

FEDERAL LABOR STANDARDS

I. INTRODUCTION

A. Regulatory Requirements

Section 110(a) of the Housing and Community Development Act of 1974, as amended, requires all laborers and mechanics employed by contractors and subcontractors in the performance of construction work, financed in whole or in part with assistance received under this Act, to be paid prevailing wages in accordance with the **Davis-Bacon Act**, as amended.

Additionally, provisions of the **Contract Work Hours and Safety Standards Act** (CWHSSA) and the **Copeland Act** are applicable whenever Davis-Bacon Act requirements apply. Therefore, most recipients of Arkansas Community and Economic Development Program (ACEDP) assistance must comply with all three Acts whenever contractors and subcontractors are utilized.

Labor standards provisions are generally **not applicable** to the following activities:

- Purchase of equipment
- Installation of equipment, machinery and fixtures, **if incidental** to the contract
- Demolition, if construction does not follow. Demolition to permit construction of a new building will require payment of prevailing wages
- **Rehabilitation** of residential structures that will contain fewer than eight units when completed
- Utility connection contracts on private property (e.g., LMI hookups)
- Some types of force account labor. (The Arkansas Economic Development Commission must be notified prior to construction if force account labor is desired. The grants division will approve force account labor only in exceptional cases supported by documentation indicating that force account projects similar to those proposed have been performed by the grantee.) Specific questions regarding force account requirements should be referred to the grants manager assigned to the project.

B. Applicable Statutes

1. The **Davis-Bacon Act** (40 USC 276a-276a-5) requires that all mechanics and laborers employed in federally assisted contracts in **excess of \$2,000** are paid prevailing wages, including fringe benefits, for similar work in their locality. Other provisions of the Davis-Bacon Act require the following:
 - Employees must receive compensation on a weekly basis.

- Wage determinations and “Notice to All Employees Working on Federal or Federally Financed Construction Projects” (Form 93) must be posted in a prominent location at the job site.
 - Employees performing more than one job classification must be paid separately for **each** classification.
 - Violations of the Davis-Bacon Act may result in suspension of contractor payment until the violations are corrected or until enough funds have been withheld to pay employees wage restitution. Violations may also result in contract termination or debarment of the contractor or subcontractor.
2. The **Copeland "Anti-Kickback" Act** (40 USC 276c) applies to all contracts subject to Davis-Bacon requirements. This act requires that employers withhold only permissible deductions for bona fide benefits including taxes, deductions required by court decree, and withholdings authorized in writing by the employee (e.g., insurance). Other provisions of the Copeland Act require the following:
- Contractors and subcontractors must complete weekly payrolls (Form 92) and Statements of Compliance (Form 92).
 - Payrolls must be retained by the contractor and grantee for four years after project completion.
 - Violations could result in contract termination and criminal prosecution.
3. The **Contract Work Hours and Safety Standards Act** (CWHSSA) (U.S.C. 327-333), as amended, also applies to all contracts subject to Davis-Bacon requirements. This act requires workers be paid at least one and one-half times their basic rate of pay for any time worked in excess of 40 hours in one week. This requirement applies to all work during the week, not just work done on an Arkansas Economic Development Commission project.

Violations of CWHSSA make contractors liable for any unpaid wages and for liquidated damages to the United States in the sum of \$10 per incident per day. Intentional violations are a federal misdemeanor, punishable for each offense by a fine of not more than \$1,000 or by imprisonment for not more than six months, or both. Violations may also be grounds for contract termination.

C. **Responsibilities**

It is the responsibility of the **grantee**, as a condition of ACEDP funding, to ensure compliance with federal labor standards provisions during the course of the project. The grantee must develop a filing system for each construction contract in accordance with the Recordkeeping Chapter of this Administrative Procedures Manual. The Arkansas Economic Development Commission grants manager will provide technical assistance to grantees and administrative agencies conduct labor

standards compliance reviews and investigate complaints regarding labor standards matters.

All prime contractors are responsible for ensuring that all subcontractors they employ conform to **all** labor standards provisions including but not limited to

- Verification of eligibility to participate in federally-assisted contracts
- Timely submittal of weekly payrolls including a signed Statement of Compliance
- Payment of prevailing wages as listed on the wage determination
- Inclusion of federal labor standards provisions in subcontracts over \$2,000

To protect the personal privacy of employees, copies of weekly payrolls are not to be released to outside parties and may be withheld under Exemption Six to the Freedom of Information Act.

