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DOL Releases Final Rule to Update the Davis Bacon and Related Acts

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On August 8, 2023, the Department of Labor ("DOL") released its long-awaited final rule updating guidance related to the Davis Bacon and Related Acts ("DBRA"). The final rule expands and finalizes requirements across a variety of areas relevant to contracts subject to the DBRA. This update focuses on the impacts to fringe benefit administration.

The final rule will be effective 60 days after its publication in the *Federal Register*.

Background

The DBRA applies to contracts in excess of $2,000, issued by the federal government or District of Columbia for construction, alteration, or repair of public buildings or public works. It also applies to projects receiving federal assistance (including contracts issued by states but receiving federal assistance). Amongst the various requirements, a contract subject to the DBRA will include a wage determination which specifies the locally prevailing wage and fringe benefits that a contractor must pay to its covered employees.

Covered contractors may meet their obligation to pay fringe benefits by:

- Making irrevocable contributions to a trustee or third party pursuant to a bona fide fringe benefit fund, plan, or program (e.g., health, dental, vision and life insurance); or

- Paying the designated fringe rate as wages.

Contractors subject to the DBRA must comply with strict recordkeeping requirements, including submitting certified payroll records, maintaining employee biographical information, wage determination classifications, and rates of pay. In addition, to meet their fringe benefit obligations, contractors must also track their covered employees' hours worked and all fringe benefit payments made to these employees.

The Final Rule

The final rule implements requirements across a broad range of issues applicable to contracts subject to the DBRA.

Regarding fringe benefit administration under the DBRA, the final rule:

- Codifies the requirement that fringe benefit payments must be annualized,
- Clarifies and formalizes the requirement that unfunded benefit plans must be approved by the DOL to be credited as a bona fide fringe benefit, and
- Finalizes the DOL's existing approach that certain administrative expenses may not be credited against fringe benefit requirements.

The final rule stresses that these new requirements do not expand obligations under the DBRA, rather they formalize approaches to enforcement that have long been utilized by the DOL.

Annualization of Fringe Benefit Payments

Annualization is the method of calculating the hourly equivalent amount of a contractor's contributions to fringe benefit plans that may be credited against the contractor's fringe benefits obligations. Under annualization, an employee's total amount of hours worked (on both covered and uncovered projects) are divided by the total amount of payments made for fringe benefits. Since fringe benefit rates are stated as an hourly rate in a contract, annualization converts annual (or monthly) fringe benefit payments to an hourly amount to determine whether the contractor has met their obligations under the contract.

While the DOL has long been enforcing an annualization requirement through previously released guidance, the final rule formally codifies this requirement.

Additionally, contractors may request an exception from the annualization requirement where:

- The benefit provided is not continuous in nature;
- The benefit does not provide compensation for both public and private work; and
- The plan provides for immediate participation and essentially immediate vesting.

Unfunded Benefit Plans

The final rule formally codifies the requirement that an unfunded benefit plan must be approved by the DOL to be considered a bona fide fringe benefit and creditable against a contractor's fringe benefit requirements.

It should be noted that if an employer subject to the DBRA wants to use an unfunded, self-insured health plan to meet the fringe benefit obligations, that plan must be approved by the DOL.

Contractors wishing to utilize an unfunded benefit plan to meet their fringe benefit requirements must submit a written request to the DOL to consider whether the benefit plan meets the requirements to be considered "bona fide." These requests may be submitted by email to the DOL's Wage and Hour Division at unfunded@dol.gov.

Noncreditable Administrative Expenses

It is common practice for contractors to engage third party administrators to provide certain administrative services on behalf of the contractor regarding their covered employee population. These services can include employee hours tracking, fringe benefit payment accounting and reconciliation, benefit administration support, recordkeeping, and employee communications.

The final rule makes clear that where administrative expenses are incurred primarily for the benefit or convenience of the contractor or subcontractor, they cannot be credited against the contractor's fringe benefit obligations. In other words, an expense incurred for performing services that would ordinarily be the responsibility of the contractor cannot be "pushed onto" their covered employees and credited toward the fringe obligation.

Examples of expenses that are noncreditable include:

- Recordkeeping costs incurred to ensure compliance with fringe benefit requirements (e.g., tracking of covered employees' hours worked and fringe benefit contributions paid),
- The cost of completing claim forms,
- Transmitting enrollment information to insurance carriers or service providers, and
- Updating or maintaining the contractor's personnel records.

The final rule states that not all administrative expenses incurred by a contractor are noncreditable. A contractor may credit costs incurred that are directly related to the administration and delivery of bona fide fringe benefits.

Applicability to Service Contracts Act ("SCA") Contracts

The SCA applies to service contracts in excess of $2,500 issued by the federal government or District of Columbia and includes similar prevailing wage and fringe benefit requirements as the DBRA.

While the final rule is targeted at contracts covered by the DBRA, it appears likely that the DOL intends to enforce the requirements against SCA contractors as well. The final rule frequently references the similarities between the fringe benefit requirements under the DBRA and the SCA. Specifically, the rule reinforces that it is not an expansion of the requirements under either the DBRA or SCA, but rather a codification of longstanding enforcement practice by the DOL with regards to the requirements under *both* statutes. Further guidance would be welcome.

Employer Action

Employers subject to the DBRA and the SCA should review their current fringe benefit administration to ensure that all fringe benefit payments have been properly annualized.

Any unfunded benefit plans that covered employers are crediting against their fringe benefit obligations should be submitted to the DOL for approval.

Contractors utilizing third party administrators to assist in their fringe benefit administration should determine whether these expenses can be credited against their fringe benefit obligations.