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Chapter 15

DAVIS-BACON AND RELATED ACTS AND CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

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15a GENERAL AND STATUTORY PROVISIONS: DBRA/CWHSSA

15a00 Purpose and use of FOH chapter 15.

(a) This chapter supplements 29 CFR 1, 29 CFR 3, and 29 CFR 5 -7, pertaining to a group of statutes generally identified as the Davis-Bacon and Related Acts (DBRA) and the Contract Work Hours and Safety Standards Act (CWHSSA). Many related acts are listed in 29 CFR 1, Appendix A, and 29 CFR 5.1. The Davis-Bacon Act (DBA), the Copeland "Anti-Kickback" Act, CWHSSA, 29 CFR 1, 29 CFR 3, and 29 CFR 5 -7 are available at http://www.dol.gov/whd/contracts/dbra.htm or at http://www.wdol.gov/ in the Library.

(b) Under Reorganization Plan No. 14 of 1950 (64 Stat. 1267) the federal contracting or other administering agency has the primary responsibility for the enforcement of the DBRA/CWHSSA labor standards provisions included in its contracts. The Secretary of Labor (Secretary) has coordination and oversight responsibilities, including the authority to investigate labor standards compliance as warranted. Pursuant to the authority under the Reorganization Plan No. 14 of 1950, the Secretary has issued the regulations referenced in (a) to coordinate the administration and enforcement of DBRA/CWHSSA labor standards. All Agency Memorandum (AAM) No. 76, dated May 31, 1968 to agencies administering statutes referred to in 29 CFR 5, Subpart A, reflects an agreement between the DOL and the contracting agencies for administering the labor standards of DBRA/CWHSSA. AAM No. 118, AAM No. 129, and AAM No. 177 were subsequently issued to remind all contracting agencies of their labor standards enforcement responsibilities.

15a01 The Davis-Bacon Act.

This act applies to contracts in excess of $2,000 for the construction, alteration, and/or repair of public buildings or public works, including painting and decorating, where the United States (U.S.) or the District of Columbia (DC) is a direct party to the contract. The act requires all contractors and subcontractors to pay the various classes of laborers and mechanics employed on the site of the work on the contract the wage rates and fringe benefits determined by the Secretary to be prevailing for corresponding classes of employees engaged on similar projects in the locality. In addition, the act requires that certain labor standards provisions be specified in the contract awarded to the successful bidder (*see* 29 CFR 5.5 (a)). An applicable wage determination must also be included in the contract documents.

15a02 The Related Acts.

These are federal statutes which authorize federal assistance in the form of contributions, grants, loans, insurance, or guarantees for programs such as the construction of hospitals, housing complexes, sewage treatment plants, highways, and airports. Included in the language of these statutes are references to the DBA labor standards provisions and the requirement that laborers and mechanics be paid prevailing wage rates. Since Congress is continually enacting and amending legislation, the list of the DBRAs in the regulations may not be completely up to date. Consequently, it may be necessary to consult the regional office for verification of DBRA coverage.

15a03 The Contract Work Hours and Safety Standards Act.

(a) This act contains weekly (after 40 hours) overtime pay requirements and applies to most federal contracts which may require or involve the employment of laborers or mechanics,

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including watchmen and guards, and to which any agency or instrumentality of the U.S. or DC or a territory is a party. *See* FOH 15g. CWHSSA was amended by Pub. L. No. 99-145 (effective January 1, 1986) to eliminate the daily overtime provisions (AAM No. 143, December 23, 1985).

(b) Contracts for construction or services in excess of $100,000 are covered by CWHSSA. This act also extends to federally-assisted contracts subject to DBRA wage standards to which the federal government is not a direct party, except where the federal assistance is only in the nature of a loan guarantee or insurance.

(c) Contracts exempt from this act are discussed in FOH 15i00.

(d) Section 102 of CWHSSA requires that laborers and mechanics employed on covered contracts be paid not less than one and one-half times their basic rate of pay for hours worked in excess of forty in a workweek. It also provides for liquidated damages in the sum of $10 for each calendar day (with respect to each employee employed in violation) on which an employee was required or permitted to work overtime hours without the payment of overtime wages required by CWHSSA.

(e) Section 107 of the act provides health and safety standards on covered construction work which are administered by Occupational Safety and Health Administration (OSHA).

15a04 **<u>The Copeland "Anti-Kickback" Act.</u>**

(a) The "Anti-Kickback" section of the Copeland Act makes it punishable by a fine or by imprisonment up to 5 years, or both, to induce any person working on a federally-funded or assisted construction project to "give up any part of the compensation to which he is entitled under his contract of employment." *See* Copeland "Anti-Kickback" Act and 29 CFR 3.

(b) Regulations pertaining to Copeland Act payroll deductions are contained in 29 CFR 3. Deductions permissible without application for approval by the Secretary are explained in 29 CFR 3.5; those which require approval are explained in 29 CFR 3.6. Note: in 29 CFR 3.5 certain deductions, including those which meet the requirements of FLSA section 3(m), 29 CFR 531, can be made without the consent of the Secretary. The Copeland Act and 29 CFR 3.3 -3.4 require the contractor or subcontractor to file a weekly "Statement of Compliance." 29 CFR 5.5(a)(3)(ii) requires, as a contract stipulation, that the contractor submit weekly to the contracting agency a copy of all payrolls, along with a weekly "Statement of Compliance". Contractors may use Optional Form WH-347, available at http://www.dol.gov/whd/forms/wh347instr.htm for this purpose.

(c) The willful falsification of a payroll report or "Statement of Compliance" may subject the employer to civil or criminal prosecution under 18 USC 1001 and 31 USC 3729 and may also be a cause for debarment.

(d) The "Anti-Kickback" provision applies to any federally-funded or assisted construction contract except contracts for which the only assistance is a loan guarantee. This provision applies even where the contract is not covered by a labor standards statute. 29 CFR 3, as explained above, applies only to payroll deductions made under contracts subject to federal wage standards.

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15a05 The Miller Act.

(a) This act (*see* 40 USC 3131 -3133) provides, in general, that federal contracts in excess of $100,000 for construction, alteration, or repair of any public building or public work of the U.S., may not be awarded to any person, until such person furnishes to the U.S. a bond with a surety satisfactory to the contracting officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in the contract.

(b) DOL exercises no functions under the Miller Act, but the information in this section is pertinent since the act provides protection to laborers and mechanics, and its application is coextensive with the DBA, except for the $100,000 threshold. In order to protect their rights under this act, employees of prime contractors or first-tier subcontractors must give written notice by registered mail to the prime contractor of failure to receive proper wages within 90 days of the date of performance of the last labor by the underpaid worker. Employees of lower tier sub-subcontractors are not protected by the act.

(c) Suits to recover wages under the Miller Act must be commenced within 1 year after the date on which the last of the labor was performed and must be brought in the name of the U.S., for the use of the person suing, in the U.S. District Court for any district in which the contract was to be performed and executed. Suit is brought and prosecuted by the worker's own attorney. Although the Miller Act does not apply to federally-assisted projects (*i.e.*, the related acts), many states and grant programs require surety bonds with substantially similar requirements.

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15b DAVIS-BACON AND RELATED ACTS (DBRA)

15b00 Coverage: general.

(a) Coverage is extended to construction contracts awarded directly by the federal government or financially assisted under any statute referencing DBA labor standards, including but not limited to those listed in 29 CFR 1 and 29 CFR 5. However, if a statute authorizes assistance but does not include either directly or by reference a DBA labor standards clause, the DBRA does not apply. *See* FOH 15b00(b).

(b) In situations where a project is funded under a number of federal statutes, DBRA applies to the project if any one of the statutes authorizing a portion of the financial assistance requires payment of DBA wages. To verify coverage under various DBRA contracts, contact the regional wage specialist (RWS).

(c) The Surface Transportation Assistance Act of 1982 (Pub. L. No. 97-424), effective January 6, 1983, expanded DBA coverage to all federal-aid highway construction projects to include those involving resurfacing, restoration, rehabilitation, and reconstruction (4-R work). Previously, 23 USC 113, the Federal-Aid Highway Act, had been construed to exclude 4-R work from initial construction.

(d) The $2,000 threshold for coverage pertains to the amount of the prime contract, not to the amount of individual subcontracts. If the prime contract exceeds $2,000, all work on the project is covered.

15b01 Geographical scope.

The scope of the DBA is limited, by its terms, to the fifty states and DC and the Commonwealth of Northern Mariana Islands. The scope of each of the related acts is determined by the terms of the particular statute under which the federal assistance is provided. For example, DBRA would apply to a construction contract funded under the Housing and Community Development Act of 1974 located in Guam or the Virgin Islands. However, although direct DBA would not apply in places such as Guam or the Virgin Islands, CWHSSA would apply. *See* FOH 15g00.

15b02 Statute of limitations.

(a) The Portal-to-Portal Act applies to the DBA. It prevents the commencement of any court suit for unpaid straight-time wages more than 2 years after performance of the work (3 years in the case of willful violations), where such actions are judicially determined to be permissible under the law. However, it is DOL's position that the Portal-to-Portal Act does not apply to administrative actions initiated through the administrative law judge (ALJ) hearing procedures, and thus, the Portal-to-Portal Act does not preclude such corrective administrative action after 2 (or 3) years.

(b) Failure to pay the minimum rates specified in a DBA contract is a breach of the contract, and the contracting agency may withhold funds sufficient to pay the unpaid employees. Such funds may be withheld from the contractor without regard to the statute of limitations in the Portal-to-Portal Act and may be transferred to the comptroller general and paid to the underpaid employee without regard to such time limit.

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(c) The Portal-to-Portal Act does not apply to federally-assisted projects (the related acts) on which DBA wage rates are required to be paid. The various state statutes of limitations would apply to such projects in private actions where they are judicially determined to be permissible under the law. The federal 6-year statute of limitations would apply in government enforcement actions (*see* 28 USC 2415(a)).

15b03 **Definition of public building or public work.**

The term "public building" or "public work" includes building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a federal agency to serve the interest of the general public regardless of whether title thereof is in a federal agency. *See* 29 CFR 5.2(k).

15b04 **Site of the work: definition.**

(a) The DBA provides that every covered contract must contain a stipulation that the contractor or subcontractor must pay all mechanics and laborers "employed directly upon the site of the work" at wage rates not less than those stated in the advertised specifications. The related acts which provide for federal construction assistance contain no reference to site of the work. However, 29 CFR 5.5(a)(1)(i) prescribes a contract clause which in effect extends the site of the work concept to the related acts. Certain U.S. Department of Housing and Urban Development (HUD) related acts, including the U.S. Housing Act of 1937 and the Housing Act of 1949, however, specifically require payment of not less than the wage rates prescribed to all mechanics and laborers employed "in the construction and development of the project." In short there is no site of the work concept with respect to the U.S. Housing Act of 1937 or the Housing Act of 1949. (It should be noted that the overtime requirements of CWHSSA apply to all laborers and mechanics performing contract work, regardless of the site of their employment. *See* FOH 15g03.)

(b) The DBA limits coverage to laborers and mechanics employed on the site of the work but does not define this term. "Site of the work" is defined in 29 CFR 5.2(l). The description below provides general guidance used by the Wage and Hour Division (WH or WHD) in DBA and DBRA investigations:

(1) The "site of the work" is the physical place or places where the building or work called for in the contract will remain *and* any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project. *See* 29 CFR 5.2(l)(1). For example:

a. If a small office building is being erected, the site of work will normally include no more than the building itself and its grounds.

b. In the case of larger contracts, such as for airports, highways, or dams, the site of the work is necessarily more extensive and may include the whole area in which the construction activity will take place.

c. Where a very large segment of the dam is constructed up-river and floated downstream to be affixed onto a support structure, the secondary construction site would be within the meaning of site of the work for DBA purposes if it was established for and dedicated to the dam construction project.

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(2) Except as provided in paragraph 29 CFR 5.2(l)(3), batch plants, borrow pits, job headquarters, tool yards, etc., are part of the site of work provided they are dedicated *exclusively* or nearly so to the contract or project, and are *adjacent or virtually adjacent* to the site of the work as defined in 29 CFR 5.2(l)(1).

(3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, and tool yards, etc. of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular federal or federally-assisted contract or project.

Also excluded from the site of the work are fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc, of a commercial or material supplier which are established by a supplier of materials for the project *before opening of bids* and not on the site of the work as stated in 29 CFR 5.2(l)(1), even where such operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

(c) Once the limits of site of the work have been determined, the wage determination applies only to those mechanics and laborers employed by a contractor or subcontractor *on the site of the work*.

(d) In 2000 DOL revised the two related definitions in the regulations that set forth rules for the administration and enforcement of the DBA prevailing wage requirements. Revisions in the regulatory definitions of "site of the work" and "construction, prosecution, completion, or repair" were made to clarify the regulatory requirements in view of three U. S. appellate court decisions, which had concluded that DOL's application of these related regulatory definitions was at odds with the language of the DBA that limits coverage to workers employed "directly upon the site of the work."

For a full discussion of the revisions made to the regulatory definition of the "site of the work" in 2000, *see* the final rule published in the Federal Register on December 20, 2000, 65 FR 80268 -80278. Also, *see Building and Construction Trades Department, AFL-CIO* v. *United States Department of Labor Wage Appeals Board*, 932 F.2d 985(D.C. Cir 1991) (*Midway*), *Ball, Ball and Brosamer* v. *Reich* (D.C. Cir 1994), and *Cavett Company* v. *U.S. Department of Labor* 101 F. 3d 1111 (6th Cir. 1996).

(e) The Federal Acquisition Regulation (FAR) (48 CFR 52.222.5 -.11) has been revised to address the issue of secondary sites that may be considered to be within the regulatory definition of "site of the work." Therefore, federal contract stipulations include provisions that address the possibility of a covered secondary site of work. Contracting agencies should consult the WHD when confronted with site of work issues.

(f) CWHSSA has no site of work limitation. *See* FOH 15g03.

