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A Workplace Law Update

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U.S. Department of Labor Announces Plans to "Go Back to the Future"

By: John D. Gardiner, Member, Workplace Law Group

The U.S. Department of Labor ("DOL") recently announced that it is taking steps in furtherance of the Biden Administration's stated aim to increase workers' wages.

On Friday March 11, the DOL announced that it will review and update *inter alia* "prevailing wages" as defined and required under the Davis-Bacon Act – originally enacted in 1931, the interpretive regulations to which were last substantively revised in the early 1980s – which governs how federal contractors are paid when working on federally funded construction projects.

According to the DOL's notice of proposed rulemaking "[t]he Department of Labor (Department) proposes to amend regulations issued under the Davis-Bacon and Related Acts that set forth rules for the administration and enforcement of the Davis-Bacon labor standards that apply to federal and federally assisted construction projects. As the first comprehensive regulatory review in nearly 40 years, the Department believes that revisions to these regulations are needed to provide greater clarity and enhance their usefulness in the modern economy". See WHD 1235-AA40-NPRM.

If the updated regulations are finalized (there is little standing in the DOL's way other than public comment), such a revision would revert back to the "three-step process" when setting the "prevailing wage" standard. The standard, which has not been used since 1983, sets (at step two of three) the prevailing wage at the rate paid to at least 30% of the workers doing a particular job in a designated area.

Currently and prospective from 1982-1983, the DOL definition of "prevailing wage" has been comprised of two steps: first, identifying if there was a single wage rate paid to more than 50% of workers, and second, if not, relying on a weighted average of all the wage rates paid. See 87 FR 15698 beginning at pages 15698-15805.

The DOL proposal relies on reinstituting the "three-step process" and therein step two (of three) which takes (as applicable) "the wage rate paid to the greatest number of workers, provided it was paid to at least 30% of workers." See 87 FR 15698 beginning at pages

15698-15805.

While the DOL envisions greater opportunity and attendant draw to those working in the construction industry – generally favored by building trades unions – employers have (and likely will) cite flawed survey data and artificially high rates (*i.e*. it's easier to get to 30% versus 50% when setting "prevailing wages") when opposing such a change.

It is important to keep in mind that the DOL calculates the "prevailing wage" via a survey; if the DOL receives an inadequate response rate (which happened frequently when seeking the 50% threshold), then the DOL averages the rates for a particular job in a specific area, and requires construction contractors to use a "blended rate".

The DOL proposal also includes additional anti-retaliation provisions, "intended to ensure that workers who raise concerns about payment practices or assist agencies or the Department [of Labor] in investigations are protected from termination or other adverse employment actions" as well as a proposal to update local wage rates periodically between survey periods. See DOL's notice of proposed rulemaking starting at page 196. See 87 FR 15698 beginning at pages 15746.

The DOL will accept public comments on the proposal between March 18, 2022 and May 17, 2022.

Employers should stay tuned for further updates and consider proactively conferring with a member of **Bodman's Workplace Law Group**. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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