D. Types of Wage Determinations

A **wage determination** is a listing of wage rates and fringe benefits for various classifications of laborers and mechanics which the United States Department of Labor (DOL) has determined to be prevailing in a given area for a particular type of construction (e.g., building, heavy, highway or residential). A wage determination includes not only the original decision but also any subsequent decisions that modify, supersede, correct or otherwise change the rates and scope of the original decision. There are two types of wage determinations: general (area) determinations and project specific determinations.

General wage determinations are published by the DOL in *General Wage Determinations Issued Under the Davis-Bacon and Related Acts* or online and reflect wage patterns for particular types of construction in a given location. These determinations have no expiration date and are effective until modified or replaced by a superseded wage determination. Most ACEDP projects will be issued general wage determinations.

Project-specific wage determinations are issued by DOL, at the request of the Arkansas Economic Development Commission, for individual projects or wage rates located in areas not covered by general determinations. These determinations are applicable to the named project only and are effective only for 180 calendar days from the date of issuance. If a project-specific wage determination is not used within the 180-day period, it is void and an extension to the expiration date or a new determination must be requested from the Arkansas Economic Development Commission. Any extension requests must be in writing and include a brief statement justifying why the extension is necessary, proper, and in the public interest to prevent undue hardship or to avoid serious delay in completion of the project. The grants division will notify the grantee, after obtaining a response from DOL, if the request for extension is approved or denied. If the request for extension is denied, a new wage determination must be issued for the project.

Wage determinations can be changed by the issuance of modified or superseded wage determinations.

Modifications of general and project specific wage determinations are issued periodically by DOL to update certain information in the original determination. Usually, a modification will amend part of the wage determination and will not require replacement of the entire determination. If a grantee's wage determination is modified prior to bid opening, the modified determination will apply to the project unless the modification is published less than 10 days prior to bid opening and there is not time to notify all bidders before the opening. **Superseding** wage determinations are usually issued annually to update provisions of determinations. Supersedes wage determinations will supersede or replace existing wage determinations entirely.

II. LABOR STANDARDS ACTIVITIES

A. Obtaining a Wage Determination

To request a wage determination, the grantee must complete an SF-308, "Request for Determination and Response to Request" (**Form 90**). It is important that this request be submitted early enough to ensure that the wage determination is incorporated into the bid specifications submitted to the Arkansas Economic Development Commission for approval. General wage determinations should be processed by the grants division within three calendar days. Project-specific wage determinations will require a processing time of at least 15 days.

Grantees may also check wage determinations online at this website: <http://www.wdol.gov>. If checked online, the grantee should fax or mail a copy of the wage determination and the SF-308 from to the Arkansas Economic Development Commission grants manager.

The SF-308 Form must:

- Be fully completed except for the section marked "For Department of Labor Use Only".
- Include a concise description of the work for which the wage determination is being requested.
- List all classifications needed; however, **check only those classifications anticipated**. An additional page may be attached, if necessary, to complete a description of work or to list additional crafts.
- Indicate the type(s) of work, "building, residential, highway or heavy," applicable to the project. The following guidelines should be referenced to make this decision:

Building Construction involves the construction of sheltered enclosures (whether or not inhabited) with walk-in access for the purpose of housing persons, machinery, equipment or supplies and the installation of utilities and equipment above and

below the grade level of such structures. Examples include alteration/addition/new construction of buildings, erection or assembly of buildings and plants, and construction of water and sewage treatment plants (buildings only).

Residential Construction involves the construction, alteration, or repair of single family houses or apartment buildings no more than four stories high and may also include site work and provision of parking areas, utilities, streets and sidewalks. Examples include town or row houses, apartment buildings (four stories or fewer), single-family houses, mobile home developments, and married-student housing.

Highway Construction involves construction, alteration, or repair of roads, streets, highways, runways, taxiways, alleys, trails, paths, parking areas, and other similar projects that are not incidental to building or heavy construction. Examples include roadbeds, shoulders, highway bridges, curbs, concrete pavement including sidewalks, parking lots, and runways.

Heavy Construction involves construction of projects that cannot be classified as "building," "residential," or "highway." Examples include canals, breakfronts, dams, drainage projects, flood control projects, land reclamation, levees, reservoirs, sewage collection and disposal lines, water mains, and water and sewage treatment plants (other than buildings).

B. Ten- and Ninety-Day Verifications

Ten days prior to bid opening, the grantee must verify that the applicable wage determination has not been modified or superseded. The grantee should contact the grants manager to verify that the wage determination is still valid and acknowledge the verification with a memorandum to the project labor file. Grantees may also verify the wage determination online, then forward verification to the Arkansas Economic Development Commission grants manager.