15b05 **<u>Construction, prosecution, completion, or repair.</u>**

29 CFR 5.2(j) defines the terms "construction, prosecution, completion, or repair" to mean all types of work done on a particular building or work at the site thereof (including work at a facility deemed part of the site of the work) by laborers and mechanics of a construction contractor or construction subcontractor including without limitation:

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(a) Altering, remodeling, and installation (where appropriate) on the site of the work of items fabricated off-site

(b) Painting and decorating

(c) The manufacturing or furnishing of material, articles, supplies or equipment on the site of the building or work

(d) Transportation between the site of the work (within the meaning of 29 CFR 5.2(l)) and a facility which is dedicated to the construction of the building or work and deemed a part of the site of the work (within the meaning of 29 CFR 5.2(l))

15b06 **Force account construction work.**

(a) In some instances a government agency (or a state or political subdivision thereof using federal money) may perform construction work under what is generally known as force account. In essence, this is a do-it-yourself type of construction – the governmental agency receiving the grant decides not to contract out the work but actually performs it in-house with its own employees. Such work is not generally subject to DBRA/CWHSSA because governmental agencies and states or their political subdivisions are not considered contractors or subcontractors within the meaning of the DBA. However, any part of the work not done under force account but contracted out is subject to DBRA/CWHSSA in the usual manner.

(b) Certain related acts require payment of prevailing wages to all laborers and mechanics "employed in the construction (or development) of the project" (*e.g.*, the U.S. Housing Act of 1937 and the Housing Act of 1949). *See* FOH 15e13. State and local government agencies receiving federal assistance under statutes containing this or similar wording not restricting coverage to employees of contractors or subcontractors, which perform construction with their own employees, must pay such employees according to DBRA/CWHSSA.

15b07 **Lease arrangements.**

(a) Where the government enters into a lease/purchase agreement DBA applies, because the cost of the construction is eventually paid for by the government. DBA also applies to a lease option or to a term lease agreement where there is substantial and segregable construction activity, and where the structure is a public building or public work. This may be true, for example, where the building is built at the request of the government pursuant to government specifications for government use or purpose for the period of the lease.

(b) AAM No. 176 identifies the following factors as among those to be considered in determining whether a lease/construction contract is construction for the DBA:

(1) "Length of Lease"

(2) Extent of government involvement in the construction project (such as whether the building is being built to government requirements and whether the government has the right to inspect the progress of the work)

(3) The extent to which the construction will be used for private rather than public purposes

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(4) The extent to which the costs of construction will be fully paid for by the lease payments

(5) Whether the contract is written as a lease solely to evade the requirements of the DBA

(c) Postal Service lease agreements are governed by the Postal Reorganization Act (39 USC 410(d)). Under the terms of that act, Postal Service lease agreements for rent of net interior space in excess of 6,500 square feet are required to include DBA labor standards for any construction, modification, alteration, repair, painting, decoration, or other improvement of the facility covered by the agreement.

15b08 Post exchange contracts.

The DBA applies to Post exchange contracts for construction, alteration or repair of buildings regardless of whether such contracts are paid for with appropriated or nonappropriated funds.

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15c EXCLUSIONS FROM COVERAGE UNDER DBRA

15c00 Exceptions to coverage.

(a) Section 4 of the DBA provides that "this Act shall not be construed to supersede or impair any authority otherwise granted by [f]ederal law to provide for the establishment of specific wage rates." Thus, for example:

(1) If a railroad undertakes to perform a contract normally subject to DBRA, coverage is not extended to employees of railroad common carriers if they are covered by the Railway Labor Act. However, if the railroad contracts out such construction work, laborers and mechanics employed by contractors or subcontractors are covered.

(2) While the DBA contains no express exemption for common carriers, coverage is not extended to common carriers who are hauling over regularly scheduled routes in accordance with published tariff rates and pursuant to a bill of lading. On the other hand, transportation of materials from an exclusive borrow pit to fulfill the specific needs of a construction contract would not normally be within the common carrier exception since such transportation is not normally carried out over a regularly scheduled route in accordance with published tariff rates and pursuant to a bill of lading.

(b) Under the terms of certain authorizing statutes, DBRA does not apply to construction of less than a designated number of housing units. For example:

(1) Section 110 of the Housing and Community Development Act of 1974: rehabilitation of residential property designed for fewer than eight families

(2) Section 802 of the Housing and Community Development Act of 1974: construction of residential property designed for fewer than eight families

(3) Section 12 of the U.S. Housing Act of 1937: fewer than nine units

(4) Sections 212, 220, and 233 of the National Housing Act: fewer than 12 units

(5) Sections 212, 221, and 235(j) (1) of the National Housing Act: fewer than eight families

(6) Section 287 of the Cranston-Gonzalez National Affordable Housing Act of 1990: fewer than 12 units

(c) Section 14 of the United States Housing Act of 1937 established the Comprehensive Improvement Assistance Program (CIAP), under which HUD provides financial assistance to public housing agencies for improvement of existing public housing projects and upgrading of the management and operation of such projects. Section 12 of that act sets forth the labor standards which must be contained in any contract for loans, annual contributions, sale or leases pursuant to the act, and provides that (1) all laborers and mechanics employed in the *development* of a CIAP-funded lower income housing project be paid DBRA wages, and (2) all maintenance laborers and mechanics employed in the *operation* of such a project be paid wages prevailing in the locality as established by *HUD*. While most CIAP-funded work items are developmental for purposes of prevailing wage rate determinations and are

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therefore subject to DBRA, certain work items (non-routine maintenance, formerly referred to by HUD as major repairs), in addition to routine maintenance, are recognized as operational and are subject to HUD-determined (*not* DBRA) rates. HUD has issued guidance to its field offices and public housing agencies (*see* 24 CFR 968.105 and 24 CFR 968.110), which distinguishes work items subject to HUD-determined or to DBRA prevailing wages. In essence, repair or replacement necessitated by normal wear and tear over time is to be considered operational and outside the coverage of DBRA, provided that the work is not so substantial as to constitute reconstruction. Thus, conversion of equipment or premises and replacement or alteration of property which results in betterment and involves significant construction activity is subject to DBRA. Any questions on the proper classification of particular work items subject to DBRA under CIAP which cannot be resolved locally with HUD will be referred though channels to the RWS and National Office (NO), if necessary. The WHD *does not* enforce HUD-determined wage rates under CIAP.

(d) Construction projects administered by the Farmers Home Administration and funded under the Community Facility Program of the Farm and Rural Development Act of 1972 or under section 515, Title V of the Housing Act of 1949, as amended by the Housing and Community Development Act of 1974, do not contain DBA labor standards and are not covered if there is no *other* federal assistance containing DBA labor standards.

(e) Projects solely funded under the Land and Water Conservation Fund Act of 1965 or under the Colorado River Basin Project Act are not covered.

15c01 **Waivers of coverage.**

(a) DOL does not have the authority to grant waivers from DBA coverage of a contract to which the government is a direct party or from a federally assisted (*i.e.*, DBRA) contract. However, in some cases, the particular DBRA statute funding the project may specifically provide for a waiver or an exemption by the administering agency from the provisions of the DBA.

(b) Pursuant to authority under section 107 of the Housing and Community Development Act of 1974, as amended (42 USC 5307(e)(2)), the Secretary of HUD has waived the DBRA/CWHSSA labor standards requirements in connection with Community Development Block Grants for Indian Tribes and Alaskan Native villages.

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15d INTERPRETATIONS: APPLICATION OF DBRA TO TYPES OF WORK AND CONTRACTS

15d00 American Recovery and Reinvestment Act of 2009 (ARRA).

(a) DBA coverage under ARRA

(1) AAM No. 207 outlined the applicability of the DBA labor standards to ARRA funded projects. The ARRA was signed by President Obama on February 17, 2009. The ARRA appropriated substantial funding for construction, alteration, and repair of federal buildings and for infrastructure projects. Federal agencies directly contracting for construction work are required by existing DBA requirements to ensure that bid solicitations and resulting contracts contain DBA labor standards and wage determinations. Federal agencies must ensure that recipients of assistance under ARRA require contractors and subcontractors to pay laborers and mechanics on federally-assisted construction projects at least the prevailing wages as determined under the DBA.

Specifically, section 1606 of Division A of ARRA states that DBA's prevailing wage requirement applies to ARRA-appropriated construction projects, as follows: "Notwithstanding any other provision of law and in a manner consistent with other provisions of this [a]ct, all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the [f]ederal government pursuant to this [a]ct shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor…."

The language "notwithstanding any other provision of law" explicitly overrides any limitation to DBA coverage that may be contained in the other related acts. Therefore, if a construction project is funded under multiple statutes, including one with a pre-existing DBRA provision as well as ARRA, then the ARRA prevailing wage requirement applies if any such ARRA assistance is provided for the project.

Two provisions of ARRA exempt certain tribal contracts from section 1606. One provision states that section 1606 does not apply "to tribal contracts entered into by the Bureau of Indian Affairs" with the appropriations provided under ARRA for repair and restoration of roads; school improvements, repairs, and replacement construction; and detention center maintenance and repairs. A second provision states that section 1606 does not apply "to tribal contracts entered into by the [HHS Indian Health] Service" with the ARRA appropriation for Indian health facilities construction projects. Of course, even though ARRA does not apply the DBA to those projects, if the projects receive funding under another related act that requires DBA prevailing wage requirements, those requirements would continue to apply.

Prevailing wage coverage under ARRA-assisted projects must be determined in the same manner as under the DBA. ARRA-assisted projects must follow the requirements in regulations 29 CFR 1, 29 CFR 3 and 29 CFR 5.

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(2) AAM No. 208 outlined the applicability of the DBA labor standards to projects financed with the proceeds of the five tax-favored bonds listed in section 1601 of Division B of ARRA. It also highlighted the responsibilities of state and local governmental entities, contractors, and others for implementation of, and compliance with, the DBA labor standards in connection with projects financed with the proceeds of the tax-favored bonds.

Specifically, section 1601 of Division B of ARRA provides that the DBA's prevailing wage requirement applies to projects financed with the proceeds of:

a. Any new clean renewable energy bond, as defined in section 54C of the Internal Revenue Code of 1986, issued after the date of the enactment of ARRA Division B

b. Any qualified energy conservation bond, as defined in section 4D of the Internal Revenue Code of 1986, issued after the date of the enactment of ARRA Division B

c. Any qualified zone academy bond, as defined in section 54E of the Internal Revenue Code of 1986, issued after the date of the enactment of ARRA Division B

d. Any qualified school construction bond, as defined in section 54F of the Internal Revenue Code of 1986

e. Any recovery zone economic development bond, as defined in section 1400U–2 of the Internal Revenue Code of 1986

An entity (usually a state or local government agency) with contracting responsibility for a project financed with the proceeds of one of the five tax-favored bonds must cause or require the contracting officer for the project, at least as soon as the entity receives notice of ARRA assistance with respect to the project, to insert in full the standard DBA contract clauses found in 29 CFR 5.5(a) (and the applicable wage determination in effect at the time of notice of ARRA assistance) in bid solicitations and covered construction contracts that are in excess of $2,000 for construction, alteration or repair (including painting and decorating).

The requirement to insert the standard DBA contract clauses and attach the applicable wage determination in effect at the time of notice of ARRA assistance applies regardless of the amount or form of ARRA funding or assistance. Thus, coverage under section 1601 of Division B of ARRA can exist even if a project is financed only in part by proceeds of one of the bonds listed in section 1601. If bond proceeds are pooled in a general fund or otherwise, then every project financed in whole or in part by the pooled proceeds is subject to DBA requirements provided that other applicable coverage criteria are satisfied.

(b) Weatherization contracts

Using ARRA appropriations, the Department of Energy (DOE) awards grants under the Weatherization Assistance Program to state-level government agencies. These agencies then contract with local agencies, usually Community Action Agencies, to deliver weatherization

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services to eligible residents. Individuals and families apply for assistance through the local agencies. If approved for services, professionally trained weatherization assistance program technicians perform on-site audits to identify cost-effective measures that can be taken. Crews then make the repairs and improvements to increase energy efficiency. The technicians conducting the audits are typically employees of the governmental or community action agency. The repair crews typically work for contractors.

It is WHD's longstanding position that governmental agencies are not contractors or subcontractors within the meaning of the DBA when the construction is performed by their own employees on a force account basis. *See* FOH 15b06. However, laborers or mechanics employed by a private, non-profit Community Action Agency cannot be considered as force account labor and will be covered under the DBA labor standards requirements when performing ARRA-assisted weatherization work. In addition, when the Community Action Agency contracts out work that is assisted with ARRA funding, the agency must apply the DBA labor standards and appropriate wage determination to the contract. Therefore, repair crews performing the duties of laborers or mechanics for a Community Action Agency or its contractors must be paid at least the DBA prevailing wage. Certain activities such as energy audits and inspections are not viewed as construction work performed by laborers or mechanics within the meaning of the DBA.

(c) State Energy Program and individual homeowners

DOE, through its Office of Energy Efficiency and Renewable Energy (EERE), operates a State Energy Program (SEP) that provides grants to states that may be used to fund individual states' SEP plans. These grants are funded in whole or in part by ARRA. An individual homeowner who receives a rebate for material and/or labor costs he or she has incurred in connection with qualifying energy efficiency and weatherization improvements to his or her home under a DOE SEP rebate program is not responsible for DBA compliance. This general interpretation addresses only whether DBA labor standards apply to individual homeowners who receive a rebate, funded in whole or in part by ARRA, to reimburse them pursuant to DOE programs for certain energy efficiency and weatherization improvements to their homes.

15d01 <u>Carpet laying and installation of draperies.</u>

DBRA applies to carpet laying and the installation of draperies when it is performed as an integral part of or in conjunction with new construction, alteration, or reconstruction. On federal contracts the McNamara-O'Hara Service Contract Act (SCA) applies to carpet laying when it is performed as a part of routine maintenance (*e.g.*, replacement of worn out carpeting in a public building or a public work where no other construction is contemplated).

15d02 <u>Clean-up work.</u>

Cleaning work is covered by the DBRA in situations where the cleaning is performed as a condition precedent to the acceptance of a building as satisfactorily completed. For example, this would include activities such as window scraping and washing, removal of excess paint, and sweeping. Where cleaning is carried out after the construction contractor and subcontractors have finished their work, left the site, and the contracting agency has accepted the project as completed, such work would not be considered a part of the construction and would not be covered under DBRA. However, SCA may apply in the latter situation if there is a direct contract with the federal government.

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15d03 Demolition work in relation to construction.

