

FRINGE BENEFITS

Definition 29 U.S.C. § 3141(2); 29 C.F.R. §§ 5.2(p) and 5.23.

- ◇ Under the Davis-Bacon Act, the terms “wages,” “scale of wages,” “wage rates,” and “prevailing wages” include:
 - ◇◇ The basic hourly rate of pay,
 - ◇◇ Any contribution irrevocably made by a contractor or subcontractor to a trustee or third party pursuant to a bona fide fringe benefit fund, plan or program, and
 - ◇◇ The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated to the employees in writing.

In practice

- ◇ The Davis-Bacon “prevailing wage” is made up of two interchangeable components – a basic hourly rate and fringe benefits found prevailing in an area and published in a Davis-Bacon wage determination. Along with the basic hourly rate listed on the wage determination, a fringe benefit amount is listed for any classification for which fringe benefits have been found prevailing. The sum of both the basic hourly rate and any fringe benefits listed comprise the Davis-Bacon “prevailing wage” requirement for a given classification. If no fringe benefits are found prevailing and listed for a given classification, the basic hourly rate itself is the “prevailing wage” requirement for that classification.
- ◇ The regulations at 29 C.F.R. § 3.10, issued under the Copeland Act, and applicable to wage payments on projects subject to Davis-Bacon prevailing wage requirements, specify the allowable “methods of payment” as follows:

§ 3.10 Methods of payment of wages.

The payment of wages shall be by cash, negotiable instruments payable on demand, or the additional forms of compensation for which deductions are permissible under this part. No other methods of payment shall be recognized on work subject to the Copeland Act.

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

**DBA/DBRA COMPLIANCE
PRINCIPLES**

- ◇◇ Generally the “cash” portion of the prevailing wage, as discussed below, is the worker’s paycheck (which may be paid by electronic transmission of the wages to a worker’s account, if the worker authorizes such direct deposit).
- ◇ A contractor’s prevailing wage obligation may be met by any combination of cash wages and creditable “bona fide” fringe benefits provided for a covered worker:
 - ◇◇ The total, including any fringe benefits listed for the classification, may be paid entirely as cash wages;
 - ◇◇ Payments made or costs incurred by the contractor for “bona fide” fringe benefits may be creditable towards fulfilling the requirement; or
 - ◇◇ A combination of cash wages paid and “bona fide” fringe benefits may be used together to meet the total required prevailing wage.
- ◇ Davis-Bacon fringe benefits must be paid for all hours worked – both straight time and overtime hours.
- ◇ Each classification on a Davis-Bacon wage determination stands alone and each laborer and mechanic is due the full prevailing wage (including fringe benefits, if listed) for all hours of work in a classification.

Example:

A Davis-Bacon wage determination requires:

| | |
|-----------------------|-------------|
| Basic hourly rate | \$14.00 |
| Fringe benefit | <u>1.00</u> |
| Total prevailing rate | \$15.00 |

Here are some examples of how a contractor can comply:

1. \$15.00 in cash wages;
2. \$14.00 plus \$1.00 in pension contributions or other “bona fide” fringe benefits; or
3. \$12.00 plus \$3.00 in pension contributions or any combination of “bona fide” fringe benefits. (In this case, to compute the minimum overtime rate under CWHSSA, half the basic rate listed, i.e., \$7.00 must be added to the full \$15.00 straight time DBA prevailing wage. Thus, the CWHSSA overtime pay rate would be \$22.00 per hour.)

Note: Under DBA/DBRA monetary wages paid in excess of the basic hourly rate may be used as an offset or credit to satisfy fringe benefit obligations, and vice versa.

Application to all hours worked

- ◇ Under Davis-Bacon, fringe benefits must be paid for **all** hours worked, including overtime hours. However, the fringe benefit amounts listed in the applicable wage determination may be excluded from the half-time premium due as overtime compensation.

