Chapter 11 INTERPRETATIONS AND APPLICATIONS

11-1 **Introduction.** This chapter provides additional guidance involving interpretations related to the application, administration, and enforcement of federal prevailing wage requirements.

See also the U.S. Department of Labor's (DOL) *Field Operations Handbook*, specifically Chapter 15, which provides DOL's interpretations of statutory provisions pertaining to the Davis-Bacon and Related Acts (DBRA) and the Contract Work Hours and Safety Standards Act (CWHSSA). It is available at https://www.dol.gov/agencies/whd/field-operations-handbook.

For ease in reference, in this chapter DBRA refers to Davis-Bacon requirements applicable via HUD Related Acts and maintenance wage rate decisions (MWD) refers to prevailing wage rates determined or adopted by HUD for covered maintenance work.

11-2 **Business owners.** A laborer or mechanic who owns at least a *bona fide* 20% equity interest in the enterprise in which employed, regardless of the type of business (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a *bona fide* exempt executive, meaning they are not subject to DBRA/MWD wage requirements.

A person with a 20% or greater interest in a business who is required to work long hours, makes no management decision, supervises no one, and has no authority over personnel, *does not* qualify for the executive exemption.

11-3 **Clean-up work.** Cleaning work performed *during* construction and as a condition precedent to the acceptance of the completed project is subject to DBRA. Examples include window washing, removal of debris and sweeping. In the absence of a specific classification and wage rate for cleaning on the applicable wage decision, or if a request for additional classification and wage rate is not approved by DOL, cleaners shall be classified as Laborers (general) and paid the associated rate on the applicable wage decision.

Cleaning performed *after* completion and acceptance of the construction work in preparation for occupancy and which is not performed under the contract for construction is not subject to DBRA.

11-4 **Contract award.** Where relevant for DBRA/MWD purposes, a contract shall be deemed awarded in accordance with the following guidelines:

A. The date the contract is executed.
B. The date of the adoption of a resolution or ordinance authorizing the award.

11-5 **Convict labor.** Using convict/prison inmate labor on DBRA/MWD-covered work is not prohibited. However, there is no exemption from DBRA/MWD wage requirements for convict/prison inmate labor. Some exemptions from federal prevailing wage

requirements (DBRA/MWD) may be operable in certain cases. For example, some federally assisted projects may not meet a threshold for DBRA/MWD applicability. The convict/prison labor participants may qualify as exempt force account employees (see paragraph 11-11 *Force account labor* below) or as *bona fide* volunteers. (See also Labor Relations Letter LR-92-01.)

11-6 **Deductions for income taxes.** HUD does not enforce or attempt to provide advice regarding employer obligations to make deductions from employee earnings for income taxes. However, HUD may refer to the Internal Revenue Service or other responsible agency(ies) copies of certified payroll reports that show wages being paid in gross amounts (i.e., without tax deductions) for its review and action it deems appropriate.

11-7 **Demolition.** In most cases, demolition standing alone is not subject to DBRA *unless* it will be followed by DBRA-covered construction work. This remains true whether the demolition is financed or assisted with HUD program funds or with other (non-HUD) funding. There are very few exceptions. (See also Labor Relations Letter LR-09-01.)

A. **DBRA-covered demolition work when the character of the follow-on construction is known.** When demolition is covered by DBRA, it is considered "site preparation" and takes on the character of the construction work that will follow. Some examples include:

1. The demolition of a 16-story apartment building that will be followed by the construction of 2-story townhomes is residential construction and subject to a residential wage decision.
2. The demolition of a 4-story apartment building that will be followed by the construction of a community center is building construction subject to a building wage decision.
3. The demolition of an office building that will be followed by the construction of a parking lot is highway construction subject to a highway wage decision.

B. **DBRA-covered demolition work when the character of the follow-on construction is *not* known.** In some circumstances, it may be known that the demolition will be followed by DBRA-covered construction work, but the character of the follow-on construction is not known at the time the demolition will be performed. For example, it is unknown at demolition whether the follow-on construction will involve residential construction (e.g., low-rise apartment buildings of four stories or less) or building construction (e.g., a high-rise apartment building of five or more stories). In such cases, a heavy wage decision applies.