(a) To determine whether a demolition contract is subject to DBRA, it is necessary to look at the entire scope of that contract as well as other contracts that might be part of the same overall project. Demolition, standing alone, (except for demolition work under Urban Renewal projects authorized pursuant to the Housing Act of 1949, as amended) is not necessarily considered to be "construction, alteration, and/or repair of a public building or a public work" subject to the prevailing wage requirements of DBRA. For example, the demolition of a building because such structure is no longer needed would not in itself be a covered construction activity. However, where an existing building is being demolished and further construction activity at the site is contemplated that is subject to DBRA, DBRA would apply to such demolition, such as demolition performed to permit construction of a new building or highway (*see* AAM No. 190 and FOH 14d08).

(b) In some cases the nature of the demolition or removal work alone might be considered construction activity covered by DBA. Removal of asbestos or paint from a facility that will not be demolished would be considered to be an alteration or repair (*see* AAM No. 153) and certain hazardous waste removal contracts that involve substantial earth moving to remove contaminated soil and re-contour the surface may be considered construction (*see* AAM No. 187).

15d04 Disaster relief contracts.

DBA applies to any direct federal contract for "construction, alteration, and/or repair of a public building or public work;" therefore, DBA applies to any direct construction contracts awarded by federal agencies such as the U.S. Army Corps of Engineers, Federal Emergency Management Administration (FEMA), or the U.S. Army.

DBA labor standards also apply to federally-assisted contracts where the statute authorizing the funding requires payment of prevailing wage rates in accordance with the DBRA. An example of such a contract is a U.S. Environmental Protection Agency grant to complete sewer repair where the grant is funded by the Federal Water Pollution Control Act.

Grants for disaster relief under FEMA's principal relief authority, the Robert T. Stafford Disaster Relief Act, are not subject to the DBA prevailing wage requirements. FEMA provides grants for disaster assistance including low-interest loans to repair or replace personal property, business disaster loans to fund repair or replacement of real estate, and assistance to state or local governments to pay costs of rebuilding a community's damaged infrastructure.

15d05 Drilling work in various situations.

(a) The application of the DBA to a contract for drilling work would turn upon whether the contract is one for "construction" of "public works" within the meaning of the DBA.

(b) Exploratory drilling

Drilling, like excavating generally, is usually considered construction activity. The critical question is whether the holes which would be dug during the course of the exploratory drilling would be "works" within the statutory term "public work". The word "works" in the term "public works" refers typically to improvements, such as buildings, canals, or roads,

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rather than mere progress or activity. Consequently, exploratory drilling for the purpose of obtaining data to be used in engineering studies and the planning of a project such as a dam and reservoir, the actual construction of which has not been authorized and for which funds have not yet been appropriated, would not be within the term "work" because it relates to an activity as distinguished from a project or improvement.

Also, the holes themselves, which are opened to obtain cores and which are subsequently to be filled in or abandoned, would not be "works" because they are not improvements. The products sought by the digging are the cores of the earth and not the holes themselves. *See* FOH 14d02. In contrast, wells drilled to obtain a water supply for a military base or a contract for digging of test holes, which later may become "public works" or permit conversion to water wells, oil wells, or other "public works," are covered.

(c) Soil boring prior to or during construction for the purpose of setting foundations

Soil boring contracts are considered covered by the DBRA if they are directly related and incidental to, or an integral part of, the actual construction process. This is to be distinguished from the situation where such contracts are for the formulation of engineering plans and specifications, designs, and the conduct of site investigations. The latter activities are regarded as preliminary work, and not as a part of the construction process. *See* FOH 14d04.

(d) Plugging of oil or gas wells

A contract which calls for the plugging of oil or gas wells and the removal of above-ground equipment in connection with the construction of a reservoir on land containing such wells would be covered by the DBRA no matter whether the work is characterized as demolition (*i.e.*, the dismantling of the above-ground equipment), incidental to construction, or well drilling (*i.e.*, the rerunning of the tubing and replacement of the cement plugs).

15d06 <u>Landscape contracting.</u>

Landscaping performed in conjunction with new construction or renovation work subject to DBRA is covered. In addition, elaborate landscaping activities standing alone such as substantial earth moving and rearrangement of the terrain (*e.g.*, strip mine reclamation) may constitute construction within the meaning of the DBA, without any requirement that it be related to other construction work (*see* 29 CFR 5.2(i)). Landscaping which is not covered by the DBA is work to which the SCA may be applicable. (*See* 29 CFR 4.116.)

15d07 <u>Military housing privatization contracts.</u>

The Army, Navy, and Air Force are improving the condition of military housing in a project referred to as the Military Housing Privatization Initiative (MHPI). Under this initiative, in most instances, a private developer leases the land for a long term and then is responsible for constructing or renovating existing housing developments using military rental referrals to fund and maintain the newly renovated and privatized developments.

The Army, Navy, and Air Force have agreed to include DBA provisions and applicable wage determinations in all MHPI contracts and have agreed that all developers will be required to comply with the DBA labor standards provisions.

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15d08 **Painting and decorating.**

DBRA applies to the "construction, alteration, and /or repair, including painting and decorating, of public buildings or public works." DBRA coverage has been extended to the painting or repainting of mail collection boxes, street and traffic lines, the refinishing of floors and bowling lanes, and the installation of wall covering or hanging wallpaper. Federal contracts for painting of government owned, privately occupied houses, apartments, commercial properties, etc., are also covered by the DBRA.

15d09 **Public utility installation.**

(a) Whether or not the employees of a public utility, who perform construction-type work in connection with federal and federal-assisted projects, are covered by the DBRA will depend upon the nature of the contracts involved and the work performed thereunder.

(b) Where a public utility is furnishing its own materials and is in effect extending its own utility system, such work is not subject to DBRA. The same conclusion would apply where the utility company may contract out such work for extending its utility system. However, where the utility company agrees to undertake a portion of the construction of a covered project such work would be subject to the DBRA labor standards requirements of the construction contract.

(c) For example, DBRA wage provisions of the U.S. Housing Act do not apply to a contract between a local housing authority and a city water department under which the department installs water mains in streets adjacent to a housing project; connects mains and meters to the project's plumbing; furnishes water to the project; and operates and maintains such mains and meters without expense to the authority beyond an initial service charge, since the city is engaged essentially in the extension of its water distribution system rather than in the development of the project.

(d) Also, employees of a telephone company engaged in the installation of ordinary telephone facilities for a government facility under construction are engaged essentially in the extension of the telephone company's system rather than in government construction and, therefore, are not covered by the DBA. However, removal and relocation of telephone lines at the sole option of the government to eliminate interference of the lines *with construction at the project site* is construction work covered by the DBA.

15d10 **Sewer repair service.**

(a) The internal inspection of sewer lines for leakage and damage through the use of closed circuit TV inspection and the *simultaneous* sealing of leaks or other damage in the lines as the machine inspects the sewer line is covered by DBRA. On the other hand, if the contract is only for inspection, DBRA would not apply. However, SCA would apply in the latter situation if the government was a direct party to the contract.

(b) When this type of work is an issue in an investigation, an area practice survey (*see* FOH 15f05) should be conducted to determine which classification, if any, in the applicable wage determination performs this work. In conducting the area practice survey, evidence should be gathered concerning specific projects where repair work was actually performed. If the survey does not show that a classification in the applicable wage determination has *actually*

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performed this type of work, the use of a conformed classification and rate would probably be appropriate (*see* 29 CFR 5.5(a)(1)(ii)).

15d11 Shipbuilding, alteration, repair, and maintenance.

The building, alteration, and/or repair of ships under government contract is work performed upon "public works" within the meaning of the DBA. Wage determinations for shipbuilding under the DBA are issued only if the location of contract performance is known when bids are solicited. However, a government contract which calls for the construction, alteration, furnishing, or equipping of a naval vessel (*i.e.*, U.S. Navy and U.S. Coast Guard vessels) is subject to the Walsh-Healey Public Contracts Act (PCA). A contract which calls for maintenance and/or cleaning, rather than alteration or repair, of a ship or naval vessel is a service contract within the meaning of the SCA. *See* FOH 13b11 and 14c06.

15d12 Steam and sand blast cleaning.

A government contract requiring steam and sand blast cleaning and water proofing is covered by the DBA. Such cleaning operations performed on public buildings are authorized for the purpose of renewing the original appearance of these buildings and are performed for the same purpose as painting and decorating which are covered by the DBA.

15d13 Supply and installation contracts.

(a) Installation work performed in conjunction with supply or service (*e.g.*, base support) contracts is covered by the DBRA where it involves more than an incidental amount of construction activity (*i.e.*, the contract contains specific requirements for substantial amounts of construction, reconstruction, alteration, or repair work) and such work is physically or functionally separate from and can be performed on a segregated basis from the other non-construction work called for by the contract (*see* 29 CFR 4.116(c)(2)). For example, DBA coverage has been extended to installing a security system or an intrusion detection system, installing permanent shelving which is attached to a structure, installing air-conditioning ducts, excavating outside cable trenches and laying cable, installing heavy generators, mounting radar antenna, and installing instrumentation grounding systems, where a substantial amount of construction work is involved.

(b) Whether installation work involves more than an incidental amount of construction activity depends upon the specific circumstances of each particular case and no fixed rules can be established which would address every fact situation. Factors requiring consideration include the nature of the prime contract work, the type of work performed by the employees installing the equipment on the project site (*i.e.*, the techniques, materials, and equipment used and the skills called for in its performance), the extent to which structural modifications to buildings are needed to accommodate the equipment (*i.e.*, widening entrances, relocating walls, or installing wiring), and 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.

(c) DBRA does not apply to construction work which is incidental to the furnishing of supplies or equipment, if the construction work is so merged with non-construction work or so fragmented in terms of the locations or time spans of its performance that the construction work is not capable of being segregated as a separate contractual requirement.

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15e INTERPRETATIONS: APPLICATION OF DBRA TO TYPES OF EMPLOYEES

15e00 Definition of laborers and mechanics.

The terms "laborer" and "mechanic" are defined in 29 CFR 5.2(m) and generally include workers whose duties are manual or physical in nature as distinguished from mental or managerial and include apprentices, trainees, and helpers (in the case of CWHSSA, *see* FOH 15j00). The terms do not apply to workers whose duties are primarily administrative, executive, professional, or clerical, rather than manual (*see* FOH 15e15). Generally, mechanics are considered to include any worker who uses tools or who is performing the work of a trade. The DBA requires payment of the applicable prevailing wage rate to all laborers and mechanics "regardless of any contractual relationship which may be alleged to exist."

15e01 Apprentices.

(a) An apprentice (*see* 29 CFR 5.2(n)(1)) is (1) any person employed under a bona fide apprenticeship program registered with a state apprenticeship agency which is recognized by the DOL Employment and Training Administration (ETA), Office of Apprenticeship Training, Employer and Labor Services (OA), or if no such recognized agency exists in a state, under a program registered with the OA itself; or (2) a person in the first 90 days of probationary employment as an apprentice in such an approved apprenticeship program who is not individually registered in the program, but who has been certified by OA or a state apprenticeship agency (as appropriate) to be eligible for probationary employment as an apprentice. All apprentices other than probationary apprentices must be individually registered in the approved program. Consistent with the level of training in the program, an apprentice will perform for the appropriate period of time all levels of work, from the lowest unskilled laborer's work to the highest skilled or craft work of the finished mechanic, under the supervision of the journeyworker. To be employed in compliance with the regulations the following guidelines must be observed:

(b) Allowable ratio: apprentices to journeyworkers

(1) The allowable ratio of apprentices to journeyworkers employed on the contract work in any craft classification will not be greater than the ratio permitted the contractor as to the entire work force under the registered program. *See* 29 CFR 5.5(a)(4)(i). The allowable ratio is to be applied on a daily basis. If a contractor has both an apprentice and a trainee program, the trainees must be counted together with the apprentices in determining compliance with the allowable ratio (*i.e.*, the journeyworkers may not be counted twice).

(2) For the purpose of illustration only, assume that a contractor is allowed a ratio of one apprentice to every three journeyworkers under the terms of the approved plan. This same ratio would apply on DBRA covered jobs. Thus, in this example, the allowable number of apprentices is illustrated by the following chart:

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Journeyworkers	Allowable Apprentices
0-2	0
3-5	1
6-8	2
9-11	3

Note: the ratios are applied in terms of whole number increments for the journeyworkers (as reflected in the preceding chart) and not in terms of fractions thereof, unless a different standard is specified in the approved plan. Also, the allowable ratio will vary from plan to plan.

(3) Recognizing that the DBRA work may be performed in a location other than the place where the program registration was initially made, the allowable ratio is the ratio specified in the contractor's or subcontractor's registered program (*see* 29 CFR 5.5(a)(4)(i)).

(4) A working supervisor or owner may be counted as a journeyworker for ratio purposes provided such a worker spends the majority of his or her time in the craft, at the site.

(5) In determining the proper ratios, bootstrapping is not allowed. For example, if an employer has employees who are misclassified and determined to be entitled to the journeyworker's rate or has utilized an excessive number of apprentices who are also entitled to the journeyworker's rate, such employees cannot then be counted as journeyworker for ratio purposes.

(c) Registered apprentice ratio exceeded

If a contractor or subcontractor employs apprentices in such a number that the permissible ratio is exceeded, all apprentices employed in excess of the ratio are considered to have been improperly employed and will be entitled to the rate for the classification of work which they are performing. For example, if an employer is permitted to employ three apprentices under an approved plan and it is disclosed that the employer is employing five apprentices on the project, the first three apprentices employed on the project will be considered within the quota; the last two employed will be considered improperly employed and must be paid the full prevailing wage rate for the work performed. As a practical matter, if it is impossible to determine which apprentices were first employed on the project, any equitable formula for allocating the time due at the applicable prevailing wage rate will be acceptable. For example, in the preceding situation, it would be permissible and equitable to rotate three of the five apprentices each week as a solution to the problem of which of these employees were first employed on the project. The remaining two employees would then be allocated the full prevailing wage rate in a manner which distributes the time improperly employed as equally as possible.

(d) Evidence of bona fide apprenticeship registration

29 CFR 5.5(a)(3)(i) requires that a contractor or subcontractor utilizing apprentices maintain written evidence of the registration of the program and the apprentices, and of the ratios and wage rates prescribed in the applicable programs.