For example:

An employee worked 44 hours as an electrician. The wage determination rate was \$16.00 (basic hourly rate) plus \$2.50 in fringe benefits. The electrician would be due:

$$\begin{array}{rcl}
 44 \text{ hours} \times \$18.50 & = & \$814.00 - \text{(straight time pay)} \\
 4 \text{ hours} \times \frac{1}{2} \text{ of } \$16.00 & = & \underline{32.00} - \text{(overtime pay)} \\
 & & \$846.00
 \end{array}$$

Crediting fringe benefit contributions to meet DBA/DBRA requirements

- ◇ The Davis-Bacon Act and 29 C.F.R. § 5.23 list fringe benefits to be considered.

Examples:

Life insurance

Health insurance

Pension

Vacation

Holidays

Sick leave

Supplemental Unemployment Benefits

- ◇ The use of a truck is not a fringe benefit; a Thanksgiving turkey or Christmas bonus is not a fringe benefit. (See *Cody-Zeigler, Inc.*, WAB Case No. 89-19 (April 30, 1991).)

- ◇ No credit may be taken for a benefit required by federal, state or local law, such as:

- Workers compensation

- Unemployment compensation

- Social security contributions

Funded fringe benefit plans 29 C.F.R. §§ 5.26-5.27.

- ◇ The contractor's fringe benefit contributions made irrevocably to a trustee or third party pursuant to a bona fide fringe benefit fund, plan or program can be credited towards meeting the prevailing wage requirement without prior DOL approval. For example:
 - ◇◇ Contractor pays a third party provider for health insurance monthly premiums.
 - ◇◇ Contractor makes quarterly contributions to retirement plan trust.
- ◇ The amount of contributions for fringe benefits must be paid **irrevocably** to the trustee or third party.
- ◇ Contributions to fringe benefit plans must be made regularly, not less often than **quarterly**. (This requirement is specified in the standard Davis-Bacon contract clauses at 29 C.F.R. § 5.5(a)(1)(i).) Annual contributions into a fringe benefit plan fund do not meet this requirement.
- ◇ The contractor must make payments or incur costs in the amount specified by the applicable wage decision **with respect to each individual laborer or mechanic**. Thus, the amount contributed for each employee must be determined separately, and credit taken accordingly towards the prevailing wage requirement for each individual. (It is not permissible to take credit based on the average premium paid or average contribution made per employee.)
- ◇ Credit may not be taken for fringe benefit contributions made on behalf of employees who are not eligible to participate in the plan (e.g., those excluded due to age or part-time employment).
 - ◇◇ Some plans provide that contributions and allocations under the plan will only be made on behalf of participants who are employed on the last day of the plan year. No credit is permitted for such participants for whom no contribution is made or

for contributions made for employees whose accounts receive no allocation solely because they are not employed on the last day of the plan year.

- ◇◇ On the other hand, it is not required that all employees participating in a fringe benefit plan be entitled to receive benefits from the plan at all times. For example, an employee who is eligible to participate in an insurance plan may be prohibited from receiving benefits from the plan during a 30-day waiting period. Contributions made on behalf of these employees would be creditable against the contractor's fringe benefit obligations.
- ◇ A pension plan that meets the Employee Retirement Income Security Act (ERISA) requirements may be considered "bona fide" for DBA/DBRA purposes. In accordance with 29 C.F.R. § 5.26, the fringe benefit plan trustees must assume the usual fiduciary responsibilities imposed on trustees by applicable law. A contractor may be a pension plan trustee.
- ◇ Some pension plans contain "vesting" requirements. Where an employer contributes to the plan, employees may be required to complete a certain length of service before they have a nonforfeitable right to benefits based on the employer's contributions to the plan. Thus, an employee who leaves employment before completing the specified length of service may forfeit all or part of the accrued benefit.
 - ◇◇ Such forfeitures are permitted, provided the plan is a bona fide plan that meets applicable requirements under ERISA, including minimum vesting requirements.
 - ◇◇ Forfeited Davis-Bacon contributions may not revert to the employer, but should be distributed among the remaining plan participants.
- ◇ Credit for profit sharing or other discretionary employer contributions that fund pension benefit plans can be given if certain conditions are met:
 - ◇◇ DOL requires contractors to contribute irrevocably to an escrow account not less often than quarterly, during the period of the Davis-Bacon covered work, an amount sufficient to meet any claimed fringe benefit credit towards meeting the Davis-Bacon prevailing wage obligation (based on expected profit sharing pension plan contributions) on behalf of each employee participating in the plan.
 - ◇◇ Upon the annual determination of profits, monies placed in escrow are transferred to the pension trust fund and used as an offset against the contractor's obligation to the laborers and mechanics under the profit sharing plan.