C. **Inapplicability of MWD rates.** Demolition is not considered maintenance. Therefore, MWD rates do not apply to demolition in any circumstance.

11-8 **Employee status.** Every person performing the work of a laborer or mechanic in construction or maintenance work covered under DBRA/MWD wage standards is *employed* regardless of any contractual relationship alleged to exist between the contractor and such person. This status, as defined here, is pertinent for prevailing wage purposes *only*. This status regarding Federal prevailing wage requirements does not imply any other obligation on the part of the associated "employer".

11-9 **Excluded professions.** Employees performing work that is primarily executive, professional, managerial, supervisory, or clerical in nature are not "laborers and mechanics" for the purposes of DBRA/MWD prevailing wage requirements. (See also paragraph 11-14, *Laborers and Mechanics*.)

11-10 **FHA Section 212(a) – Off-site work and DBRA Applicability**. Under Section 212(a) of the National Housing Act, both the location and the timing of the work affect the applicability of Davis-Bacon wages to FHA-insured projects. Off-site work, which is construction work outside the boundaries of the property that is secured by the mortgage being insured, does not typically require Davis-Bacon wages. Work that is done on the secured property requires Davis-Bacon wages regardless of whether the work is financed through the FHA-insured mortgage or is paid from sources outside the mortgage. However, work prior to application for FHA insurance (or pre-application in the case of Early Starts) would not typically require Davis-Bacon wages. This would include demolition or remediation done prior to application or pre-application. Where the MAP Guide is applicable, the application for insurance is considered filed for Davis-Bacon purposes once a Multifamily Accelerated Processing (MAP)-approved lender has submitted all documents required by the MAP Guide to HUD.

11-11 **Force account labor.** In some instances, a government agency (state or political subdivision thereof) may perform DBRA-covered construction work with its own employees. These governmental employees are referred to as "force account" labor. Force account workers are excluded from DBRA coverage. This exclusion stems from the language of most DBRA statutes such that the covered classes of workers are those employed by "contractors and subcontractors" and the concept that governmental agencies are not considered "contractors" or subcontractors" within the meaning of these DBRA statutes.

A. **Non-force account labor.** Any portion of the DBRA-covered work that is not performed with excluded force account labor is subject to DBRA and other labor standards in the usual manner.

B. **Non-excluded force account labor.** Certain HUD related acts (i.e., U.S. Housing Act of 1937, Native American Housing Assistance and Self-determination Act of 1996) require the payment of prevailing wages to *all* laborers and mechanics without stipulation that such laborers and mechanics are employed by contractors and subcontractors. Under these statutes, the governmental agency employees must be paid in accordance with the applicable DBRA/MWD requirements.

11-12 **Fringe benefits.** An employer may take credit for contributions made for bona fide fringe benefits regardless of whether any fringe benefits are included on the applicable DBRA/ MWD wage decision. Employees who are excluded from a fringe benefit plan(s) for any reason, or for whom the cash wages paid and contributions fail to meet the total of the applicable prevailing wage, must receive any difference in cash wages. Employers must make contributions to fringe benefits plans on a regular basis, i.e., at least quarterly.

A. **Conventional fringe benefit plans.** Conventional plans are ordinarily those that are common to the construction industry and which are paid directly to the employees in cash or into a fund, plan or program (*aka* "funded" plans). Employers may take credit for contributions made under such conventional plans without requesting the approval of DOL under 29 CFR § 5.5(a)(1)(iv).

B. **Unconventional fringe benefit plans.** Where a fringe benefit is not of the conventional type described in the preceding paragraph (A) (e.g., unfunded plans), DOL must determine whether the fringe benefit is bona fide for DBRA purposes (29 CFR § 5.5(a)(1)(iv)); similarly, HUD must determine whether the fringe benefit is bona fide for MWD purposes. Employers must produce evidence of such "bona fide" determination in order to take credit for unconventional fringe benefits against the applicable DBRA/MWD wage rate.

11-13 **Helpers.** The term helper is defined for DBRA purposes at 29 CFR § 5.2(n)(4). Helpers are permitted on a DBRA or MWD contract only if the helper classifications are specified in the applicable DBRA or MWD wage decision or additional classifications and wage rates are approved by DOL (DBRA) or HUD (MWD).