If a contract has not been awarded within 90 days after bid opening, the wage determination must again be verified as discussed above. **Any** modified or superseding wage determination issued will apply to the contract.

C. Verification of Contractor Eligibility

In accordance with the General Service Administration's (GSA) Office of Government wide Policy, Cities, Counties, Contractors and Professional Service providers **MUST** be registered with the System for Award Management (SAM) **prior to obtaining a contract** and/or agreement with a project receiving Federal and/or State funding. The System for Award Management (*previously known as CCR-Central Contractor Registration*) is a database that is used to collect, validate, store and disseminate data in support of Federal and State agency contracts and assistance awards.

SAM registrants must provide basic information relevant to procurement and financial transactions in order to complete their registration. Registrants must update or renew their registration at least once a year to maintain an active status. An active status must be maintained for the life of the contract and/or agreement.

In order to register with SAM, you must have a Data Universal Numbering System (DUNS) number. There is **NO CHARGE** for obtaining a DUNS number or for registering in SAM. A DUNS number can be obtained at www.dnb.com or call 800-424-2495. SAM has a **FREE** online registration process that can be accessed at www.sam.gov.

Verification of the City's, County's, Contractor's and/or Professional Services Provider's active SAM registration must be obtained prior to execution of all agreements and contracts. If you have questions or need additional information, please go to the SAM website or call the Federal Service Desk at 866-606-8220. You may also contact your Grant Administrator for additional assistance.

NOTE: Verification that you are registered and active in SAM.gov MUST be presented at the Pre-Construction Conference or the Notice to Proceed will not be issued.

D. Obtaining Additional Classifications

If, after bid opening or at any time during construction activities, it is found that a class of laborer or mechanic that is not listed in the determination will be employed on the project, the grantee must request that such laborer or mechanic be classified for inclusion in the wage determination. Requests for additional classifications cannot be submitted until **after** bids have been opened.

To request additional classifications, the grantee must complete the "Report of Additional Classification(s) and Rate(s) Form" (Form 91) according to the instructions provided and submit it to the Arkansas Economic Development Commission grants manager assigned to the project. Because the DOL must define the prevailing rate(s) for the additional classification(s), grantees should allow 30 or more calendar days for a response to this request.

Additional classifications will be forwarded to the grantee who must ensure that they are incorporated as part of the wage determination applicable to the project. Contractors will be responsible for payment of wage restitution (see discussion below) to unclassified or misclassified employees whose rates of pay are affected by the additional classifications.

E. Preconstruction Conference

A preconstruction conference attended by the grantee, the Arkansas Economic Development Commission, the grantee's administrator, architect/engineer, other funding agencies (if applicable) and all prime contractors and available subcontractors must be conducted prior to issuance of the Notice(s) to Proceed.

One of the major purposes of the preconstruction conference is to discuss labor compliance requirements with all contractors and subcontractors subject to federal labor standards provisions at the same time in order that all questions and compliance issues are addressed before construction on the project commences.

Each labor standard topic discussed must be documented in the Preconstruction Conference Report, consistent with standards defined in the Construction Management Chapter of the Administrative Procedures Manual. A copy of this report, with a list of conference attendees, must be submitted to the Arkansas Economic Development Commission **no later than 10 days after the conference is conducted.**

The following information should be part of the discussion concerning labor standards; although actual time spent discussing such aspects can be based upon the contractor's experience with compliance:

1. All contractors and subcontractors with contracts and/or subcontracts, in excess of \$2,000, are subject to Davis-Bacon and Related Act requirements. A copy of the Federal Labor Standards provisions is included in the contract specifications.
2. All contractors and subcontractors subject to the Davis-Bacon Act must pay all laborers and mechanics at least the prevailing wages listed on the wage determination issued for the project. The wage determination is included in the contract specifications.
3. Weekly payrolls must be completed by every contractor, subcontractor and lower-tiered subcontractor subject to federal labor standards provisions. It is the responsibility of the prime contractor to review **all** subcontractor payrolls to ensure federal labor standards compliance. If no work is performed on the project during a given workweek, the contractor/subcontractor may either submit a payroll form with the notation, "no work performed," or submit a letter to that effect. All payrolls, including those showing no work, must be numbered sequentially consistent with the number of weeks since the award of the contract. "Week one" will always be the first week after issuance of the Notice to Proceed.
4. Contractors are urged to use the Sample Payroll and the Statement of Compliance (Form 92); however, they may use other payroll forms as long as all

required items of the Sample Payroll are included and if a weekly statement is submitted containing the **identical** wording contained on the Statement of Compliance.