- ◇◇ Allowable Davis-Bacon credit is limited to the contributions made which cover that portion of the total hours worked by the covered workers during the year which is attributable to work covered by Davis-Bacon labor standards.
- ◇◇ Any shortfall in profits which results in actual payments to the pension plan being less than the rate at which the contractor claimed Davis-Bacon credit throughout the year would have to be made up by the contractor when the account is settled at year end by paying the difference (shortfall) in cash directly to the covered workers or by making additional contributions to the pension fund in an amount to cover the shortfall.
 - ◇◇◇ A contractor cannot be given credit for more than the actual costs of, or payments made into, the pension plan trust fund.

Unfunded plans 29 C.F.R. § 5.28.

- ◇ A fringe benefit plan or program which the contractor funds from the company's general assets (rather than by payments to a trustee or third party) is referred to as an unfunded plan. A contractor's reasonably anticipated costs in providing bona fide fringe benefits under such a plan may be creditable towards meeting the Davis-Bacon prevailing wage obligations if certain requirements are met. Unfunded fringe benefit plans generally include:
 - ◇◇ Holiday plans
 - ◇◇ Vacation plans
 - ◇◇ Sick pay plans
- ◇ No type of fringe benefit is eligible for consideration as an unfunded plan unless it meets the following criteria:
 1. It can be reasonably anticipated to provide benefits described in the Davis-Bacon Act;
 2. It represents a commitment that can be legally enforced;
 3. It is carried out under a financially responsible plan or program; and
 4. The plan or program has been communicated in writing to the laborers and mechanics affected.

- ◇ To ensure that such plans are not used to avoid compliance with the Act, the DOL directs the contractor to set aside, in an account, no less often than quarterly, sufficient assets to meet the future obligations of the plan.

Annualization

- ◇ Annualization is a computation strategy used to determine the hourly rate of contribution that is creditable towards a contractor's prevailing wage obligation on DBA/DBRA covered projects.
 - ◇◇ This principle is important because the amount of credit a contractor may claim as an offset against the prevailing wage obligation can be as significant in determining Davis-Bacon compliance as whether a particular fringe benefit plan is a bona fide fringe benefit plan under the DBA.
 - ◇◇ Annualization is particularly important for computing the fringe benefit credit when a contractor employs workers on both DBA/DBRA covered projects and projects not subject to DBA/DBRA coverage and makes contributions to fund fringe benefit plan(s) during the year.
- ◇ Background and rationale
 - ◇◇ When the 1964 DBA amendments added fringe benefits as a component of DBA "prevailing wages," the fringe benefit plans that were prevalent were collectively bargained fringe benefit plans that called for the same rate of contribution for all hours worked by laborers and mechanics employed on both DBA/DBRA covered projects and other (non-covered) construction.
 - ◇◇ The annualization principle was originally applied in the 1970's in the context of health insurance plans.
 - ◇◇◇ A contractor sought to receive Davis-Bacon credit for the entire annual cost of purchasing health insurance for its employees who worked on both government and private work.
 - ◇◇◇ DOL took the position, in opinion letters, that the cost of the health insurance was appropriately apportioned among all hours worked by the employees, and that therefore the hourly Davis-Bacon credit would be derived by dividing the total annual cost of the health insurance by the total number of hours worked by employees on both Davis-Bacon and private work during the year.