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(e) Unregistered apprentices

29 CFR 5.5(a)(4)(i) provides that any employee listed on a payroll at an apprentice wage rate who is not a bona fide registered or probationary apprentice must be paid the wage rate for the classification of work actually performed. However, the fact that a worker is listed on the payrolls as an apprentice in a particular craft and paid an apprentice wage rate for that craft does not, in itself, mean that person performed only the work of, or used only the tools of, the craft in which the person is an unregistered apprentice, and it does not mean that the worker must be compensated only at the contract rate for that craft classification. Such an employee may actually be performing work as a laborer or in another craft classification, and must receive at least the rate applicable for the classification(s) of work actually performed.

(f) Employment of apprentices by more than one employer

Employment of a properly registered apprentice by more than one employer does not affect his/her status. The transfer of apprentices from one employer to another to provide varied work and training is an accepted construction industry practice.

(g) Wage computations for apprentices

In some instances, bona fide apprenticeship programs contain percentages which are applied to a stipulated wage rate (i.*e.*, stated in the approved apprenticeship program or set forth in a collective bargaining agreement), the product of which results in the wage rate paid to the apprentice. While such a computation is acceptable on construction projects *not* subject to the DBRA, the contractor on covered projects is bound by any *higher* wage rates in the wage determination and the percentages should be computed against the journeyworker's basic rate found in the wage determination. Some apprenticeship agreements may specify dollar amounts, rather than percentages of the journeyworker's rate, for various levels of progress. For this type of apprenticeship training program, in order to determine whether the apprentice is properly paid it is necessary to convert the dollar amounts to a percentage of the journeyworker's basic rate in the training program. This is then applied to the rate specified in the wage determination. For example, where the journeyworker's rate contained in the apprenticeship training program for a particular craft is $16.00 per hour and the apprentices are to receive $8.00, $10.00, $12.00, or $14.00, depending on their level of progress, the percentages to be applied against the journeyworker's rate in the wage determination should be 50%, 63%, 75%, and 88%, respectively. In addition, the apprentices are also entitled to receive fringe benefits in accordance with the provisions of the apprenticeship program. If the approved program is silent as to fringe benefits, apprentices must be paid the full amount of fringe benefits listed in the wage determination for their classification, unless the Administrator of the WHD (Administrator) determines that a different practice prevails in the locality of the construction project for that particular apprentice classification.

15e02 <u>Trainees.</u>

(a) A trainee (*see* 29 CFR 5.2(n)(2)) is any person who is receiving on-the-job training in a construction occupation under a program which has received prior approval (or prior recognition for certain programs established prior to August 20, 1975), as evidenced by formal certification of the approval (or recognition) by OA. State apprenticeship agencies have no authority over trainee programs. *See* 29 CFR 5.2(n), 29 CFR 5.5(a)(4)(ii), and 29 CFR 5.16, -.17.)

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(b) A trainee must be paid at the rate specified in the program for his/her level of progress, expressed as a percentage of the journeyworker hourly rate specified in the applicable wage determination. Also, trainees are to be paid the fringe benefits stipulated in the trainee program. If the program does not mention fringe benefits, trainees must receive the fringe benefits reflected on the wage determination for the craft.

Note: an exception to this rule applies if the Administrator determines that there is a corresponding apprenticeship program providing for less than full fringe benefits for apprentices in that particular classification, in which case fringe benefits must be paid trainees in accordance with the corresponding apprenticeship program. *See* 29 CFR 5.5(a)(4)(ii).

(c) The principles set forth in FOH 15e01 regarding allowable ratio, ratio exceeded, evidence of apprenticeship, unregistered apprentices, employment by more than one employer, and wage computations for apprentices are applicable to trainees. Exception: portability 15e01(b)(3) does not apply to trainees.

(d) A contractor employing participants under the Workforce Improvement Act of 1998 (which superseded the Job Training Partnership Act and amended the Wagner-Peyser Act) on a DBRA covered contract must pay such individuals the applicable prevailing wage rate for the classification of work performed unless the requirements in 29 CFR 5.5(a)(4)(ii) have been met and the particular training program has been approved by ETA (OA).

(e) There are a number of ETA on-the-job training programs (for example, the Step-up program) established to train and hire the unemployed. Unless the requirements of 29 CFR 5.5(a)(4) are met, individuals enrolled in such programs must be paid the applicable prevailing wage rate for the classification of work performed on covered DBRA work.

(f) The requirements of 29 CFR 5.5(a)(4)(i) and (ii) do not apply to apprentices and trainees performing on federal-aid highway construction contracts subject to 23 USC 113 and enrolled in programs certified by the Secretary of the Department of Transportation, because they are specifically exempted from DBRA by the Federal-Aid Highway Act. *See* 23 USC 113(c).

15e03 **Summer youth employment.**

(a) Under the guidelines set forth in AAM No. 71 and AAM No. 96, DOL will take no exception to the practice of paying less than the predetermined laborer or journeyworker's rate to bona fide students employed on a temporary basis for the summer months only if the employment is part of a bona fide youth opportunity program such as that sponsored by union and management or by a governmental or community group. Also, such employment must be in accordance with statutory age and minimum wage requirements. Sponsorship by an individual contractor for only one particular project would not qualify for the exception.

(b) The specific provisions of any such agreement between the contractor and the contracting agency and the rates of pay are to be in writing, and a report of the reclassification is to be submitted to the Administrator by the contracting agency.

15e04 **Federal youth and student programs.**

Section 4 of the DBA provides that the statute "does not supersede or impair any authority otherwise granted by federal law to provide for the establishment of specific wage rates."

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The authorizing statutes for the Youth Conservation Corps, 16 USC 1703(a)(3), and the Public Land Corps, 16 USC 1726, for example, specifically require the Secretaries of Interior and Agriculture to set the rates of pay or living allowances for the corps' participants. Other youth programs, such as the American Conservation and Youth Service Corps (AmeriCorps), 42 USC 12655, and Volunteers in Service to America, 42 USC 4955, specify in the statutory language the living allowances and other benefits that must be provided to each participant. In accordance with section 4 of the DBA, participants in federal youth programs that establish specific compensation to be given participants would not be covered by DBA labor standards.

15e05 Helpers.

The term helper is defined in 29 CFR 5.2(n)(4). Helpers are permitted on a DBRA contract only if the helper classifications are specified in the applicable wage determination or conformed rates are approved pursuant to 29 CFR 5.5(a)(1)(ii). Helper classifications will be issued or approved only where the helper classification in question constitutes a separate and distinct class of worker whose use is prevailing in the area, and whose scope of duties does not overlap those of another classification (journeyworker or laborer). A helper may not be used as an informal apprentice or trainee, and it is not permissible for helpers to use tools of the trade in assisting a journeyworker. *See* 65 FR 69674, November 20, 2000.

15e06 Air balance engineers.

In general, air balance engineers are not considered laborers or mechanics within the meaning of the DBA. The primary function of such employees is to take measurements and to accumulate data upon which recommendations are based to advise mechanical contractors how to rectify imperfections or imbalances in heating and air conditioning systems which may become apparent after the contractor(s) have installed such systems. Generally, however, such employees do not physically make the required corrections. If, however, such employees spend a substantial amount of their time in any workweek (*i.e.*, more than 20 percent) on the site performing manual, physical, and mechanical functions which are those of a traditional craftsperson, they would be considered laborers or mechanics for the time so spent.

15e07 Architects and engineers.

Architects, engineers, technicians, and draftspersons are not covered by DBRA, unless they perform duties as laborers and mechanics and do not meet the tests of 29 CFR 541. *See* FOH 15e15.

15e08 Convict labor.

The DBA contains no prohibition against the employment of convict labor. Executive Order 11755 permits use of convict labor under certain conditions, and 18 USC 3622 sets forth requirements for convict work-release programs. Any questions or complaints pertaining to the above provisions should be directed to the local U.S. Attorney's Office.

15e09 Dredge workers.

Government contracts for dredging involve the construction, alteration, or repair of "public works of the United States." Workers on a dredge engaged in dredging operations are generally laborers or mechanics subject to the DBRA. However, employees engaged in the

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operations of the vessel or tugboat as a means of transportation are not laborers or mechanics. *See* FOH 15e23.

15e10 Flaggers and traffic directors.

(a) AAM No. 141 set forth DBRA coverage of employees engaged as flaggers on DBRA contracts issued as of October 18, 1985. The duties of flaggers themselves have been determined to be manual and physical in nature, flaggers typically work on or around heavy or highway construction projects as part of the construction crew, and their work is integrally related and a necessary incident to the other construction activities at the site.

(b) Employees of traffic service companies which operate as subcontractors on DBRA projects to set up and service traffic control devices (*e.g.*, barricades, directional signs, lights, arrowboards, etc.) are generally covered by DBRA. However, traffic service companies which rent equipment to the prime contractor and perform only incidental functions at the site in connection with delivery of the equipment are regarded as material suppliers whose employees would not be subject to DBRA unless particular employees spend a substantial amount of time (20 percent or more) in the workweek on the covered site or sites. *See* FOH 15e16.

15e11 Guards and watchmen.

Guards and watchmen whose duties consist solely of watching or guarding are not considered laborers or mechanics for purposes of DBRA. (The rule is different under CWHSSA; *see* FOH 15j00.) However, if such an employee actually performs physical or manual work on the construction project in addition to or in connection with guarding activities, the employee should be classified as a laborer or mechanic for the time so spent and paid the appropriate wage determination rate.

15e12 Helicopter pilots.

Helicopter pilots are laborers and mechanics for purposes of DBRA. *See* FOH 15j03.

15e13 Housing authority employees.

The U.S. Housing Act of 1937 and the Housing Act of 1949 require HUD to set and enforce prevailing wage rates for architects, technical engineers, draftspersons, and technicians employed in the development of a project. In addition, maintenance laborers and mechanics employed by a local housing authority to perform routine maintenance on property owned by the authority are subject to prevailing rates established by HUD. Questions regarding such situations should be referred to the appropriate HUD labor relations advisor. *See* http://www.hud.gov/offices/olr/laborrelstf.cfm. However, if maintenance laborers and mechanics employed by a housing authority are performing construction work funded by one of the above-mentioned statutes, such work is subject to prevailing wage standards of the DBRA (*see* FOH 15b06 and 15c00(c)).

15e14 Inspectors.

Employees who make inspections at a covered construction site to see that the work meets the specifications and requirements of the contract or established standards and codes are not usually considered to be laborers or mechanics for purposes of DBRA. However, if such

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workers perform other duties as laborers or mechanics, they must be paid the wage determination rate for the particular classification involved for the time so spent.

15e15 **Managerial and professional employees.**

(a) An individual employed in a bona fide executive, administrative, or professional capacity, as defined in 29 CFR Part 541, is not a laborer or mechanic for purposes of DBRA.

(b) A supervisory employee who is not exempt under 29 CFR Part 541 and who spends more than a substantial amount of time (20 percent) in a given workweek as a laborer or mechanic must be paid the applicable DBRA prevailing wage rate for the classification of work performed for all hours engaged in such work as a laborer or mechanic. For example, if a nonexempt working foreman spends 60 percent or 24 hours of a 40 hour workweek performing administrative functions such as preparing time cards, supervising the project work, and arranging for deliveries and the remaining 40 percent (16 hours) of the time performing the duties of an electrician, the individual must be paid the electrician's prevailing wage rate for the 16 hours. *See* 29 CFR 5.2(m).

(c) An employee who owns at least a bona fide 20 percent equity interest in the enterprise in which he or she is employed, regardless of the type of business organization (*e.g.*, corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive. The salary and salary basis requirements do not apply to the exemption of business owners under 29 CFR 541.101. An individual with a 20 percent or greater interest in a business who is required to work long hours, makes no management decisions, supervises no one and has no authority over personnel does not qualify for the executive exemption. To qualify for the exemption, a minority owner with at least a bona fide 20 percent interest in the business must be an employee of the business and actively engaged in management. *See* 29 CFR 541.101.

15e16 **Material suppliers.**

(a) The manufacture and delivery to the work site of supply items such as sand, gravel, and ready-mixed concrete, when accomplished by bona fide material suppliers operating facilities serving the public in general, are activities not covered by DBRA. This would be so even though the materials are delivered directly into a contractor's mixing facilities at the work site. Such bona fide material suppliers are not considered contractors under DBRA. Thus, their employees are not subject to DBRA labor standards. *See* FOH 15b04 and 15e22.

(b) A particular facility set up at or near a construction site for the purpose of fulfilling the material requirements of a contract and thus subject to the DBRA initially, may undergo a change in its character to such an extent that it becomes the operation of a supplier. This would be so, for example, if it makes a sufficient quantity of sales from its producing facility to the general public. What constitutes a sufficient quantity of sales to the general public depends on the circumstances in each case, but must be more than mere token sales.

(c) If a material supplier, manufacturer, or carrier undertakes to perform a part of a construction contract as a subcontractor, its laborers and mechanics employed at the site of the work would be subject to DBRA in the same manner as those employed by any other contractor or subcontractor. Employees of a material supplier who are required to perform more than an *incidental* amount of construction work in any workweek at the site of work would be covered by the DBRA and due the applicable wage rate for the classification of work

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performed. This would include *warranty and/or repair work*. For example, if an employee of a supplier of precast concrete items is required to go to the project site to repair and clean such items and in so doing performs more than an incidental amount of construction activity on the contract, the individual would be subject to DBRA. Similarly, an employee of an equipment rental dealer or tire repair company who performs on-site repair work on leased equipment is subject to DBRA if the employee performs more than an incidental amount of work on the site. For enforcement purposes, if such an employee spends more than 20 percent of his/her time in a workweek engaged in such activities on the site, he/she is DBRA covered for all time spent on the site during that workweek.

(d) 29 CFR 5.2(l) specifically excludes from the definition of "site of the work" permanent fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial supplier or materialman that are established by a supplier of materials for the project *before opening of bids and* are near to but not on the actual project site, even where such operations *for a period of time may he dedicated exclusively, or nearly so*, to the performance of a contract. *See* FOH 15b04(b) and 29 CFR 5.2(l).

15e17 **Owner-operators of trucks and other hauling equipment.**

As a matter of administrative policy, the provisions of DBRA/CWHSSA are not applied to bona fide owner-operators of trucks who are independent contractors. For purposes of these acts, the certified payrolls including the names of such owner-operators need not show hours worked nor rates paid, but only the notation owner-operator. This position does not pertain to owner-operators of other equipment such as bulldozers, scrapers, backhoes, cranes, drilling rigs, welding machines, and the like. Moreover, employees hired by owner-operators are subject to DBRA in the usual manner.

