

Fair Employment Practices GUIDELINES

Ask The Expert: Q&A

This month's installment of "Ask the Expert" has been contributed by Marianela Peralta, a Shareholder in Littler Mendelson, PC's Washington, DC office. She received her Bachelor's Degree from Georgetown University and her J.D. from the University of Pittsburgh School of Law. Ms. Peralta represents employers on a wide range of employment law matters.

Q: *In the wake of the American Recovery and Reinvestment Act of 2009 (ARRA) what kinds of contract-related restrictions or wage-related obligations do companies who do business with the federal government have?*

A: Any ARRA-funded construction project mandates the payment of prevailing wages pursuant to the Davis-Bacon Act (DBA). Unlike the regular minimum wage requirement, prevailing wages include a basic wage rate as well as fringe benefits such as medical and life insurance, sick leave insurance, vacation, holiday pay and training. There are general and project wage determinations. If there is no local prevailing wage, then the Department of Labor (DOL) issues a project wage determination.

Which contracts are subject to the DBA? The DBA applies to contracts for construction, repair or alteration of a public building or public work to which the federal government or the District of Columbia is a party and whose value exceeds \$2000. The DBA now extends the prevailing wage obligations to projects stemming from legislative acts that involve funding through grants, insurance loans, and loan guarantees. For example, if a company enters into a contract with a state, and some of the money for the project comes from the Department of Transportation, then the DBA applies.

Who must be paid a prevailing wage? All laborers and mechanics (*e.g.*, workers who use

tools or who perform the work of a "trade") must be paid a prevailing wage. This includes apprentices, trainees, helpers and watchmen and guards who are employed directly on a work site — the physical location where the work is being performed. A construction laborer or mechanic working on the covered project is considered employed on the project for DBA purposes regardless of any contractual relationship alleged to exist between the contractor and the worker. This means that even independent contractors must be paid prevailing wages.

What is the liability for nonpayment of prevailing wages? The DOL will look at a company's history of compliance or a pattern of repeated violations, whether a contractor has made full restitution, and whether policies have been put in place to guarantee future compliance. The DOL has publicly stated that payment of the restitution will no longer be a basis for avoiding sanctions. Possible sanctions include:

- **Termination of work.**
- **Withholding of accrued payment.**
- **Debarment.** Contractors and subcontractors may be excluded from further government procurement and non-procurement programs as well as other federal government programs for three years. Very importantly, a prime contractor is *jointly and severally liable* for underpayments by a subcontractor if the underpayment would violate the prime contract; and
- **Litigation.** While the DOL is responsible for enforcing the various components of contracting legislation discussed here, many states have "mini" or state versions of the federal prevailing wage statutes. Therefore, a company that violates the prevailing wage provisions can find itself embroiled in litigation on both state and federal administrative and judicial fronts.

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What can an employer do to minimize its risk?

- *Determine* whether the DBA or related acts apply to your project and whether your state has a “Mini Davis-Bacon Act,” which can be more stringent than the federal version (e.g., California).
- *Confirm* that you have the correct prevailing wage determination for your project *before* you submit the bid and execute a contract. Wage determinations last for 180 days. If the bidding process is taking longer than that, confirm you have the most accurate information prior to committing to the bid.
- *Train managers and payroll staff* to properly determine what work will be subject to the payment of prevailing wages and that the employees are properly paid for overtime.
- *Train subcontractors* on the payment of prevailing wages. Include contract language that permits termination of a contract and indemnification should a subcontractor incorrectly pay employees.
- *Conduct periodic audits* to ensure compliance with the contract’s payment and reporting requirements.