- ◇◇ This principle was later applied to other fringe benefit plans as well, such as apprenticeship and training plans, vacation plans, and most pension plans under which contractors sought to receive Davis-Bacon credit for the entire cost of the plans.
- ◇ Applying annualization to compute the allowable Davis-Bacon fringe benefit credit:
 - ◇◇ Davis-Bacon credit for contributions made to fringe benefit plans are allowed based on the effective annual rate of contributions worked during the year by an employee.
 - ◇◇ In practice, annualization limits the Davis-Bacon credit to an amount equal to the hourly cost of the fringe benefit averaged over all hours an individual laborer or mechanic works during a year (both Davis-Bacon and non-Davis-Bacon hours).
 - ◇◇ To compute the contractor's allowable hourly credit towards meeting the prevailing wage obligation for a covered laborer or mechanic on a DBA/DBRA project, the total annual cost of the fringe benefit must be divided by the total number of hours the individual works in a year (including work on both covered and non-covered work).
- ◇ Effect of annualization
 - ◇◇ Application of the annualization principle to computing the fringe benefit credit for an individual's hours worked on DBA/DBRA covered projects ensures that a contractor does not fund a fringe benefit plan that provides benefits/coverage to the individual for all hours he/she works with wages earned solely on Davis-Bacon covered projects.
 - ◇◇ Thus, it prevents using the Davis-Bacon work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and compensation for all the employee's work (e.g. for a benefit that is in effect during both Davis-Bacon covered and non-covered work).
 - ◇◇ Application of the annualization principle thus restricts employers from using a variety of temporary nontraditional plans as a means to avoid increasing workers' cash wages to meet prevailing wage requirements while performing Davis-Bacon covered work.
 - ◇◇ Thus, the annualization principle encourages traditional fringe benefit plans that provide meaningful and continuous benefits to covered workers.

- ◇ The two examples below illustrate the application of annualization.
 - ◇◇ Example 1 – Computing the DBA fringe benefit credit for a pension plan with a 5-year vesting schedule:
 - ◇◇◇ For all defined benefit pension plans and for defined contribution pension plans which do not provide for immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), Davis-Bacon credit for contributions made to the plan is allowed based on the effective annual rate of contributions for all hours worked during the year. In other words, if a contractor wishes to receive \$2.00 per hour credit for pension plan contributions, the contractor must contribute at this same rate for all hours worked during the year (or otherwise make additional regular contributions at least quarterly, that would result in a \$2 average contribution to the plan based on all hours worked in the year). If this is not done, the credit for DBA/DBRA purposes would have to be revised accordingly.
 - ◇◇ Example 2
 - ◇◇◇ Assume that a firm's contributions for the pension benefit were computed to be \$2,000.00 a year for a particular employee. If that employee worked 1,500 hours of the year on a DBA/DBRA covered project and 500 hours of the year on private non-Davis-Bacon jobs, \$1.00 per hour ($\$2,000 \div 2,000$ hours) would be creditable towards meeting the firm's obligation to pay the prevailing wage on the covered project. This method for determining the allowable Davis-Bacon credit for fringe benefit payments illustrates that employers are normally prohibited from using contributions made for covered work to fund the plan for periods of non-covered work.
- ◇ Exception from the annualization requirement
 - ◇◇ For contributions made to defined contribution pension plans which provide for immediate participation and immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), a contractor may take Davis-Bacon credit at the hourly rate specified by the plan, regardless of whether the contractor makes contributions to the plan when working on non-Davis-Bacon projects.
 - ◇◇◇ Under such plans, contributions are irrevocably made by the contractor, most, if not all, of the workers will become fully vested in the plan, and the

higher contributions made during Davis-Bacon work result in an increase in the value of the individual employee's account.

