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US DOL Updates Prevailing Wage Rules for Construction Industry

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On August 8, the U.S. Department of Labor (DOL) published final rules changing the method by which prevailing wages will be calculated for federally funded construction projects. The final rules were adopted after publication of proposed rules on March 18, 2022 and a 60-day comment period in which the DOL received 40,938 comments. Although the full regulations are more than 700 pages, the most significant changes are summarized here. The new prevailing wage rules change how prevailing wage and fringe benefits rates are calculated. The updated methodology, which is a return to the three-step process used until 1982, is expected to result in higher rates for both prevailing wages and fringe benefits.

Significant Changes

<u>Determination of Prevailing Wage – the 30% Rule</u>

Under prior rules, two steps were used to determine a prevailing wage: (1) identify if there was a single wage rate paid to more than 50% of workers in a classification; and, if not, (2) rely on a weighted average of all rates paid in the classification.

The new rules add a step in between. Going forward, the DOL will continue to determine whether a majority (more than 50%) of wage rates in a classification are the same. If so, that is the prevailing wage. If there is no majority, however, the DOL will determine the prevailing wage based on the wage rate earned by at least 30% of workers. If there is no wage earned by at least 30% of workers, the DOL will rely on a weighted average of all rates paid in a classification. This three-step process was the method used to determine prevailing wages until 1982, when the Reagan-era DOL simplified the analysis to the two-step process described above. The DOL at the time expressed concern that the three-step process contributed to inflation and gave undue weight to collectively bargained rates. Fast forward to today, when the current DOL concluded that the two-step process resulted in an overuse of weighted averages that do not reflect actual prevailing wages in a region and therefore have allowed companies who paid unfairly low wages to certain workers to artificially decrease the prevailing wage. The DOL's revised rules are explicitly intended to, and likely will, result in higher prevailing wage rates across the board.

<u>Determination of Fringe Benefit Rate</u>

The DOL also has revised the method used to calculate fringe benefit rates to accord with the 30% rule for prevailing wage determinations. Under the new rules, the DOL will continue to first identify whether more than 50% of workers in a classification are paid fringe benefits. If not, fringe benefits will not be included in the wage determination for that classification. If receipt of fringe benefits is the majority, the DOL will determine whether any one rate for fringe benefits is paid to at least 30% of the workers who receive those benefits. If so, that is the fringe benefit rate; if not, the DOL will average the fringe benefits of the workers who receive those benefits in order to determine the rate. Just as with the new rules on calculation of prevailing wage rates, these changes are expected to result in higher fringe benefit rates.

Adoption of State or Local Rates

In certain circumstances, the DOL is now permitted to adopt state or local prevailing wage rates, where they exist, if the DOL determines that the state or local government's method and criteria for determining prevailing wage rates are similar enough to those used by the DOL. There are approximately 26 states which have established their own prevailing wages, but it is too early to tell which of these the DOL might adopt.

Periodic Adjustment of Prevailing Wage Rates

New to the rules with this most recent update is a provision which authorizes the DOL to periodically adjust out-of-date prevailing wage and fringe benefit rate determinations[1]. These adjustments will be based on the U.S. Bureau of Labor Statistics Cost Index data and will be made no more than once every three years.

Additional Protection Against Retaliation

The new rules impose greater liability for employers who retaliate against employees by firing or punishing them for reporting violations of the law or participating in DOL investigations or other compliance actions. The DOL currently enforces the prevailing wage rules primarily through payment of back wages to aggrieved employees or debarment of the employer (in extreme cases). The new rules add anti-retaliation provisions that give the DOL power to order reinstatement of an aggrieved employee (with restoration of seniority, benefits, etc.) in addition to back pay, other monetary damages, and expungement of disciplinary records. Finally, the DOL strengthened its power to withhold money from a contractor to pay employees their lost wages.

Effect on Employers

These changes are expected to have dramatic effects on the construction industry. The White House indicated that the new rules will put thousands more dollars per year into the hands of construction workers, while construction contractors have expressed significant concern that they will be forced to pay a significantly higher price for labor than under previous rules.

The final rules go into effect on October 9, 60 days after their publication in the Federal Register on August 10. It is not clear at this point whether some states or localities will change their prevailing wage methodology to conform to the new federal rules, but in any case, these new rules are likely to have significant and far-reaching implications for the construction industry.

[1] For non-collectively bargained rates.

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