5. Bona fide subcontractors with established businesses must list on certified payrolls all personnel engaged in contract work, including themselves if they perform construction work. Subcontractors with no other employees who maintain that they are subcontractors must be listed on the prime contractor's payroll and compensated at wage rates not less than the prevailing rate for the type of work performed regardless of any contractual relationship alleged to exist between themselves and the contractor.

Subcontractors who do employ other workers on the project may submit payrolls including themselves as long as a wage classification for their crafts is listed and the effective hourly rate paid to themselves is not less than the prevailing rate for that craft on the wage determination. Payrolls must also include the hours worked and provide the owner's name, address and the last four digits of the social security number. Self-employed individuals who do not prove to be bona fide subcontractors will be considered employees of the prime contractor.

If there is any doubt as to the bona fide nature of self-employed subcontractors who have no other employees, the following questions should be asked:

- Do the subcontractors have a license, registered trade name and telephone listing?
- Do the subcontractors have liability insurance or a subcontractor's bond?
- Do the subcontractors have a Federal Tax Identification Number?

Any of this information **plus** a signed contract containing the federal labor standards provisions will be sufficient to establish that they are bona fide subcontractors.

6. The grantee should require that all payrolls be submitted within a specified time frame. It is recommended that payrolls be submitted within seven working days after the end of the payroll workweek.
7. Payroll records must be retained by the grantee and contractor for three years after completion of the project. The payroll records must be available at all times during the retention period for inspection by representatives of the Arkansas Economic Development Commission, HUD, and the DOL.
8. The grantee must ensure that the project wage determination is posted with the "Notice to All Employees Working on federal or Federally Financed Construction Projects" at the site of the work in a prominent and accessible place where it can be easily read by all workers. It is suggested that on projects covering large areas, these posters be placed at more than one location. A sample of the notice is provided as Form 93.

9. All contractors and subcontractors are required to withhold from their employees all deductions required by state and federal law. Employers must retain W-2 or 1099 forms for all employees and provided them, upon request, to the Arkansas Economic Development Commission, HUD or the DOL.

F. Use of Apprentices and Trainees

Apprentices and trainees may be employed on ACEDP projects at less than Davis-Bacon wages under certain circumstances. **Apprentices** may be paid at less than the prevailing wage for the craft only when they are (a) employed and individually registered in a bona fide DOL-approved apprentice program, or (b) employed in their first 90 days of probationary employment as apprentices who are not individually registered in the program but have been certified by the DOL as eligible for probationary apprenticeship employment. The contractor must submit a copy of the apprenticeship papers with the first payroll on which that worker appears. The following requirements pertain to the use of apprentice workers:

- The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor's entire work force under the registered program.
- Workers listed on a payroll at an apprentice wage rate who are not trainees as defined below, or are not registered or otherwise employed as stated above, shall be paid the wage rate determined by the Secretary of Labor for the classification of work performed.
- The contractor or subcontractors may be required to furnish written evidence of the registration of their program to DOL, HUD, the Arkansas Economic Development Commission and/or the grantee.
- The wage rate paid to apprentices shall not be less than the specified rate in the registered program for the apprentice's level of progress expressed as a percentage of the journeymen's rate contained in the applicable wage determination.

Trainees may work at less than the prevailing rate for a craft if they are employed and individually registered in a DOL-approved trainee program. A copy of a trainee's papers must be submitted by the contractor with the first payroll on which the trainee appears. The following requirements pertain to the use of trainees:

- The ratio of trainees to journeymen shall not be greater than the ratio permitted under the plan approved by the Employment and Training Administration of DOL.
- Trainees must be paid not less than the rate specified in the approved program for their level of progress.
- The contractor or subcontractors may be required to furnish written evidence of the certification of their programs, the registration of the trainees, and the

- ratios and wage rates prescribed in that program to DOL, HUD, the Arkansas Economic Development Commission and/or the grantee.
- If the Employment and Training Administration withdraws approval of the training program, the contractor will no longer be permitted to utilize trainees at less than the applicable pre-determined rate for the work performed until an acceptable program is approved.

G. Monitoring Labor Standards Compliance

1. Contract Management

All contracts and subcontracts over \$2,000 must be reviewed to ensure that all federal labor standards provisions and the wage determination are included in the text of the contract. Inclusion by reference is unacceptable.

If a wrong wage determination was issued because the grantee did not accurately describe the project in the request for determination, the Arkansas Economic Development Commission may require a corrected, applicable wage determination. In cases of wrong determinations or failure to include a determination, the grantee must either terminate and reprocure the contract with the valid determination, or make the valid determination retroactive to the beginning of construction through supplemental agreement or change order. The contractor must be compensated for any increases in wages resulting from such a change.