11-14 **Laborers and mechanics.** The terms "laborer" and "mechanic" generally include workers whose duties are manual or physical in nature as distinguished from mental or managerial, and include apprentices, trainees, and helpers. These terms *do not* apply to workers whose duties are primarily administrative, executive, professional, or clerical, rather than manual. Generally, *"mechanics"* are considered to include any worker who uses tools, or who is performing the work of a trade. All laborers and mechanics must be paid the applicable DBRA/MWD wage rate *regardless of any contractual relationship which may be alleged to exist*.

11-15 **Material suppliers.** The manufacturing and delivery to the work site of supply items such as sand, gravel, and ready-mixed concrete, when accomplished by a bona fide material supplier operating facilities serving the public in general, are not subject to DBRA/MWD requirements.

11-16 **Multiple work classifications.** Employees who perform work in more than one work classification may be paid no less than the applicable prevailing wage rate for actual hours worked in each classification, *provided* that the work performed is capable of separation into more than one classification and that time records are maintained to accurately reflect the actual hours worked in each classification involved. Tasks which are normally performed as part of the fundamental trade classification are not separable.

11-17 **Owner-operators of power equipment.** Owner-operators of power equipment will often enter into contracts for services at an hourly rate including both "man and machine". These hourly rates will include items over and above labor, such as equipment maintenance, fuel, liability, etc. Due to the difficulty of ascribing costs to non-labor costs vs labor costs, HUD and its program clients may accept a combined "man and machine" hourly rate on the responsible employer's certified payroll *provided* that the combined hourly rate may not be less than the applicable wage rate for the operator of the respective power equipment.

11-18 **Owner-operators of trucks and other hauling equipment.** DOL administrative policy holds that DBRA and CWHSSA are not applied to bona fide owner-operators of trucks who are independent contractors. For the purposes of these Acts, certified payrolls do not need to include hours worked or wage rates paid, only the name and work classification "Truck Driver - owner-operator". This policy does *not* pertain to owner-operators of power equipment such as bulldozers, backhoes, cranes, drilling rigs, etc.

11-19 **Payroll certification.** For the purposes of DBRA payrolls, only an officer of the business or a person authorized in writing by an officer of the business may certify required weekly payroll reports. Signatures must be in ink. Signatures other than in ink, e.g., in pencil, by signature stamp, copies, and facsimiles, are not acceptable. (See Labor Relations Letter 96-01.)

A. **Owners of businesses working with their crew.** HUD permits owners of businesses working on the same job site with their crew to certify to the payment of their own prevailing wages in conjunction with the owner's certification that all of their employees have likewise received no less than the applicable prevailing wages. In such cases, the payrolls need only to include the owner's name, work classification (including the designation as "owner"), and the daily and total weekly hours worked. The rate(s) of pay or amount(s) earned are not required for such owners.

B. **Owners of businesses that do not work with a crew.** HUD does not permit non-exempt owners of businesses who work alone (e.g., self-employed subcontractors, sole proprietors) to certify to the payment of their own wages. Such owners must be carried on the certified payroll report of the responsible employer, i.e., the entity under whose auspices the person(s) is engaged on the covered work.

11-20 **Piece rate/piece work employees.** Employees whose earnings are calculated by the amount of work produced (rather than hours worked) must receive no less than the applicable DBRA/MWD wage rate based upon the hours of work performed. The employer must divide the piece rate earnings by the actual hours worked to determine the "effective" hourly rate. The effective hourly rate must be calculated for each week's earnings and must be no less than the applicable prevailing wage rate. It does not matter whether the effective hourly rate changes from week to week as long as the result is at least as much as the prevailing wage rate. If the effective hourly rate is less than the applicable prevailing wage rate, the employee must be compensated at the prevailing wage rate for all

hours worked.

11-21 **Proper work classification.** Questions on the proper classification for laborers or mechanics performing various types of work are resolved based on area practice. It is immaterial whether the contractor or subcontractor is union or non-union; however, it is relevant whether the prevailing wage rate(s) on the applicable wage decision for the classification(s) in question are based on union agreements or are based on open shop (non-union) wage data.