15e18 **Relatives.**

There are no exceptions from coverage, on the basis of family relationship, for relatives who are performing the work of laborers or mechanics. They must be paid the prevailing wage rate for the classification of work performed and included in the payroll records.

15e19 **Repair employees: tire repair companies and heavy equipment dealers.**

An employee of an equipment rental dealer or tire repair company who performs on-site repair work on leased equipment is subject to DBRA if the employee performs more than an incidental amount of work on site. *See* FOH 15e16(c).

15e20 **Survey crews.**

(a) Where surveying is performed immediately prior to and during actual construction, in direct support of construction crews, such activity is covered by DBRA. Under the U.S. Housing Act of 1937 and the Housing Act of 1949, the development of the project coverage test is broader and may also cover preliminary survey work.

(b) The determination as to whether certain members of survey crews are laborers or mechanics is a question of fact. Such a determination must take into account the actual duties performed. As a general matter, members of the survey party who hold the leveling staff while measurements of distance and elevation are made, who help measure distance with a surveyor chain or other device, who adjust and read instruments for measurement or who

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direct the work are not considered laborers or mechanics. However, a crew member who primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent.

15e21 Timekeepers.

Timekeepers who perform no manual labor on construction projects are not considered to be laborers or mechanics for purposes of DBRA. However, if such workers perform other duties as laborers or mechanics, they must be paid the wage determination rate for the particular classification involved for the time so spent.

15e22 Truck drivers.

The application of the DBA to truck drivers is based on the definition of "construction, prosecution, completion, or repair" in 29 CFR 5.2(l) (*see* FOH 15b05). Three U.S. appellate court decisions in the 1990s helped to clarify these definitions and provide the guidelines below. *See* 65 FR 80268 -80278, December 20, 2000.

(a) Truck drivers are *covered* by the DBA in the following circumstances:

(1) Drivers of a contractor or subcontractor for time spent working on the site of the work

(2) Drivers 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* FOH 15e22(b)(3))

(3) Truck drivers transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site

(4) Truck drivers transporting portions(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(s) will remain

(b) Truck drivers are *not covered* in the following instances:

(1) Material delivery truck drivers while off the site of the work

(2) Drivers of a contractor or subcontractor traveling between a DBA job and a commercial supply facility while they are off the site of the work

(3) Truck drivers whose time spent on the site of the work is *de minimis*, such as only a few minutes at a time merely to pick up or drop off materials or supplies

15e23 Tugboat operators, tugmasters, captains, and deckhands.

In general, tugboat personnel are engaged in navigational transportation, and are not considered to be laborers or mechanics. However, for example, if a crew member on a dredging project is performing work directly related to the covered construction project such as connecting, extending, and controlling the pipeline through which dredged material is

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being pumped, the individual would be considered a laborer or mechanic for the time so spent and entitled to the applicable prevailing wage rate. *See* FOH 15j00.

15e24 Volunteers.

There are no exceptions to DBRA coverage for volunteer labor unless an exception is specifically provided for in the particular DBRA under which the project funds are derived. Furthermore, DOL does not have the authority to grant waivers for volunteer labor. *See* FOH 15c00.

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15f APPLICATION OF PREVAILING WAGE AND FRINGE BENEFIT REQUIREMENTS

15f00 Contract clauses.

(a) In any contract subject to the labor standards provisions of DBRA, the contracting agency is required to include in the contract the clauses set forth in 29 CFR 5.5 relating to minimum wages, apprentices, trainees, withholding, payrolls and basic records, and liabilities and penalties for violations. *See* FAR 48 CFR 52.222-6 -15.

(b) The labor standards clauses in 29 CFR 5.5 included in a prime contract are by their terms required to be included as well in any subcontract or any lower tier subcontract made thereunder. Contractors who subcontract by means of purchase orders or other informal type contract forms will be considered in compliance with 29 CFR 5.5 provided they attach copies of the applicable wage determination and labor standards clauses to the subcontract form. *See* 29 CFR 5.5(a)(6).

(c) When the labor standards clauses are omitted from subcontracts in which they should have been included, and are not incorporated by reference in the subcontracts, the right of the subcontractor's employees to receive compensation in accordance with the wage determination in the prime contact is not affected. In such circumstances, since the subcontractor did not contract to pay the DBRA rates, the subcontractor would not generally be held responsible. However, the prime contractor would be obligated to pay the subcontractor's laborers and mechanics as required by the labor standards provisions of the prime contract.

15f01 Prevailing wage rates and fringe benefits.

The DBA requires the Secretary to predetermine, as a monetary wage, the prevailing wage rates for corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the area where work is to be performed. Bona fide fringe benefits are included within the meaning of the terms "wages, scale of wages, wage rates, minimum wages, and prevailing wages," as used in the DBA. *See* 40 USC 3141 and 29 CFR 5.2(p).

15f02 Wage determinations.

(a) The term "wage determination" includes the original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision.

(b) There are four basic categories of wage determinations based on the type of construction (*see* AAM No.130 and AAM No. 131):

Building: sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment or supplies. This category includes all construction of such structures, the installation of equipment, as well as incidental grading and paving. Such structures need not be habitable to be building construction. Examples of building construction projects are auditoriums, city halls, apartment buildings (five stories and above), hospitals, office buildings, schools, warehouses, and shopping centers.

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Residential: single family houses or apartment buildings of four stories or less.

Highway: alteration or repair of roads, streets, highways, runways, alleys, trails, paths, parking areas, and other similar projects not incidental to building or heavy construction.

Heavy: This is a catch-all category. It includes all other projects not classified as building, highway or residential (*e.g.,* bridges over navigable waters, dams, dredging and irrigation projects, tunnels). Of the four categories of construction, this is the only type of construction that can be broken into subcategories such as water and sewer line projects and dredging projects.

A project which includes elements of two or more types of construction normally requires multiple wage determinations if such category of construction is substantial (*i.e.* greater than 20 percent of project costs or greater than $1,000,000).

(c) General wage determinations

General wage determinations are published at http://www.wdol.gov.

(d) Project wage determinations

Project wage determinations are issued in response to specific requests from contracting agencies when there is no general wage determination applicable to the type of construction in the geographical area for the project involved.

15f03 <u>Use and effectiveness of wage determinations.</u>

(a) General wage determinations contain no expiration date. Once issued, they remain valid until modified, superseded, or canceled. They may be used by the contracting agency, without prior notification to DOL, in contracts to be performed within the specified geographical area and for the types of construction designated in the wage determination.

(b) Project wage determinations are effective for 180 calendar days from the date they are issued. If the contract for which a project wage determination is requested is not awarded within the 180 days before the wage determination expires, the contracting agency must request a new wage determination or obtain an extension of the expiration date from the Administrator. A project wage determination is applicable only to the particular project for which it was initially requested; it may not be included by the contracting agency in any other construction contracts.

(c) Modifications to general and project wage determinations, notice of which are published in web site http://www.wdol.gov or received by the contracting agency less than 10 days before bid opening, but not after bid opening, are effective unless the agency finds there is not sufficient time to notify bidders of the change. *See* 29 CFR 1.6(c).

(d) In addition, 29 CFR 1.6(c)(3)(iv) provides that if a contract to which a *general* wage determination has been applied is not awarded within 90 days after bid opening, any modification published prior to contract award is effective, unless the agency obtains an extension of the 90 day period from the Administrator. 29 CFR 1.6(e) provides that if a bid solicitation is found to contain a wrong wage determination, or if a wage determination is withdrawn as a result of an Administrative Review Board decision, notification to the

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contracting agency of such a finding is effective immediately, provided notification is made prior to contract award. Further, 29 CFR 1.6(f) provides a mechanism to require contracting agencies to utilize a wage determination after award if it is found that the agency failed to include any wage determination in a covered contract or used a wage determination which clearly does not apply to the contract. 29 CFR 1.6(g) contains guidelines for the application of wage determinations in situations where federal funding or assistance is not approved until after contract award (or after start of construction where there is no contract award).

(e) Project or general wage determinations included in a contract are effective for the life of the contract. However, contracts that contain option clauses by which a contracting agency may unilaterally extend the term of the contract require inclusion of a current wage determination at the time the option is exercised. *See* AAM No. 157.

15f04 **Payrolls and reporting requirements.**

Payrolls and basic records relating thereto must be maintained and preserved as required by 29 CFR 5.5(a)(3) and 48 CFR 52.222-8. 29 CFR 3.3, 29 CFR 3.4, and 29 CFR 5.5(a)(3) contain the reporting requirements relative to submission of the weekly *Statement of Compliance* and payrolls to the contracting agency. Contractors and subcontractors on DBRA covered construction projects must submit each week a *Statement of Compliance* which certifies the contractor's compliance with the DBRA requirements. This "Statement of Compliance" is usually referred to as the certified payroll record.

The contractor must submit weekly a copy of all payrolls to the contracting agency. The payrolls submitted must set out accurately and completely all required basic payroll information. The payroll information may be submitted in any form desired. Optional Form WH-347 is a WHD form available to contractors on http://www.wdol.gov. The prime contractor is responsible for submission of the certified payrolls to the contracting agency. Each payroll submitted must be accompanied by a *Statement of Compliance* which is found on the reverse side of the WH-347.

The contractor or subcontractor must make the payroll records available for inspection, copying, or transcription by authorized representatives of the contracting agency or the DOL and must permit these representatives to interview workers during working hours on the job.

If the contractor or subcontractor fails to submit the required records or to make them available, the federal agency may, after written notice to the contractor, take such action as is necessary to cause suspension of any further payment, advance or guarantee of funds. Failure to submit the required records upon request or to make such records available may be grounds for debarment action.

15f05 **Area practice: determining proper classification of work.**

(a) To determine the proper classification of work performed on a DBA covered project, it may be necessary to conduct a local area practice survey. Under the DBA there are not standard classification definitions. (This differs from SCA classifications, which are defined in the SCA Directory of Classifications.) Note: while the Dictionary of Occupational Titles, published by ETA, may be used as reference material, it *cannot* be relied on for making employee classification determinations.

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(b) The Wage Appeals Board ruled in *Fry Brothers Corp.* (WAB Case No. 76-6, June 14, 1977) that the proper classification of work performed by laborers and mechanics is that classification used by firms whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination. Questions as to the proper classification for the work performed by a laborer or mechanic are resolved by making an area practice survey. Area practice surveys can be conducted by the contracting agencies or by WHD using the following guidelines. AAM No. 130 and AAM No. 131 provide guidance regarding the proper categories of the various types of construction (building, heavy, highway, and residential) subject to local or area practice. *Before any area practice survey is started, the RWS must be contacted. See* http://www.dol.gov/whd/programs/dbra/regions.htm.

(c) Basic principles/preliminary steps for conducting surveys to determine prevailing local area practice

(1) Clearly define the scope of work/duties for which proper classification is at issue.

(2) Refer to the wage determination in the DBA/DBRA covered contract.

(3) Determine what classifications may perform the work duties in question.

(4) Examine the identifiers for each classification to determine whether the rates in the wage determination for each such classification reflect union negotiated or non-union wages.

a. Non-union rates in a DBA wage determination are listed in a wage rate block that has an SU identifier, and appear in alphabetical order in the list of classifications in the wage determination (*e.g.*, after sheet metal workers and before truck drivers). Other wage determination blocks reflect rates in collective bargaining agreements.

b. Union rates are listed under identifiers that refer to the union whose rates are reflected in a given wage rate block in the DBA wage determination. Examples are: ASBE (International Association of Heat & Frost & Asbestos Workers), ELEC (International Brotherhood of Electrical Workers), PLAS (Operative Plasters and Cement Masons), and PLUM (United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada). The number following in the identifier usually indicates the local union number for the union that negotiated the rates shown in the wage determination block.

(5) In accord with *Fry Brothers Corp*., information to be considered in the area practice survey is from firms whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination.

a. If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are non-union rates, the dispute will be resolved by examining the practice(s) of non-union contractors in classifying workers performing the duties on similar construction in question in the area (usually the same county).

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b. If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are union rates, the dispute will be resolved by examining the practice(s) of union contractors in classifying workers performing the duties in question on similar construction in the area (usually the same county). (Often such questions can be resolved by a limited area practice survey.)

c. If a combination of union and non-union rates are listed in the wage determination for classifications that may have performed the work in question on similar construction in the area (usually the same county), the dispute will be resolved based on the combined information from:

1. union contractors for the classification(s) for which union rate(s) are listed in the applicable wage determination; and

2. non-union contractors for the classification(s) for which non-union rate(s) are listed in the applicable wage determination.

(6) To ensure the local area practice survey examines how workers who performed the duties in question were classified when they worked on similar construction projects in the same area as the project in question during the survey timeframe, proper classification of the laborers or mechanics performing the work in question will be resolved by examining the classification practice(s) of contractors who performed the work in question on:

a. similar construction projects: building construction, residential construction, highway construction, heavy construction (*see* AAM No. 130 and AAM No. 131);

b. that were in progress in the same area (normally the same county);

c. during the year preceding the contract in question (as discussed below).

(7) The extent of the information required for making area practice determinations will depend on the facts in each case. For example:

a. If, in gathering preliminary data, all of the parties agree as to the proper classification, the area practice is thus established (*i.e.*, a limited area practice survey).

b. However, if all parties do not agree (*i.e.*, jurisdictional dispute between two unions, or management does not agree with the union, or where non-union rate(s) in the wage determination may apply and the practice among non-union contractors in the area varies), it will be necessary to determine by a full area practice survey which classification actually performed the work in question.

c. The survey will collect information on how workers performing the work in question were classified on similar projects underway in the same locality (normally the county), during the year prior to contract award of the DBA/DBRA contract in question (or, in the case of contracts entered into

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pursuant to competitive bidding procedures – as contrasted with negotiation procedures – the year prior to bid opening; in the case of projects assisted under the National Housing Act, beginning of construction or the date the mortgage was initially endorsed, whichever occurred first; or, in the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, beginning of construction or the date the agreement to enter a housing assistance payments contract was executed, whichever was first).

(d) To conduct a *limited area practice survey* to determine the proper classification of work

Follow the preliminary steps described in 15f05(c), above.