2. Payroll Review

It is suggested that the first several weeks of payrolls for each contractor and subcontractor be comprehensively reviewed to ensure compliance with federal labor standards. Thereafter, spot checks can be performed to ensure compliance.

Force account laborers must be paid local minimum wages, and the grantee must maintain weekly payroll records on all permanent and temporary project force account workers. Force account payroll records must be part of the project labor files.

Reviewers should ask the following questions when reviewing the payrolls:

- Do the classifications listed on the payrolls exactly match classifications listed on the wage determination? Classifications such as "operator" are too broad and are therefore unacceptable.
- Are deductions calculated correctly and are they permissible?
- Is the compliance statement completed correctly and signed by the proper official?

- Are the payrolls numbered consecutively in accordance with the number of construction weeks?
- Do all payrolls include the employees' full names, addresses, classifications and the last four digits of the social security numbers? On subsequent payrolls, if a worker's name is reported exactly as on the first payroll and if no other worker has the same name, the social security number is not required and the address is not required unless the worker changes address. It is recommended that all payrolls contain the full name, address, classification, and the last four digits of the social security number for each employee on the payroll.
- Is there disproportionate employment within various classifications, particularly as it relates to laborers, helpers, apprentices or trainees? For illustration, the following circumstances might indicate problems, depending on the status and type of project:
 - Several laborers and only one journeyman electrician on a payroll submitted by the electrical subcontractor would normally indicate that laborers are performing electrical work.
 - A greater number of helpers (where permissible) than mechanics may indicate that helpers are performing the work of mechanics.
 - A greater number of apprentices than mechanics may indicate that all of the apprentices are not properly registered in an approved program.
 - Laborers are performing contract work involving heavy machinery.
 - Is overtime being paid for all work in excess of 40 hours per week and is this amount correct?
 - Do payrolls match information given by employees during interviews?
 - Are payroll computations accurate? A few scattered minor errors on payrolls may be ignored; however, if such errors are numerous, corrections must be requested and the contractor notified in writing to use more care in preparing payrolls. If small errors are ignored, they should be noted as such on the payroll.

3. Field "On-site" Inspections

Field inspections must be conducted at least once during the course of construction to ensure labor compliance. Field inspections will ensure that the wage determination and "Notice to Employees" are prominently posted and will enable access to workers for employee interviews. The person conducting the site visit on behalf of the grantee should document these findings in the labor file, i.e., verification that the wage rates and "Notice to Employees" were posted on the construction site.

4. Employee Interviews

During the course of construction, the grantee must conduct interviews of workers employed on the project. Interviews should be scheduled at various times throughout construction **because each job classification on the**

project must be represented. The number of interviews conducted will be determined by the size of the project, but must be comprehensive enough to determine that payroll records are accurate.

Employee interviews must be recorded on the "Record of Employee Interview for an ACEDP Project" (Form 94) or on a similar form approved by the Arkansas Economic Development Commission. Records of employee interviews are to be maintained with the labor compliance files and for convenience should be attached to the payroll for the week during which the interviews were conducted.

Employees currently employed may be interviewed during working hours on the job, provided the interviews can be properly and privately conducted on the premises at a time convenient to the employer and employees. In case of possible falsification of records, fear of reprisals, or intimidation, it may be more advisable to conduct the interview elsewhere, such as at the employees' homes, the grantee's office, or another suitable place. Interviewers must identify themselves to the worker and confirm their identity by showing some credentials. They must explain that the project is being constructed with federal assistance which requires that workers be properly paid and that the purpose of the interview is to determine whether the required wages are being paid. The employees must be informed that the information given is confidential, and their identities will be disclosed to the employer only with the employees' written permission. If a worker does not want to give particular information, the interviewer should not insist.

Employees and former employees may be interviewed by mail; however, at least one field inspection will need to be made to verify that the proper Federal labor standards documentation is prominently displayed.

5. Resolving Labor Standards Violations

If a payroll is found to be incomplete or inaccurate, the contractor must be instructed to submit additional or corrected information on a revised or supplemental payroll for the work week(s) in question. A revised or supplemental payroll must be numbered the same as the original payroll for that work week but must indicate the appropriate correction or revision number, e.g., "Payroll No. 8-Supplement No. 2". However, if the grantee has reason to suspect a payroll is false, a report must be immediately submitted to the Arkansas Economic Development Commission with a copy of the payroll.