A. **Prevailing wage rates based on union agreements.** If the prevailing wage rates for the classifications in question are based on union agreements, the prevailing practice concerning work performed in those classifications is that practice observed by contractors and subcontractors signatory to the agreements. Therefore, unless there is a jurisdictional dispute between the craft unions, the duties ascribed to any job classification will be the same as those outlined in the appropriate collective bargaining agreements. If the collective bargaining agreements are silent on the issue, the local unions involved must be consulted.

B. **Prevailing wage rates based on open shop data.** In areas where the prevailing wage rates on the applicable wage decision are based on open shop data, the prevailing practices of open shop contractors in the area are deemed to be area practice.

11-22 **Relatives.** There are no exceptions made in the enforcement of DBRA/MWD on the basis of family relationship for relatives performing the work of laborers or mechanics. Such relatives must be paid no less than the prevailing wages applicable to the type of work performed and must be included on associated payroll records.

11-23 **Repair employees.** An employee of an equipment rental dealer or other company that performs repair work on-site is subject to DBRA/MWD if the employee performs more than an incidental amount of work on site.

11-24 **Site of the work.** The site of the work is limited to the physical place or places where the construction called for in the contract/scope of work will remain when the work has been completed *and* any other site where a significant portion of the building or work is constructed, provided that such site(s) is established specifically for the performance of the contract or project. (See also *DOL Field Operations Handbook, 15b04*.) For FHA projects, off-site is defined in paragraph 11-10.

A. **Dedicated support locations.** Batch plants, borrow pits, job headquarters, tool yards, fabrication facilities, etc., are part of the "site of the work" provided they are dedicated *exclusively* or nearly so to the contract/project, and are *adjacent or virtually adjacent* to the site of the work.

B. **Established support locations.** Excluded from the site of the work are established support locations such as permanent offices, branch plants, fabrication plants, tool

yards, etc., of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular project/contract. Also excluded are similar locations of a commercial or material supplier established in the proximity of, but not on, the active site work prior to the opening of bids, even if dedicated exclusively to the covered project for a period of time.

C. **Maintenance (MWD) work.** Site of the work is generally not subject to interpretation as it pertains to maintenance work subject to MWD because maintenance work is designed to sustain physical elements already on-site.

11-25 **Start of construction/work.** Start of construction or work, as those terms are used with labor standards/prevailing wage requirements, means the beginning of initial site clearance and/or other preparation provided that those activities are pursued diligently and are followed with minimal delay by other construction/work activity.

11-26 **Final Closing and Warranty Work.** Final closing is defined as all work is complete, the final Trip Report (form HUD-95379) at 100% construction is completed, and the final payout from the FHA loan has occurred. In situations where work needs to occur under a warranty and the last disbursement has not occurred, the work is covered under Davis-Bacon. Otherwise, it is considered repair and does not meet the DOL definition of purpose, time, and place, as per AAM 130.

11-27 **Statute of limitations.** There is no statute of limitations relative to administrative actions correcting violations of DBRA/MWD labor standards provisions.

A. **Portal to Portal Act.** The Portal to Portal Act (PA) applies to the Davis-Bacon Act. It prevents the commencement of any court suit for unpaid straight-time wages more than two years after the performance of the work (three years in the case of willful violations), where such actions are judicially determined to be permissible under the law.

The PA does not apply to federally assisted projects (i.e., the Related Acts) in which DBRA wage rates are required to be paid. State statutes of limitations apply to such project or projects in private actions where they are judicially determined to be permissible under the law. The federal six-year statute of limitations applies in government enforcement actions (28 USC § 2415(a)).

B. **Corrective administrative actions.** Administrative actions to correct violations of the DBRA/MWD, including actions initiated through the Administrative Law Judge hearing procedures, are not subject to time limits.

11-28 **Summer youth employment.** Youth (ages 16 to 22 years old) who are bona fide students and part of a bona fide youth opportunity program may be employed on DBRA/MWD projects on a temporary basis during the summer months and may be paid less than the applicable prevailing wage rate. Such employment must be in accordance with statutory age and minimum wage requirements. The provisions of the program, including the rates

of pay, must be documented in writing. (See also *DOL All Agency Memoranda Nos. 71 and 96*.)