(1) If the applicable wage determination *reflects union rates* for the classifications involved:

a. Contact the unions whose members may have performed the work in question to determine whether the union workers performed the work on similar projects in the county in the year prior to the wage determination lock-in date (contract award date, or other date, as described above) for the project at issue.

b. The criteria for usable data is similar projects (same type of construction), in the same county as the project in question, within the usable time frame of one year prior to the wage determination lock-in date for the contract in question, as established by 29 CFR 1.6(c).

c. If *union contractors* performed the work, each union should be asked how the individuals who performed the work in question were classified. If *no union workers* performed any of the work in question in the county during the survey timeframe, the RWS should be contacted for further guidance.

d. The information provided by the unions should be confirmed with collective bargaining representatives of management (*i.e.*, the contractor representatives). These would include local chapters of contractors' associations that bargain with the unions. For example, the Associated General Contractors of America (AGC), the National Electrical Contractors Association (NECA), the Mechanical Contractors Association of America, etc. Contact the NO, Division of Wage Determinations, Branch of Construction Wage Determinations for information needed to contact the contractors' association and the local union that negotiated the collective bargaining agreement whose rates are reflected in the contract wage determination.

e. If all parties agree as to the proper classification of the work in question, the area practice is established. If two unions are engaged in a jurisdictional dispute over a specific type of work and both have performed the work in question during the applicable time period, contact RWS for further guidance. A more extensive area practice survey will be required to resolve the question.

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Note: with regard to (2) and (3), below, it may be more practical in many instances to proceed directly to a full area practice survey if calls to the contractors are needed anyway to determine whether each contractor is a union or open shop contractor (*see* information in FOH 15f05(d)(4)).

(2) If the applicable wage determination *reflects non-union rates* for the classifications involved:

a. Contact open shop contractors (many are members of the Associated Builders and Contractors of America (ABC)) and ask whether they performed the work in question on similar projects underway in the county during the survey timeframe. While it may not be possible to know if contractors are union or open shop contractors prior to calling them, there would be no need to request information from the union contractors concerning their classification practices in this case.

1. If so, the non-union contractors should be asked how the employees who performed this work were classified.

2. If all the non-union contractors agree, or if a clear majority of them agree, the area practice is established.

3. If no open shop contractor performed the work at issue in the county during the survey timeframe, contact the RWS for further guidance.

(3) If the applicable wage determination reflects a *mix of union and non-union rates* for the classifications involved:

a. Contact the unions, and contact union and open shop contractors (and/or their associations) to determine who performed the work at issue on similar projects during the survey timeframe.

1. If all parties agree, or if a clear majority of the parties (both union contractors regarding the classification listed with a union rate in the wage determination and non-union contractors regarding the classification listed with a non-union rate in the wage determination) agree on the classification, the area practice is established.

2. Contact the RWS if no work of the type at issue was performed in the county during the applicable time frame discussed above.

(4) For any type of wage determination (whether based on union rates, non-union rates, or a mixed schedule): if the parties contacted in the limited area practice survey do not agree (*i.e.*, jurisdictional dispute between the unions, management does not agree with union, or disagreement between the open shop contractors), or if there is no clear majority in agreement, then it is necessary to contact the RWS and prepare to conduct a full area practice survey.

(e) How to conduct a *full area practice survey* to determine the proper classification of work

Follow the preliminary steps described in FOH 15f05(c).

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(1) Identify similar projects in the same geographical area as the project under investigation (usually the county) which were in progress during the period 1 year prior to the wage determination lock-in date of the contract involved in the dispute/investigation. If no similar projects were built in the area during that time frame, contact the RWS for advice in expanding the survey's geographic scope and/or its time frame. Note: where data regarding the classification practices of union contractors are sought in the area practice survey, it may be appropriate to request a list of contractors who may have performed the work in question from the relevant union(s) and use such list(s) to contact the contractors as a way to identify relevant projects.

(2) Identify firms that performed the work in question on these projects and determine those from which data should be collected based on whether the relevant classifications in question in the wage determination are either non-union rates, union rates, or both. For example, if only non-union wage rates in the wage determination are involved, information from union contractors is not relevant; if only union rates are involved, information from open shop contractors is not relevant. Similarly, if the classifications in the wage determination that may have performed the work in question are a mix of union and non-union rates, information from both union and open shop contractors will need to be collected, but data from union contractors cannot be used to support the non-union rate and data from open shop contractors cannot be used to support the union classification rate.

(3) For each project, obtain data from the week in which the greatest number of employees performed the work in question, and record how many performed such work on each project and how such employees were classified and paid.

(4) Compile all relevant information received and total the number of employees who performed the work in question in each classification reported. The data should be tallied separately for union and non-union contractors/workers – only data from union contractors/workers can be counted to support a union rate listed in the contract wage determination, and only data from open shop contractors can be counted to support a non-union rate in the wage determination.

a. The classification which has the clear majority of employees performing the work in question is the proper classification.

b. If the data does not show that at least 60 percent of the workers who performed the duties in question were classified in the same classification, contact the RWS for further guidance.

15f06 **<u>Business owners.</u>**

An employee who owns at least a bona fide 20 percent equity interest in the enterprise in which employed, regardless of the type of business organization (*e.g.*, corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive. The salary and salary basis requirements do not apply to the exemption of business owners under 29 CFR 541.101. An individual with a 20 percent or greater interest in a business who is required to work long hours, makes no management decisions, supervises no one and has no authority over personnel does not qualify for the executive exemption. To qualify for the exemption, a minority owner with at least a bona-

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fide 20 percent interest in the business must be actively engaged in management. *See* 29 CFR 541.101.

15f07 Discharging minimum wage and fringe benefit obligations under DBRA.

(a) A contractor or subcontractor performing work subject to a DBRA wage determination may discharge its minimum wage obligations for the payment of both straight time wages and fringe benefits by (1) paying both in cash, (2) making payments or incurring costs for bona fide fringe benefits, or, (3) by a combination thereof. Thus, under the DBRA (unlike SCA) a contractor may offset an amount of monetary wages paid in excess of the minimum wage required under the determination to satisfy its fringe benefit obligations. *See* 40 USC 3142(d) and 29 CFR 5.31. This may be done, for example, in the following ways:

Minimum Wage Determination	
Basic hourly rate	$17.00
Fringe benefits	$4.00
Total minimum wage/fringe benefit obligation	$21.00

(1) $21.00 in cash wages;

(2) $17.00 plus $4.00 in pension contributions or other bona fide fringe benefits;

(3) $15.00 plus $6.00 in pension contributions or any combination of bona fide fringe benefits.

*Note: overtime must be paid at time and one-half the *basic* hourly rate of $17.00. *See* 29 CFR 5.32.

(b) Regulation of payroll deductions

(1) 29 CFR 3.5 permits the following deductions from wages *without the approval of the Secretary*. *See* 29 CFR 3.5 for further detail.

a. Deductions for social security or federal or state income tax withholding

b. Deductions for bona fide prepayment of wages

c. Deductions for court ordered payments

d. Deductions for contributions to fringe benefit plans, *provided that* the deduction is not prohibited by law, that it is either voluntarily consented to by the employee in writing in advance of the time the work is done or provided for in a collective bargaining agreement, that no profit or other benefit is obtained by the contractor, and that the deduction serves the convenience of the employee

e. Deductions for purchase of U.S. savings bonds when voluntarily authorized by the employee

f. Deductions to repay loans or to purchase shares in a credit union

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g. Deductions voluntarily authorized for contributions to organizations such as the Red Cross, United Way, or similar charitable organizations

h. Deductions to pay union initiation fees and membership dues, not including fines or special assessments, *provided that* a collective bargaining agreement provides for such deductions and the deductions are not otherwise prohibited by law

i. Deductions for the reasonable cost of board, lodging, or other facilities meeting the requirements of section 3(m) of FLSA.

j. Deductions for the cost of safety equipment purchased by the employee if such equipment is not required by law to be furnished by the employer, if such deduction is not prohibited by FLSA or other law, and if the cost on which the deduction is based does not exceed the actual cost to the employer.

(2) Pursuant to 29 CFR 3.6, any contractor may apply to the Secretary for permission to make any deductions not permitted under 29 CFR 3.5. *The Secretary may approve payroll deductions* whenever *all* of the following conditions are met:

a. The contractor does not make a profit or benefit directly or indirectly from the deduction

b. The deduction is not otherwise prohibited by law

c. Either the employee voluntarily consented to the deduction in writing in advance of the time the DBA/DBRA work is performed or the deduction is provided under the terms of a bona fide collective bargaining agreement

d. The deduction serves the convenience and interest of the employee

15f08 **Salaried employees.**

In many cases salaried employees perform work on DBRA covered projects and noncovered projects in the same workweek. To determine whether the employee has been properly paid for the time spent on the DBRA project, it is first necessary to determine the hourly rate of pay. For example, an employee who is working 40 hours per week and paid a salary of $600.00 per week would be paid at the rate of $15.00 per hour. If this same employee is entitled to a prevailing rate of $19.50 per hour for DBRA covered work, he or she would be entitled to an additional $4.50 per hour for work performed on the DBRA project. An employer may not arbitrarily allocate a greater portion of the employee's salary to DBRA work in order to achieve compliance with the act. It should be kept in mind that a nonexempt (*i.e.*, 29 CFR 541) salaried employee is only due the applicable DBRA rate for those hours actually spent performing laborers' and mechanics' duties. *See* 29 CFR 5.2(m) and FOH 15e15(b).

15f09 **Hourly paid employees.**

The same type of problem as discussed in FOH 15f08 may be encountered with regard to hourly paid employees working on DBRA covered work and non-covered work in the same workweek. The contractor may not arbitrarily change the employee's hourly wages to meet

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its DBRA obligations. For example, assume an employee's regular rate of pay is $15.00 per hour and the prevailing wage under DBRA is $19.50 per hour. In a week in which both DBRA and non-covered work are performed, the employer cannot reduce the employee's regular rate of pay of $15.00 per hour on non-government work to offset the higher rate required under DBRA. This same principle applies where an employee performs work in more than one DBRA classification; an employee may be paid not less than the specified wage determination rate for each of the actual hours worked in each classification (*see* 29 CFR 5.5(a)(1)(i)).

15f10 **Piece rate employees.**

In order to determine the basic hourly rate for a piece rate employee, it is necessary to divide the total hours worked in the workweek into the total wages paid. The basic hourly rate for a piece rate employee must be calculated on a weekly basis.

15f11 **Crediting of fringe benefit payments.**

(a) 29 CFR 5.5(a)(1)(i) and FAR 52.222-6(b)(2) require that contributions to fringe benefit plans made by a contractor or subcontractor must be made on a regular basis (*i.e.*, not less often than quarterly).

(b) Normally, contributions made to a fringe benefit plan for government work generally may not be used to fund the plan for periods of non-government work. *See* FOH 15f12(b).

(c) A contractor must make payments or incur costs in the amount specified in the applicable wage determination for each individual laborer or mechanic performing covered contract work. Where the cash wages paid and the per hour cost equivalents for fringe benefits together do not equal the sum of the prevailing wage rate and fringe benefit amounts set forth in the applicable wage determination, the balance due must be paid in cash to each of the employees underpaid. Note: where a fringe benefit includes a percentage, compliance will be achieved by computation of the percentage stated times the basic wage rate.

(d) Contractors and subcontractors are required to pay fringe benefits for all DBRA covered work in the workweek. Unlike SCA, fringe benefits for DBA must be paid for both straight time and overtime hours. However, fringe benefit payments are not included in the basic/regular rate of pay for CWHSSA overtime purposes. *See* FOH 15k06.

(e) A contractor may take credit for contributions for any bona fide fringe benefits regardless of whether the particular benefit is listed on the applicable wage determination.

(f) The contractor is under no obligation to obtain the employee's concurrence before contributing to the fringe benefit plan on his or her behalf.

(g) Fringe benefits must be bona fide. There is no difficulty in determining whether a particular fringe benefit is bona fide in the ordinary case where the benefits are those common to the construction industry and which are paid directly to the employees in cash or into a fund, plan or program. An example of the latter would be the types of benefits listed in the act itself which are funded under a trust or insurance program. Contractors may take credit for contributions made under such conventional plans without requesting the approval of DOL under 29 CFR 5.5(a)(1)(iv).

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(h) Where a particular fringe benefit or benefit plan is not of the conventional type described in the preceding paragraph (g), it will be necessary for the NO to examine the facts and circumstances involved to determine whether the fringe benefit or the plan is bona fide in accordance with the requirements of the act. This is particularly true with respect to unfunded plans, which are discussed in 29 CFR 5.28. Contractors or subcontractors seeking credit under the act for costs incurred for such plans must request specific permission from the WHD under 29 CFR 5.5(a)(1)(iv).

A contractor may not take credit for any benefit required by law, such as social security contributions or workers compensation.

15f12 **Computing hourly fringe benefit equivalents.**

(a) In determining cash equivalent credit for fringe benefit payments, the period of time to be used is the period covered by the contribution. For example, if an employer contributes to a hospitalization plan on a weekly basis, the total hours worked (DBRA covered and non-covered) each week by each employee should be divided into the contribution made by the employer on behalf of each employee to determine the hourly cash equivalent for which the employer is entitled to take credit for each employee. If contributions are made biweekly, cash equivalents would be computed bi-weekly. If contributions are made quarterly, cash equivalents would be computed quarterly, etc.

(b) 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. For example, the hourly cash equivalent may be determined by dividing the cost of the fringe benefit by the total number of working hours (DBRA and non-covered) to which the cost is attributable. Total hours worked by employees must be used as a divisor to determine the rate of contribution per hour, since employees may work on both DBRA and non-government work during the year and employers are prohibited from using contributions made for nongovernment work to discharge or offset their obligations on DBRA work (*see* FOH 15f11(b)). Note: however, that if the amount of contribution varies per employee, credit must be determined separately for the amount contributed on behalf of each employee (*see* FOH 15f11(c)).

(c) To illustrate the principles set out in (b), assume that the annual cost of a pension program is $15,000. The total actual working hours (DBRA and nongovernment) are 15,000. Thus $15,000 / 15,000 hours = $1.00 per hour 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 DBRA-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. 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 use 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.

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(d) 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.