- ◇◇◇ Pursuant to this exception, the contractor may take credit for the full amount of contributions made to such a plan during periods of DBA/DBRA covered work without annualizing the credit claimed (even if the contractor makes no contributions to the plan during periods of non-Davis-Bacon work).
- ◇◇◇ The amount of contributions to such plans should be in conformance with any limitations imposed by the Internal Revenue Code and ERISA.

Computing hourly fringe benefit equivalents for contributions made weekly, monthly, quarterly, etc. to claim credit towards fulfilling the prevailing wage requirement

- ◇ In determining cash equivalent credit for fringe benefit payments, the period of time to be used is the period covered by the contribution. If contributions are made weekly, cash equivalents should be computed weekly. If contributions are made quarterly, cash equivalents should be computed quarterly, etc.
 - ◇◇ For example, if an employer contributes to a hospitalization plan on a weekly basis, the contribution made by the employer on behalf of an employee should be divided by the total hours worked (DB covered and non-covered) each week by the employee to determine the hourly cash equivalent the employer is entitled to count as credit towards the prevailing wage obligation for that employee.
- Example: An employee works as an electrician where the wage determination rate is \$16.00 (basic hourly rate) plus \$2.50 in fringe benefits.
- ◇◇ Where the employer provides the electrician with medical insurance in the amount of \$200 per month (\$2,400 per year), the employer would divide the total annual cost of the benefit by 2,080 hours (40 hours x 52 weeks) to arrive at the allowable fringe benefit credit.
- (\$200 x 12 months) divided by 2080 hours = \$1.15 per hour.
- ◇◇ If the employee in this example receives no other "bona fide" fringe benefits, then for each hour worked on a covered contract the individual is due \$16.00 (basic hourly rate) plus \$1.35 paid as cash (the difference between the \$2.50 per hour fringe benefit required under the applicable wage determination and the credit allowed for the provision of medical insurance.) Thus,

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

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PRINCIPLES**

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| Basic hourly rate | \$16.00 |
| Medical insurance benefit | 1.15 |
| <u>Additional cash due</u> | <u>1.35</u> |
| Total due per hour | \$18.50 (\$16.00+\$2.50) |

- ◇◇ On occasion, a contractor or subcontractor may offset the annual cost of a particular fringe benefit by converting such costs to an hourly cash equivalent.
 - ◇◇◇ Since construction workers often do not work a full year (2,080 hours), where the contractor makes annual payments in advance to cover the coming year and actual hours worked will not be determinable until the close of that year, the total hours worked by the DB-covered laborers, mechanics and apprentices, if any, for the preceding calendar year (or plan year), will be considered as representative of a normal work year for purposes of the above formula. To illustrate, assume that the annual cost of a pension program is \$15,000. The total actual working hours (Davis-Bacon and hours worked not subject to federal Davis-Bacon requirements) are 15,000. Thus $\$15,000 / 15,000 \text{ hours} = \1.00 per hour cash equivalent.
 - ◇◇◇ Similarly, where the contractor pays monthly health insurance premiums in advance on a lump sum basis, the total actual hours worked in the previous month or in the same month in the previous year may be used to determine (i.e., estimate) the hourly equivalent credit per employee during the current month. Any representative period may be utilized in such cases, provided that the period selected is reasonable.
 - ◇◇◇ Where the cost incurred included contributions for employees other than covered laborers, mechanics, and apprentices, the hours of such non-covered employees must be included in the computation of the hourly cash equivalent or the contributions for such employees must be eliminated prior to determining the cash equivalent for covered employees.
- ◇ In computing cash equivalents, it should be kept in mind that under certain kinds of fringe benefit plans the rate of contribution for employees may vary. For example, under a hospitalization plan the employer often contributes at different rates for single and family plan members. In such situations, an employer cannot take an across the board average equivalent for all employees; rather, the cash equivalent can only be credited based on the rate of contributions for each individual employee.