.

2-9 **Sweat equity.** Sweat equity programs permit members of eligible families to provide labor in exchange for program benefits including acquisition of property for homeownership or to provide labor in lieu of, or as a supplement to, rent payments. Sweat equity participants are exempt from Federal prevailing wage requirements. Sweat equity is permitted under HOME (see §255 of the NAHA) and (for homeownership) in Indian and Native Hawaiian housing programs under NAHASDA (see also *ONAP Program Guidance No. 2003-03*, dated 2/4/2003).

2-10 **Department of Labor Regulations.** Reorganization Plan #14 of 1950 (discussed in Chapter 1) authorizes the Secretary of Labor to prescribe standards, regulations and procedures which are observed by Federal agencies, including HUD, in the administration and enforcement of Federal labor standards provisions such as Davis-Bacon wage requirements. These regulations are published at Title 29 in the Code of Regulations (CFR); copies of the relevant DOL regulations are contained in Appendix II-4 and are available on-line at: <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html>.

DOL regulations are discussed in more detail throughout this Handbook as related topics are covered. The relevant Parts include:

- A. **Part 1 – Procedures for Predetermination of Wage Rates.** This Part explains how DOL determines the prevailing wage rates under the Davis-Bacon Act. It defines “prevailing wage” and describes how DOL conducts wage surveys and makes determinations of prevailing wages. It discusses when revisions to wage determinations (e.g., supersedeas wage determinations, modifications) become effective with regards to events such as contract awards, starts of construction, bid openings, FHA initial endorsements, and Section 8 agreements to enter into Housing Assistance Payments (HAP) contracts. Part 1 also discusses reconsideration by the Wage and Hour Administrator of wage determinations or of decisions by the Administrator concerning the application of a wage determination.
- B. **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.** This Part requires the submission of weekly certified payroll reports, discusses permissible payroll deductions from wages, and describes acceptable methods of wage payment. It also concerns the anti-kickback provisions of the Copeland Act.
- C. **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).** This Part concerns the responsibilities of Federal agencies in the administration and enforcement of Davis-Bacon wage requirements, Copeland Act anti-kickback, certified payroll and wage payments requirements, and CWHSSA overtime provisions. Part 5 is likely the most relevant for HUD Labor Relations staff. It contains definitions, provisions that must be included in the contracts for all covered works, standards for contractor/subcontractor compliance, enforcement requirements and remedies, debarment proceedings, liquidated damages provisions for CWHSSA overtime violations, and reporting requirements.
- D. **Part 6 – Rules of Practice for Administrative Proceedings Enforcing Labor Standards in Federal and Federally Assisted Construction Contracts and Federal Service Contracts.** This Part concerns administrative hearings on enforcement of the Davis-Bacon and Related Acts, the Copeland Act, Contract Work Hours and Safety Standards Act, and the Service Contract Act. It primarily involves responsibilities and procedures within the Department of Labor.
- E. **Part 7 – Practice Before the Administrative Review Board with Regard to Federal and Federally Assisted Construction Contracts.** This Part

concerns the rules of practice of the Administrative Review Board (formerly known as the Wage Appeals Board). Again, this Part primarily involves responsibilities and procedures within the Department of Labor.

- 2-11 **Department of HUD program regulations.** HUD programs regulations are published at 24 CFR. HUD regulations are available on-line at: [www.access.gpo.gov/nara/cfr/cfr-table-search.html](http://www.access.gpo.gov/nara/cfr/cfr-table-search.html).

Some HUD program regulations contain requirements pertaining to labor standards provisions. HUD regulatory provisions will be discussed throughout this Handbook and its appendices, as appropriate.

- A. **Part 70 – Use of Volunteers on Projects Subject to Davis-Bacon and HUD-Determined Wage Rates.** This Part governs the use of bona-fide volunteers on projects subject to prevailing wage requirements. It contains definitions and procedures for implementing exemptions and obtaining waivers from HUD concerning prevailing wages for volunteers.
- B. **Part 92 - Home Investment Partnerships Program.** This Part, specifically §92.354, contains the labor standards provisions applicable to the HOME program. It discusses applicability issues and prevailing wage exclusions for volunteers and sweat equity.
- C. **Part 200 – Introduction to FHA Programs.** This Part, at §200.33, contains the labor standards provisions applicable to FHA insurance programs.
- D. **Part 266 – Housing Finance Agency Risk-Sharing Program for Insured Affordable Multifamily Project Loans.** This part, at §266.225, contains the labor standards provisions applicable to HFA risk-sharing projects.
- E. **Part 891 – Supportive Housing for the Elderly and Persons with Disabilities.** This Part, at §891.155(d), contains the labor standards provisions applicable to Section 202 and Section 811 projects.
- F. **Part 1000 – Native American Housing Activities.** This Part, at §1000.16, contains the labor standards provisions applicable to Indian housing programs.
- G. **Part 1006 – Native Hawaiian Housing Block Grant Program.** This Part, at §1006.345, contains the labor standards provisions applicable to the Native Hawaiian Housing Block Grant Program.

### **Related Appendices**

- II-1 HUD Davis-Bacon Related Acts (Excerpts)
- II-2 Davis-Bacon Act/Copeland “Anti-kickback” Act
- II-3 Contract Work Hours and Safety Standards Act
- II-4 DOL Davis-Bacon Regulations (29 CFR Parts 1, 3, 5, 6 and 7)

- II-5 Federal Labor Standards Coverage in Major HUD Programs
- II-6 Factors of Labor Standards Applicability