15f13 **Eligibility standards for participation in fringe benefit plans.**

Eligibility standards are permissible in an otherwise bona fide fringe benefit plan under DBRA. However, an employer must make payments or incur costs in the applicable specified amounts with respect to each individual laborer or mechanic performing covered contract work. Employees who are excluded from a plan for whatever reason and for whom the employer makes no contribution must be paid in cash. For example, many hospitalization plans require a waiting period of 30 days before an employee can participate in the plan. Since the employer normally makes no contribution for the employee during the waiting period, the employee must be paid the fringe benefit in cash or furnished other bona fide fringe benefits equal in monetary value. If the plan requires contributions to be made during the eligibility waiting period, credit may be taken for such contributions. Since it is not required that all employees *participating* in a bona fide fringe benefit plan be entitled to receive benefits from that plan at all times, however, credit may not be taken for contributions for employees who by definition are *not eligible to participate*, such as employees who are excluded because of age or part-time employment. Similarly, employers frequently make contributions to union fringe benefit funds for employees who are not members of the union. If the employee cannot participate in or receive benefits from the union fund, the employee must be paid the fringe benefits in cash, even though the employer, by the terms of his union contract, may be required to contribute to the union fringe benefit fund on behalf of such employees.

15f14 **Pension and profit sharing plans.**

(a) In order for a pension plan or a profit sharing plan providing for pension benefits to be creditable towards meeting the prevailing wage requirements of DBRA, the contributions must be irrevocably made to a trustee or a third party as set forth in 29 CFR 5.26 and 5.27. In accordance with 29 CFR 5.26, the trustees must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. However, there is no prohibition against the contractor being a trustee of a plan.

(b) As a general rule, contributions to profit sharing plans providing pension benefits may not be creditable towards meeting a contractor's or subcontractor's prevailing wage obligation because of the uncertainty or discretionary nature of the contribution provisions of the plan.

Since by its nature a profit sharing plan is only operative if there are profits, there is no guarantee that any contributions will be made on behalf of an employee. In addition, since contributions under such plans are normally made on an annual basis, they fail to meet the requirement that plan contributions be made not less often than quarterly. *See* 29 CFR 5.5 (a)(1)(i).

(c) However, credit for profit sharing that funds pension benefit plans can be given if certain conditions are met. The contractor would be required to contribute irrevocably to an escrow account not less often than quarterly, during the period of the DBRA covered work, an

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amount sufficient to meet any claimed fringe benefit credit under DBRA for pensions on behalf of each employee participating in the plan. Upon the annual determination of profits, the monies placed in escrow are transferred to the pension trust fund and used as an offset against the contractor's obligation to employees under the profit sharing plan. Allowable credit under DBRA would be limited to the contributions made which cover that portion of the total hours worked by the employees during the year which is attributable to work covered by DBRA. Any shortfall in profits which results in actual payments to the pension plan being less than the rate at which the contractor claimed DBRA 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 employees, or by making additional contributions to the pension fund in an amount to cover the shortfall. A contractor cannot claim credit for more than the actual costs of, or payments made into, the plan.

(d) Vesting is a usual provision of a pension plan which requires that an employee must work a specified period of time before he has earned the right to the pension benefits provided in the plan. It is WHD's position that such provisions are permissible under the act if they meet the requirements of the Employee Retirement Income Security Act.

(e) Forfeitures are fringe benefit monies which have been contributed on behalf of terminated, non-vested participants who have been terminated prior to having vested in the plan. Pension and profit sharing plans normally contain provisions for the disposition of forfeitures. Such provisions provide that forfeitures are to be used to reduce a contractor's future contributions or are allocated to the remaining employees' accounts. In either case, such provisions are not prohibited under the DBA. However, the contractor may not use such forfeitures as a credit toward meeting the requirements of an applicable DBA wage determination. To do so would allow the contractor to take double credit for the same contributions.

(f) (1) For defined contribution pension plans that provide for a higher hourly rate of contributions to be made for DBRA work than for non-covered work, the higher rate paid for DBRA work will be fully credited only if the plan provides for immediate participation *and* immediate or essentially immediate vesting schedules (*e.g.*, 100 percent vesting after an employee works 500 or fewer hours). In addition, if the employer wishes the plan to qualify for tax exempt status, the amount of annual contributions may not exceed a limitation imposed by the Internal Revenue Code.

(2) *For all defined benefit pension plans and defined contribution pension plans which do not provide for immediate or essentially immediate vesting schedules* (*100 percent vesting after an employee works 500 or fewer hours*), DBA 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. If this is not done, the credit for DBRA purposes would have to be revised accordingly.

(3) For example, 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 DBRA covered project and 500 hours of the year on another job not covered by DBRA, only $1500 or $1.00 per hour would be creditable towards meeting the firm's obligation to pay the prevailing wage on the DBRA project. This method for determining the allowable DBA credit for fringe benefit payments results from the fact that employers are prohibited from using contributions

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made for work covered by DBRA to fund the plan for periods of non-DBRA work, except as stated in (g)(2) above.

15f15 **Vacation and sick leave plans.**

(a) It has been found that many vacation and sick leave plans in the construction industry are generally unfunded plans within the meaning of 29 CFR 5.28. 29 CFR 5.28 provides that an unfunded fringe benefit plan will be considered to be a bona fide plan for DBA purposes if the plan:

(1) reasonably can be anticipated to provide benefits described in the DBA,

(2) represents a commitment that can be legally enforced,

(3) is carried out under a financially responsible plan or program, and

(4) has been communicated in writing to the affected employees.

To insure that such plans are not used to avoid compliance with the act, the Secretary directs the contractor to set aside, in an account, sufficient assets to meet the future obligation of the plan. At the time the employee takes vacation or sick leave the monies in such an account could be distributed and used as an offset against the vacation and sick leave plan obligation of the contractor. However, if a contractor has paid vacation or sick leave out of pocket under an unfunded plan, credit must be given for such payments (*see* FOH 15f15(d)).

(b) If an employee should terminate prior to becoming eligible under a vacation or sick leave plan, and amounts have been paid into an account on such employee's behalf for which the contractor has taken credit towards meeting its prevailing wage obligations, then the employee must be paid those amounts from the account upon termination.

(c) Situations may be encountered where unused vacation and/or sick leave is forfeited upon termination of employment. In such cases, the per hour cost of the vacation and/or sick leave credit must be computed on the basis of the total cost of the vacation and/or sick leave actually used by each employee (*i.e.*, forfeited contributions for which the contractor has claimed credit under DBRA may not revert to the contractor). Of course, if the employer pays these accumulated benefits in cash upon termination by an employee, there will be no problem in determining the cash equivalent.

(d) In order to determine the DBRA credit for vacation and sick leave, the payments made by the contractor to each employee are divided by the hours worked in the period covered by the payments. Since both sick leave and vacation are generally annual type fringe benefits, the total hours worked during the year (government and non-government) should be used as the divisor. For example, let us assume an employee was paid $1500.00 for vacation benefits and worked a total of 1500 hours for the employer during the year. The employer would be entitled to a credit of $1.00 per hour against the DBRA prevailing wage ($1500 / 1500 hours).

15f16 **Holiday pay.**

(a) The principles set forth in FOH 15f15 regarding vacation and sick leave plans apply equally to holiday pay.

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(b) If the applicable wage determination for a classification listed specifies paid holiday as a fringe benefit and an employee works any part of a week in which the holiday occurs, the employee must receive the entire holiday pay benefit, unless a different standard is provided in the applicable wage determination. However, if the employee is hired by the contractor after the holiday occurs in a particular week, he or she would not be entitled to the holiday benefit. For example, if New Year's Day occurs on Tuesday, and the employee is hired on Thursday, the employee would not be entitled to the benefit.

15f17 **Crediting apprentice training costs.**

(a) Costs incurred by a contractor or subcontractor for a bona fide apprenticeship program (*i.e.*, a program registered with either a state apprenticeship agency recognized by ETA (OA) or by ETA (OA) itself) are creditable under DBRA. Only the actual costs incurred for the training program, such as instruction, books, and tools or materials, may be credited. Where the costs incurred exceed the amounts set forth in the applicable wage determination, the excess cost may be credited towards the contractor's or subcontractor's other prevailing wage obligations, but only to the extent of the actual *costs* of the program.

(b) The cost incurred for apprenticeship training for one classification of laborer or mechanic may not be used to offset costs required to be incurred for another classification. For example, a contractor cannot claim credit for apprenticeship training costs incurred for electricians to satisfy the applicable wage determination apprentice training requirements for carpenters.

(c) Rather than contributing to apprenticeship training funds on an hourly basis, some contractors contribute a lump sum in advance for the annual cost of the program. It is permissible for a contractor to use such a method of payment and the contractor should be given appropriate credit. For example, a contractor may contribute a fee of $900 to enroll an employee in an apprentice training program for carpenters. In order to determine the amount the contractor may offset to meet this contribution, it is necessary to convert the contribution to an hourly cash equivalent. The hourly cash equivalent would be determined by dividing the cost by the total number of hours worked by carpenters and carpenter apprentices (DBRA and non-government work) to which the cost is attributable. Since construction workers often do not work a full year (2,080 hours) the total hours worked by the contractor's carpenters and carpenter apprentices, if any, for the preceding calendar year will be considered as representative of a normal work year for purposes of the above formula. The hourly cash equivalent thus obtained would be the contractor's permissible offset on DBRA covered work. In addition, the contractor's cost may not be offset over a period longer than the training period the cost was intended to cover. Thus, in this example, if the total hours worked by carpenters and carpenters' apprentices were 45,000 hours in the preceding calendar year, the contractor would be entitled to a credit of $0.02 per hour ($900 / 45,000) against the prevailing wage obligations for all carpenters and carpenters' apprentices working on the DBRA project.

15f18 **Administrative expenses: fringe benefit plans.**

The administrative expenses incurred by a contractor or subcontractor in connection with the administration of a bona fide fringe benefit plan are not creditable towards the prevailing wage under the DBA. For example, a contractor would not be able to take credit for the cost of an office employee who fills out medical insurance claim forms for submission to an insurance carrier.

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15f19 **Transportation and board and lodging expenses.**

Where an employer sends employees who are regularly employed in their home community away from home to perform a special job at a location outside daily commuting distances from their homes so that, as a practical matter, they can return to their homes only on weekends, the assumption by the employer of the cost of the board and lodging at the distant location, not customarily furnished the employees in their regular employment by the employer, and of weekend transportation costs of returning to their homes and reporting again to the special job at the end of the weekend, are considered as payment of travel expenses properly reimbursable by the employer and incurred for its benefit. Such payments are not considered bona fide fringe benefits within the meaning of the DBRA, are not part of the employees' wages, and do not constitute board, lodging, or other facilities customarily furnished which are deductible from the predetermined wage pursuant to 29 CFR 3.5(j). *See* 29 CFR 5.29(f).

15f20 **Overtime payments not required by DBRA.**

No overtime requirements are included in DBRA; overtime provisions to employees subject to the DBRA will depend on coverage under CWHSSA and/or FLSA.

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15g CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (CWHSSA)

15g00 Scope of CWHSSA coverage: general.

The DBA does not provide for compensation of covered employees at premium rates for overtime hours of work. The scope of CWHSSA is set out in section 103 of the act. The safety standards provisions are administered by OSHA. Except as otherwise provided, the act applies the maximum hours standards of 40 hours per week to any contract which may require or involve the employment of laborers or mechanics upon a public work of the U.S., any territory, or DC, and to any other contract which may require or involve the employment of laborers or mechanics if such contract is one:

(a) to which the U.S. or any agency or instrumentality thereof, or any territory, or DC is a party; or

(b) which is made for or on behalf of the U.S., any agency or instrumentality thereof, any territory, or DC; or

(c) which is a contract for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the U.S. or any agency or instrumentality thereof, *under any statute of the U.S. providing wage standards for such work*. *See* FOH 15i00(1).

Guards and watchmen and many other classes of service employees are laborers or mechanics within the meaning of CWHSSA. *See* 29 CFR 4.181(b).

15g01 Method of procurement of contracts not controlling.

The CWHSSA is applicable to contracts regardless of the method of procurement. It is immaterial whether contracts are entered into through invitations for bids or by negotiation.

15g02 Failure to include CWHSSA stipulations in contract.

The failure to incorporate the CWHSSA stipulations, as set forth in 29 CFR 5.5(b) and 48 CFR 22.305, into a contract does not preclude CWHSSA coverage.

15g03 Site of work.

The CWHSSA has no site of work limitation as does the DBA. For example, if an employee performs part of the contract work under a construction contract at the job site and then continues contract work at a shop or other facility located at a remote distance, all the hours at both locations, including travel time between them (*see* FOH 15k03(e)), would be considered subject to CWHSSA. Different wage rates, however, might be paid as the DBA prevailing wage requirements would apply only to activities performed on the site of the work.

15g04 Statute of limitations.

The Portal-to-Portal Act does not apply to the CWHSSA. Employee suits authorized by section 104(b) of the CWHSSA may be subject to some other statute of limitations such as the Miller Act. However, contracting agencies may withhold and transfer funds to the

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comptroller general in order to pay unpaid workers without regard to any statute of limitations.

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15h INTERPRETATIONS: APPLICATION OF CWHSSA TO TYPES OF WORK AND CONTRACTS

15h00 Concessionaire contracts.

(a) Post exchanges are considered agencies of the U.S. for purposes of the CWHSSA. The fact that individuals are supplying the funds in payment for services rendered does not preclude coverage. Thus, contracts between Post Exchanges and various concessionaires such as barber shops, photographic studios, snack bars, shops repairing shoes, radios, watches, TV sets and appliances, car washing racks, operators of officer clubs, and laundry and dry cleaning services, would be subject to CWHSSA.

(b) Where the amount of a contract other than a construction contract exceeds $100,000, the CWHSSA applies even though the percentage paid the government has the effect of reducing the net amount retained by the contractor to a figure of less than $100,000 (*e.g.*, where the contractor pays a post exchange a percentage of the amount collected for cleaning etc., rather than receiving payment from the government). *See* FOH 15i00(7).

(c) The application of the CWHSSA to concessionaire contracts extends to contracts under which services are provided to the public generally, and is not limited to those contracts under which services are provided to the government or its civilian or military personnel. For example, all laborers or mechanics employed by concessionaires in national park, forests, and the National Wildlife Refuge System, are covered by CWHSSA.

15h01 Contracts with states and political subdivisions.