A. **Bona fide youth opportunity program.** A bona fide youth opportunity program is that which is sponsored by, for example, union and management or a governmental or community group. Sponsorship by an individual employer for only one particular project would not qualify as a bona fide program.

B. **Supervision.** Competent supervision must be provided to all youth employed on the project. Supervisors must hold journeyman status in their respective trade. The ratio of youth to designated supervisors should be no greater than four to one.

C. **Reporting.** A copy of the program provisions must be provided to the LSS assigned to the jurisdiction involved, and to the DOL Wage and Hour Administrator.

11-29 **Supply and installation contracts.** Installation work performed in conjunction with an equipment supply contract is subject to DBRA wage requirements where it involves more than an incidental amount of construction activity. Whether installation work involves more than an incidental amount of construction activity depends on the specific circumstances of each case. Factors requiring consideration include the nature of the prime contract work; the type of work performed by the employees installing the equipment (e.g., the techniques, materials and equipment used and the skills required for its performance); the extent to which structural modifications to buildings are needed to accommodate the equipment (e.g., widening entrances, relocating walls, installing wiring); the cost of the installation work, either in terms of absolute amount or in relation to the cost of the equipment and the total project cost.

11-30 **Transportation, lodging, and board expenses.** An employer that chooses to provide or compensate its employees for transportation, lodging or board expenses may not take credit for such expenses against the applicable DBRA/MWD prevailing wage rates.

11-31 **Truck drivers.** DBRA applicability to truck drivers is based on the definitions of "construction, prosecution, completion, or repair" and "site of the work" at 29 CFR § 5.2.

A. **Truck drivers covered by DBRA:**

1. Employees of a contractor or subcontractor for time spent working on the site of the work.
2. Employees of a contractor or subcontractor for time spent loading and/or unloading materials and supplies on the site of the work, if such time is not *de minimis* (see B(3), below).
3. Drivers transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site.
4. Drivers transporting a portion(s) of the building or work between a site established specifically for the performance of the contract or project where a significant portion of such building or work is constructed and the

physical place(s) where the building or work called for in the contract/project will remain.

B. **Truck drivers *not* covered by DBRA:**

1. Material delivery truck drivers while off "the site of the work".
2. Employees of a contractor or subcontractor traveling between a DBRA-covered job site and a commercial supply facility while they are off the "site of the work".
3. Drivers whose time spent on the site of the work is *de minimis*, such as only a few minutes at a time to merely pick up or drop off materials or supplies.

11-32 **Volunteers.** Bona fide volunteers (defined for HUD programs at 24 CFR Part 70) are excluded from DBRA/MWD coverage. Such volunteers may receive payments for expenses or other nominal benefits or fees without losing "volunteer" status. Such payments, etc., cannot be tied to productivity, hours worked, or in any way be construed as wages. (See also 2-8, *Volunteers*.)

11-33 **Working foremen/supervisors.** Supervisory employees who spend 20% or more of their time performing the work of a laborer or mechanic in a workweek, must be paid no less than the applicable DBRA/MWD rate for the classification of work performed for all hours engaged in such work as a laborer or mechanic.

11-34 **Working subcontractors.** All persons performing the work of a laborer or mechanic, except *bona fide* business owners (described at 11-2), must be paid no less than the applicable DBRA/MWD wage rate for the type of work they perform. (See also 11-19, *Payroll certification*, and *Labor Relations Letter LR-96-01*.)

11-35 **YouthBuild.** The YouthBuild program is administered by the DOL. The YouthBuild Transfer Act authorizes DOL to provide grants for job training and educational activities for at-risk youths. YouthBuild participants receive a combination of classroom training, job skills development, and on-site training in the construction trades. Although the construction and rehabilitation of affordable housing is a major component of the YouthBuild training program, the focus is to prepare at-risk youth for employment. National training standards have been approved by DOL for local YouthBuild chapters. Local chapters may adopt these approved standards for their training programs. YouthBuild participants that are registered under such approved standards may be paid less than the journeyman's wage as provided by the standards. YouthBuild participants that are not registered under such approved and adopted standards must be paid at least the journeyman's wage on projects covered by Davis-Bacon wage requirements.