It is not necessary to investigate discrepancies or questionable items if they do not indicate an underpayment to a worker. For example, if the applicable wage determination requires a minimum payment of \$5.00 per hour, and a worker states that he is being paid \$5.25 per hour, but the payroll shows

payment of \$5.30 per hour, the 5 cents difference between the worker's figure and the payroll figure does not indicate underpayment since both figures are higher than the minimum rate required by the wage determination.

If underpayments are discovered and the gross amount of the wages due a worker does not exceed \$10, the contractor or subcontractor may pay the money directly to the employee and report the payment on a supplemental payroll. If the gross amount exceeds \$10, then a statement from the employee showing payment was received with both sides of the canceled check must be sent to the Arkansas Economic Development Commission. If violations of \$500 or more occur, the grants division must receive an investigative report in accordance with labor standards requirements.

H. Wage Restitution and Liquidated Damages

Whenever any violation of labor standards occurs, appropriate corrective action documented in writing, must be taken. All documentation involving wage restitution and liquidated damages must be reported to the Arkansas Economic Development Commission by the submission of a completed Labor Standards Enforcement Report (Form 96).

1. Wage Restitution

When a worker has been underpaid, the contractor must make **wage restitution** to that worker for the amount of wages due. Prime contractors are responsible for proper payment to all laborers, mechanics, watchmen, and guards they employ and for workers employed by any subcontractors hired by them.

The construction contract between the grantee and the prime contractor must require that all subcontracts over \$2,000 contain clauses imposing applicable federal labor standards provisions. If the required provisions are not included in a subcontract, **the prime contractor alone** is responsible for underpayments and liquidated damages of its subcontractors.

When labor standards violations occur, whether at the contract or subcontract level, the grantee will require corrections from the prime contractor. It is then the prime contractor's responsibility to ensure corrective action by the subcontractor. It is also the prime contractor's responsibility to submit all required confirmation of labor violation corrections to the grantee on their behalf or its subcontractor.

Withholding of funds from the contractor (with prior notification) may be recommended by the Arkansas Economic Development Commission or HUD during the course of construction, if the contractor has failed to comply with the labor standards provisions within 30 days of a written request. Only an amount

considered necessary to ensure payment of back wages (and liquidated damages, if applicable) may be withheld. If it is necessary to estimate the withholding, prompt action must be taken to determine an exact amount and to return any excess to the contractor.

When wage adjustments are necessary, the grantee must notify the contractor in writing that payment of back wages is required. This notice should identify the underpaid workers, the correct job classification(s) and wage rate(s) dates when overtime rates were not paid, and the amount of underpayment owed. The contractor must be notified to make payment using a revised or supplemental payroll computing taxes, fringe benefits and overtime properly. The payroll will be submitted by the contractor, or by the subcontractor through the contractor, to the grantee. The revised or supplemental payroll must be numbered the same as the original payroll but must indicate "revision" or "supplement."

When wage restitution exceeds more than \$10 per worker, two-sided copies of canceled checks must be submitted by the contractor to the grantee to confirm payment to all affected workers. The grantee must notify the contractor of the withholding and again specify the identity of underpaid workers, correct job classifications and wage rates, dates when overtime rates were not paid and the amounts of underpayments owed. The contractor must ensure that required payments are made and confirmation of payment is provided to the grantee as described above.

Should the prime contractor fail or refuse to make the wage restitution as required within thirty calendar days, or should he/she dispute findings of wages owed, the grantee must notify the Arkansas Economic Development Commission of the situation on the Labor Standards Enforcement Report.

If the Arkansas Economic Development Commission determines it is appropriate for the grantee to disburse wages owed from the funds withheld from the contractor to the affected workers, then the following process must be followed:

- The grantee shall address a letter to each worker at their last known address asking for address and social security number confirmation to arrange for payment of additional wages found due. Upon receipt of a reply, the social security number must be checked with the one on file (see payrolls) in order to avoid delivery of a check to a false claimant.
- The grantee must compute the **net amount** of wages due. The net amount is the gross amount minus deductions for the Federal Income Withholding Tax and the employee's share of the Social Security (FICA) Tax. Other itemized deductions, which may be applicable (state, city, permissible deductions), shall also be computed prior to finding the **net** amount due.
- Once the total amount is determined, the grantee shall prepare a W-2 Form for the employee. The checks shall be mailed to the employee, together with

the employee's copy of the W-2 Form, registered or certified mail, return receipt requested.

