

Department of Labor Forecasts Changes to the Fair Labor Standards and Davis-Bacon Acts

Litigation Alert

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Earlier this month, the U.S. Department of Labor (DOL) signaled plans to propose two new rules aimed at (1) increasing the salary threshold for exemption from the Fair Labor Standards Act (FLSA) and (2) revising the Davis-Bacon Act and Related Acts that establish wage standards for government contractors. These rules come on the back of DOL's recent [final rule](#), "Increasing the Minimum Wage for Federal Contractors," which raises the minimum wage paid to workers performing work on or in connection with covered federal contracts to \$15.00 per hour beginning January 30, 2022. While specifics are sparse on the two new rules, contractors should enter into 2022 cognizant of potential changes on the horizon.

Proposed Rules

As part of the Biden administration's [semi-annual agenda](#), DOL announced its consideration of an [overtime rule](#) that would increase salary level requirements under Section 13(a)(1) of the FLSA. The section exempts workers employed in an executive, administrative, or professional capacity at a particular salary threshold from federal minimum wage and overtime requirements. Currently the threshold is set at a weekly salary of \$684 – or \$35,568 annually. The contemplated rule does not detail how much of an increase should be expected. However, the increase could be similar to the \$47,476 threshold proposed by the Obama administration that was ultimately struck down in federal court.

Second, pursuant to its [regulatory agenda](#), DOL intends to "update and modernize the regulations implementing the Davis Bacon and Related Acts to provide greater clarity and ensure workers are truly paid local prevailing wages on federal construction contracts." The agenda does not provide further detail on the upcoming changes to Davis-Bacon but the potential update functions as one element of the DOL's goal to "foster, promote, and develop the welfare of wage earners" and to ensure workers "receive a fair day's pay for a fair day's work."

While both rules are scheduled to be proposed early next year, the rulemaking process, including a notice and comment period, likely means contractors will not see anything final until Q3 or later next year. Nonetheless, a review of the FLSA and Davis-Bacon may prove helpful in anticipation of the upcoming changes.

Fair Labor Standards Act

The Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., provides workers with minimum wage, overtime pay, and youth employment protections. Pursuant to the Act, covered workers are entitled to a minimum wage and one and one-half times the regular rate of pay for hours worked beyond 40 in a workweek. While the FLSA applies to most workers in the public and private sectors, certain employers and employees are exempted from its standards. Specifically, Section 13(a)(1) provides that bona fide executive, administrative, and professional employees are exempt from the minimum wage and overtime requirements of the FLSA. To qualify for the exemption, workers must meet both a salary test and a job duties test. The proposed DOL change would increase the salary threshold. If adopted, the higher threshold would reduce the number of employees exempted from the FLSA.

Davis-Bacon Act

The Davis-Bacon Act, 40 U.S.C. §§ 3141-3148, requires paying the local prevailing wage to laborers and mechanics in all public work projects. It is applicable to both contractors and subcontractors "performing on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works." The purpose of the Act is to give local laborer and contractors a fair opportunity to participate in federal construction projects and to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.

The Davis-Bacon prevailing wage is a combination of the basic hourly rate and any fringe benefits listed in the applicable wage determination. Wage determinations list the minimum hourly wage rate (and fringe benefits) for each classification of laborer and mechanics (*e.g.*, carpenter, electrician, plumber). Each determination is tied to a specific geographic region and is generally established depending on the type of construction (building, residential, heavy, highway) required. General wage determinations, which are created by the Wage and Hour Division (WHD) of DOL, are published online at www.sam.gov.

Contractors are required to pay their covered workers on a weekly basis and submit weekly certified payroll records to the contracting agency. Contractors can satisfy the requirements of the Davis-Bacon Act by paying their laborers and mechanics the applicable prevailing wage "entirely as cash wages or as a combination of cash wages and employer-provided bona fide fringe benefits."

Understanding the Davis-Bacon Act is vital to construction contractors to ensure compliance problems do not arise. Common issues include misclassifying laborers, inadequate recordkeeping, failing to pay the correct prevailing wage, failing to submit weekly certified payroll records, or failing to communicate applicable wage determinations to employees. Recent cases have demonstrated that certain compliance failures with respect to Davis-Bacon may open up the contractor to False Claims Act (FCA) liability. *See United States ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98 v. Farfield Co.*, 5 F.4th 315 (3d Cir. 2021) (affirming finding of FCA liability based on Davis-Bacon violation).

While it remains to be seen how DOL intends to update and modernize Davis-Bacon, contractors should review the relevant provisions governing their contracts, specifically FAR 52.222, and ensure they are familiar with the Davis-Bacon framework to prepare for any upcoming changes. If you have any questions about the FLSA or the Davis-Bacon Act, please contact one of the Miller & Chevalier attorneys listed below.

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