- Upon receipt, the grantee must then prepare a check payable to the Internal Revenue Service for the total amount of wages withheld from employees receiving payment.
- A tax return, Form 941, Employer's Quarterly Federal Tax Return, must be prepared and forwarded with the check. The "taxpayer" must be identified on the return as

_____ (Grantee), Agent for _____ (Contractor)

on _____ (Project name and location)

In the transmittal letter to Internal Revenue Service, the following statement may be helpful:

"This return covers only the taxes withheld from wages due employees engaged in the construction of the identified Arkansas Community and Economic Development project. The wages were paid out of funds withheld from the contractor to assure payment of the wages. This return does not include the employer portion of FICA tax."

If all affected workers cannot be located and restitution made, either by the contractor directly or through use of withheld funds, enough funds must be reserved in the escrow account to pay those workers the wages owed. Efforts should continue to be made to locate workers; however, if they have not been located at grant closeout, the grantee must return the withheld funds to the Arkansas Economic Development Commission. A check made payable to the Department of Housing and Urban Development, and a Labor Standards Enforcement Report covering the remaining withheld funds must be submitted to the Arkansas Economic Development Commission before the grant will be closed.

2. Liquidated Damages

Whenever overtime violations occur, the contractor must make the necessary wage restitution; and may be required to pay liquidated damages to the U.S. Government. Liquidated damages are computed at the rate of \$10 per worker for each calendar day the worker was required or permitted to work in excess of 40 hours in a week without payment of overtime rates.

In every case where it is necessary to pay wage restitution or report any other wage violations, the grantee must submit to the Arkansas Economic Development Commission a Labor Standards Enforcement Report (Form 96) indicating the amount of, and the basis for computing damages. The information will be forwarded by the Arkansas Economic Development

Commission to the HUD Field Office with a recommendation as to whether to assess, waive, or reduce the computed damages.

Funds may be withheld from the contractor to cover the computed amount of liquidated damages until the HUD Field Office issues a decision regarding assessment. The withheld funds must be placed in an escrow account as described above. Withholdings for wage restitution and liquidated damages may be deposited in the same escrow account. Should HUD decide to assess liquidated damages, the contractor will be notified in writing by the HUD Field Office labor relations staff of such intent.

Contractors have 30 days to appeal the notice from HUD. If the contractor does not respond in the thirty-day period, or if HUD rejects an appeal, the liquidated damages will be assessed from the escrow account by check made payable to the Department of Housing and Urban Development. The check must be mailed to the Department of Housing and Urban Development, per the Arkansas Economic Development Commission instruction.

The contractor may ask for a waiver or a reduction of the assessment within 30 days of HUD's notice of intent to assess. It is the contractor's responsibility to respond with an explanation of the violations and reasons why a waiver or reduction should be considered. The **only** acceptable grounds for this are that the sum of the computed damages is incorrect or that the overtime violations were unintentional despite adequate care by the contractor.

The contractor may also appeal a final decision by HUD to the U.S. Claims Court within sixty days of the date of receipt of a certified letter assessing liquidated damages.

Should HUD approve a waiver or a reduction of the computed damages, either on the recommendation of the Arkansas Economic Development Commission or through appeal by the contractor, the grantee will be notified by the Arkansas Economic Development Commission that funds held in escrow may be released to the contractor.

If the grantee has reason to believe that violations that may be serious or not easily adjustable may be present, the Arkansas Economic Development Commission should be notified of the need for investigative assistance or a complete investigation. Examples of such might be:

- Complaints of a serious nature are received from employees, competing employers, or other interested persons. **Complaints and interview statements must be treated as absolutely confidential.**
- There are habitual and persistent violations of labor standards provisions indicating a general carelessness on the part of the contractor.
- The contractor delays in furnishing payrolls without satisfactory explanation.

- Discrepancies other than routine errors are discovered, such as payrolls indicating a five-day work week and employees stating they work six days per week.

I. Submitting Labor Standards Compliance Reports

All grantees are required to submit Semiannual Labor Compliance Reports (Form 95) to report the award of all prime contracts during the reporting period that are subject to federal labor standards compliance provisions. **This report will also document the number of labor standards complaints and investigations conducted during this period and will report all wage restitution and liquidated damages.** These reports are due no later than April 5 and October 5 semiannually.

J. Finalizing Labor Compliance

Upon completion of construction and before final payment to the contractor, the grantee must submit to the Arkansas Economic Development Commission a final Labor Standards Enforcement Report (Form 96) marked “final.” If there are unresolved labor compliance concerns at that time, the grants division will assist the grantee in determining how to correct such problems and whether the grantee will need to withhold funds from final payment to the contractor in order to ensure labor compliance.

III. GLOSSARY OF ADDITIONAL TERMS

This glossary contains additional miscellaneous information and guidance for grantees and project administrators involving interpretations of labor standards administration and enforcement.

Cleaning: Cleaning performed during construction is subject to prevailing wage provisions. If a specific wage rate for cleaning is not in the wage determination, cleaners must be paid the rate for laborers. Cleaning performed after the completion of construction in order to prepare for occupancy, which is not being done under the construction contract, is not subject to Davis-Bacon wage requirements.

Helpers: The use of "helpers" who use tools in assisting mechanics and who are paid below the minimum rates for mechanics is **ordinarily not proper**, since an apprentice or trainee is usually the person who is to perform this type of work during his/her training period.

Helpers may not be used unless they are listed on the applicable wage determination or an additional classification is granted by DOL.

Family Members: There are no exceptions made in enforcement of labor requirements on the basis of family relationships. Relatives who are performing work for the contractor must be paid the required wage for the classification of job performed and must be included on payrolls.

Employees of a Governmental Body: Wage requirements do not apply to employees of a state or a political subdivision of a state, but do apply to employees of a private contractor who is a subcontractor of the state or political subdivision. Employees of utilities are exempt if they are only extending existing service to the beneficiary property.

Employees Performing Work in More Than One Classification: A person employed as a laborer or mechanic and performing work in more than one job classification must be paid at least the required rate for the actual hours spent in each classification, provided the work is separable into more than one classification and that time records are kept according to the hours spent in each classification. Work which is normally performed as part of the mechanic's craft is not separable.

Laborers and Mechanics: The terms "laborers" and "mechanics" include those workers whose duties are manual or physical as distinguished from managerial. Generally, mechanics are considered to include any worker who uses tools or who is performing the work of a recognized trade.

Supply and Installation: The manufacture or furnishing of materials, articles, supplies, or equipment is not subject to prevailing wages unless conducted in connection with and at the site of the construction, or in a temporary plant set up specifically to supply the needs of the construction. If a supply contract, not otherwise covered, requires the supplier to install the product, the installation portion of the contract is subject to prevailing wage requirements except that if the installation involves only minor construction activity, it is not subject. For

example, installation of window shades or draperies would not require Davis-Bacon wage rates; however, installation of an elevator or boiler would.

Precutting and Prefabrication: Precutting or prefabrication of parts to be used in the construction does not require prevailing wages unless conducted in connection with and at the site of construction or in a temporary plant set up specifically to supply the needs of the construction.

Site of Work: The "site of work" regarding Davis-Bacon is limited to the physical place or places where construction called for in the contract will remain when work on it has been completed and to other adjacent or nearby property used by the contractor that can reasonably be included because of proximity.

Fringe Benefits: Fringe benefits that are common to the construction industry may be credited by the contractor if paid to the employee in cash or into a fund, plan or program on the employee's behalf. Where fringe benefits are not conventional or are "unfunded plans," the Department of Labor must determine if the fringe benefits are bona fide. Vacation and sick leave plans are generally unfunded, paid from the contractor's own account, and require DOL approval before a contractor may take credit for meeting the fringe benefit obligation.

Contributions to funded plans must be made at least quarterly. Employees who are excluded from funded plans must be paid fringe benefits in cash.

When cash paid and the per-hour contribution for benefits do not equal the total rate in the wage determination, the difference must be paid the worker in cash. Fringe benefits must be paid for straight time and overtime; however, fringe benefits are not included when computing time and a-half for overtime.

Working Foreman/Superintendents: Working foremen or superintendents who devote more than 20 percent of their time during a work week to mechanic or laborer duties must be paid at least the applicable rate for those hours.

ACEDP Financing of Construction Work and Labor Provisions: The use of ACEDP funds for any of the following items is an example of financing of construction work, and Davis-Bacon wage rates will apply: construction loans or grants; payment for construction materials; payment for the cost of equipment whose installation requires prevailing wages; payment of interest, or part of the interest on a construction loan; payment of construction loan origination fees; ACEDP-funded "collateral" or "default" accounts established with the lending bank which receive no interest or less than interest payable on demand accounts.

IV. ARKANSAS ECONOMIC DEVELOPMENT COMMISSION LABOR POLICIES

- Force account labor is exempt from Davis-Bacon requirements; however, workers must be paid the local minimum wage and weekly payrolls must be kept. Force account projects still must be designed, supervised and inspected by a licensed engineer/architect.
- Contracts for utility hookup projects on residential property are exempt from Davis-Bacon requirements.
- It is the responsibility of the grantee to request wage determinations and inform the Arkansas Economic Development Commission of additional classifications at the time of the preconstruction conference and/or as soon as the classification is listed on a payroll.