In some cases, a state or political subdivision will obtain a government contract and undertake to perform it with state or municipal employees. The CWHSSA does not contain an exemption for contracts performed by state or municipal employees. Thus, the CWHSSA will apply to non-construction contracts with states or political subdivisions in the same manner as it applies to contracts with private employers, in the absence of administrative action under section 105 of the act varying such application. *See* FOH 15b06 for the application of CWHSSA to force account construction work *(i.e.*, work performed in-house with federal funds by employees of a government agency or a state or political subdivision thereof).

15h02 Food services.

Contracts to provide food services to employees in federal government buildings and installations, or the employees of firms which are managing government facilities, are subject to CWHSSA. Cooks, waitresses, buspersons, and related jobs are considered laborers or mechanics covered by the CWHSSA.

15h03 Hotels, motels, and restaurants: contracts for lodging and meals.

Contracts with hotels, motels, and restaurants for the furnishing of lodging and meals are generally subject to the CWHSSA. Employees such as maids, porters, cooks, dishwashers, waiters, and counterworkers would generally be considered laborers or mechanics covered by CWHSSA.

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15h04 Janitorial service contracts.

Janitors and window cleaners performing work on a federal government contract for services are subject to the CWHSSA.

15h05 Laundry and dry cleaning contracts: linen supply contracts.

The CWHSSA applies to laborers or mechanics performing laundry and dry cleaning service contracts or linen supply contracts.

15h06 Maintenance work done under service contracts with HUD.

Maintenance employees as well as other workers engaged in manual services for local housing authorities pursuant to service contracts with HUD are subject to CWHSSA. Contracts with the Federal Housing Administration (FHA) for work on houses owned by the FHA (*e.g.*, houses repossessed by FHA for failure of the borrower to meet payments), such as for mowing of yards, repair, and maintenance work, are also subject to CWHSSA.

15h07 Moving and storage.

Contracts which call for packing, crating, drayage, loading, and storage of household goods and personal effects of military and civilian personnel arriving and departing from military installations are subject to the CWHSSA. The primary purpose of such contracts is not considered to be for transportation within the meaning of the CWHSSA exemption. *See* 15i00(2).

15h08 Repair and servicing of vehicles.

Contracts for the repair and servicing of vehicles are generally subject to the CWHSSA and are not exempt under the open market exemption. *See* FOH 15i00(4).

15h09 Shipbuilding, alteration, repair, and maintenance.

Except where PCA is applicable, CWHSSA will apply to the building, alteration, repair, and maintenance of ships under government contracts. *See* FOH 13b11, FOH 14c06, FOH 15d11, and section 7 of Regulations & Interpretations, Number 3.

15h10 Sorting and handling of mail.

Postal Service contracts for the handling of mail may be subject to CWHSSA if they involve the separation and storage of mail, as well as its transportation, according to specifications set forth in the contract. The principal question to be determined is whether the contract in question is a contract for transportation within the meaning of section 103(b) of the CWHSSA. If the contract is essentially for sorting and storage of mail with transportation being incidental thereto, there would be coverage under CWHSSA. *See* FOH 15i01(c).

15h11 Vending machine concession agreements.

The open market exemption under section 103(b) of the CWHSSA does not include vending agreements. Laborers or mechanics employed under such contracts are subject to CWHSSA unless PCA covers such work.

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15i EXCLUSIONS AND EXEMPTIONS UNDER CWHSSA

15i00 Exemptions.

Certain types of contracts and contract work are exempted from coverage of the act, either by the terms of the act (*see* section 103(a) and (b)) or by administrative order issued by authority of the Secretary under section 105 of the act. These include (the first five are statutory):

(a) Work under a contract described in FOH 15g00(3) where the assistance from the U.S. or any agency or instrumentality is *only* in that nature of a loan guarantee, or insurance (*see* FOH 15i01(b))

(b) *Contracts* for transportation by land, air, or water (this includes, for example, mail haul contracts)

(c) *Contracts* for transmission of intelligence

(d) *Contracts* for the purchase of supplies or materials or articles ordinarily available in the open market

(e) *Work* required to be done in accordance with the provisions of the PCA

(f) *Construction contracts* of $100,000 or less

(g) *Purchases and contracts, other than construction*, in the aggregate amount of $100,000 or less. In arriving at the aggregate amount involved, there must be included all property and services which would properly be grouped together in a single transaction and which would be included in a single advertisement for bids if the procurement were being effected by formal advertising

(h) *Agreements* entered into by or on behalf of the Commodity Credit Corporation for storage in, or handling by, commercial warehouses of certain items, including grains, beans, seeds, cotton, wool, and naval stores

(i) *Certain sales* of surplus power by Tennessee Valley Authority

(j) *Contract work* performed in a work place within a foreign country or certain other areas. This exemption follows *section 13(f) of the FLSA and its effect is to make the geographical scope of CWHSSA the same as the FLSA*

15i01 Application of exclusions and exemptions under CWHSSA.

(a) The CWHSSA provides in part that the act applies if the contract is "for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by," the U.S. or any agency or instrumentality thereof under any federal law *providing wage standards for the work*. *See* 40 USC 3701(b)1(B)(iii). Thus, coverage on federally assisted contracts does not exist unless the particular statute under which the loans or grants are authorized contains wage standards, directly or by reference. For example, contracts awarded as a result of a grant from the U.S. Department of Agriculture, Soil Conservation Service, under the Watershed Protection and Flood Prevention Act (16 USCA 1001, *et seq.*) are not covered by CWHSSA since the basic statute contains no reference to wage standards.

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(b) 40 USC 3701 also provides that 40 USC 3702 (labor standards and wage and liquidated damages liabilities) shall not apply "to work where the assistance described in 40 USC § 3701(b)1(B)(iii) from the Government or an agency or instrumentality is *only* in a loan guarantee, or insurance" (emphasis added). This is a limited partial exemption from the application of CWHSSA confined to work assisted only in the quoted manner. It applies even though CWHSSA stipulations are written into the contract, but it does not affect DBRA application under the wage standards provided in the enabling statute. Particular attention should be paid to HUD projects since the assistance for many of these projects is only in the nature of a loan guarantee, or insurance.

(c) With respect to contracts involving transportation, it is necessary to distinguish carefully as to whether the contract is primarily for transportation purposes or whether the transportation is merely incidental to some other purpose of the contract. For example, mail haul contracts are for the primary purpose of transportation; hauling of materials by a contractor in connection with its construction contract is an incident to the primary purpose of the contract, which is construction, not transportation.

(d) The open market exemption in CWHSSA is much broader than the exemption in PCA. While in PCA the open market exemption is directed at the mode of purchase, in the CWHSSA the determination of whether a purchase is an open market one depends on the character of the products or article purchased. If the contract is for the purchase of materials in the form in which they are ordinarily made available to the general purchasing public, the CWHSSA open market exemption applies.

(e) Laborers or mechanics (including watchmen and guards) engaged in performance of government contracts for supplies that are not ordinarily available in the open market (*see* FOH 15i01(d)) are covered by CWHSSA if and to the extent that the work which they perform is not required to be done in accordance with the provisions of PCA. If a contract in excess of $100,000 is in part for services and in part for materials, a laborer or mechanic performing the services may be subject to CWHSSA, and another employee, engaged in producing the materials, may be subject only to PCA.

15i02 **Limited exemptions, variations, and tolerances.**

(a) Under the act, the Secretary or authorized representative may provide reasonable limitations and allow variations, tolerances, and exemptions to and from any or all of the provisions of the CWHSSA whenever such action is found to be necessary and proper in the public interest to prevent injustice, or undue hardship, or to avoid serious impairment of government business. 29 CFR 5.15 provides for consideration of any written request by any federal agency for such action, and sets forth certain variations, tolerances, and exemptions which have been granted.

(b) In limited instances, individual exemptions, variations, and tolerances under the CWHSSA have been granted to certain categories of workers on qualified contracts. However, such workers are to be paid overtime compensation as may be required by any other applicable law.

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15j INTERPRETATIONS: APPLICATION OF CWHSSA TO TYPES OF EMPLOYEES

15j00 Employees covered: laborers and mechanics - statutory definition.

The act provides that its provisions apply to all laborers or mechanics, including watchmen and guards, employed by any contractor or subcontractor in the performance of any part of the contract work. The act specifically provides that laborers and mechanics include workers performing service in connection with dredging or rock excavation in any river or harbor of the U.S., or any territory, or DC, but does not include any employee employed as a seaman. *See* FOH 15e00 and FOH 15e23.

15j01 Flight instructors.

(a) Flight instructors may qualify for exemption as teachers under the FLSA (29 CFR 541.303) if the requirements are met. *See* FOH 22. Such exempt flight instructors are not considered laborers or mechanics for purposes of CWHSSA.

(b) The fact that SCA may not apply to a particular flight training contract, or that flight instructors are not considered laborers or mechanics for purposes of the CWHSSA, does not affect the application of CWHSSA to other individuals employed as laborers or mechanics on such a contract in excess of $100,000.

15j02 Medical and hospital occupations.

Employees such as orderlies, porters, and housekeepers are laborers and mechanics. However, those rendering professional services, and those whose work is clerical, supervisory, or non-manual in nature, are not laborers or mechanics for purposes of CWHSSA.

15j03 Pilots and copilots of fixed-wing and rotary-wing aircraft.

Pilots and copilots are laborers and mechanics within the meaning of the DBRA and the CWHSSA when they are performing in that capacity. The work of a pilot requires dexterity, coordination, a degree of physical strength, and other physical and mental processes necessary to control an airplane or rotorcraft in flight, and does not meet the primary duty requirement for exemption as a bona fide executive, administrative, or professional employee. *See* 69 FR 22156 and 29 CFR 5.15(d) (stating no CWHSSA violations exist for different pay practices for certain pilots or copilots under a written employment agreement, provided specified conditions are met).

15j04 Supervisory, professional, and clerical personnel.

The CWHSSA does not generally apply to supervisory, professional, and clerical personnel. *See* FOH 15e15 and 29 CFR 5.2(m).

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15k APPLICATION OF OVERTIME STANDARDS UNDER CWHSSA

15k00 Overtime standards.

CWHSSA applies to laborers, mechanics, guards, and watchmen for the time spent on covered contract work only (*i.e.*, total up all time each employee spent working on covered contracts (exclude all commercial, non-government work)). CWHSSA requires the payment of time and one-half the basic rate of pay for all hours worked in excess of 40 hours in a week. (The daily overtime requirement under CWHSSA was repealed in 1986.)

15k01 Basic rate of pay.

(a) The CWHSSA contains no monetary wage standards; monetary wage standards result from the application of DBRA prevailing wage rate determinations, SCA prevailing wage rate determinations, or the FLSA minimum wage. The basic rate of pay under CWHSSA is the straight time hourly rate and cannot be less than the basic hourly rate required in an applicable wage determination. Under DBRA, amounts paid as fringe benefits (both contributions to bona fide benefit plans and cash payments made to meet wage determination fringe benefits requirements) are excluded in computing overtime obligations under CWHSSA.

(b) If an employee worked in more than one classification and at different rates on covered contracts during a workweek, the overtime premium is computed based on the regular rate of pay. The regular rate is the weighted average of the rates; that is, the total earnings (except statutory exclusions) at the different rates are divided by the total number of hours worked in the workweek. Overtime may be computed based on the rate in effect during the hours worked over 40 in the workweek provided the provisions of FLSA 7(g)(1) or (2) are met. *See* 29 CFR 778.6, 29 CFR 778.115, and 29 CFR 778.415 -419.

15k02 (Reserved.)

15k03 Hours worked.

(a) The principles governing the determination of what constitutes working time for purposes of the FLSA are followed in determining hours worked by laborers and mechanics performing work subject to CWHSSA. However, the application of the overtime provisions under the CWHSSA differs from the FLSA in that only the hours actually spent on a covered contract or combination of covered contracts need be considered in computing the overtime pay.

(b) In the case of an employee working for two or more employers, all hours worked under the same contract are to be counted for purposes of CWHSSA overtime even though the employers are disassociated or otherwise separate, such as a contractor and a subcontractor.

(c) An employee working for the same contractor on two or more separately awarded contracts subject to the CWHSSA is entitled to have the hours worked on all such covered contracts combined and to receive overtime for all such hours worked in the workweek in excess of 40.

(d) When an employee performs two or more types of work for which different hourly rates are applicable (*i.e.*, different classification, DBRA or SCA work which is all covered by CWHSSA or noncovered work, etc.), the CWHSSA overtime premium is computed under FLSA principles (*see* FOH 32b05 and FOH 32h).

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(e) CWHSSA does not have a site of work limitation on coverage. All hours worked on covered contracts (even at a fabrication shop away from the site) are combined for determining CWHSSA compliance. For example, if an employee starts the day performing covered work at the fabrication shop and then travels to the work site, the time at the fabrication shop and the travel time between the fabrication shop and the work site is hours worked covered by CWHSSA.

15k04 **Computation of overtime when other premium payments are involved.**

(a) Employees may receive an additional premium payment for employees performing hazardous, arduous, or dirty work. Such premium payments are not creditable as premium overtime work and must be included as part of the basic or regular rate in computing overtime under the CWHSSA in the same manner as under the FLSA. On the other hand, where the parties have agreed on premium rates for work qualifying as overtime under FLSA sections 7(e)(5), (6), or (7) which are computed as a multiple of the base rate specified by the agreement, the extra compensation paid for such overtime which is in excess of the statutory regular rate may be credited, under section 7(h) of the FLSA, toward the 50 percent premium compensation for overtime which is required by the act's provision for an overtime rate of "not less than one and one-half times" the statutory regular rate. A like rule applies under the CWHSSA.

(b) For example, an agreement provides for a rate of pay of $13 an hour for a crane operator with double-time for work in excess of 8 hours/day or 40 hours a week. A crane operator works 9 hours a day 5 days a week. Under the agreement, the crane operator is entitled to $585 (45 x $13) in straight time compensation and $65 (5 x $13 for agreed double-time overtime rate) in overtime compensation for a total of $650. The overtime premium due under the FLSA is $32.50 (5 hours x .5 x $13) and the employer paid $65. Since the employee received a creditable premium, the employee is paid in compliance.

For another example assume the same employee works under an agreement that provides a rate of $12 an hour for a crane operator, with double time based on such rate for work in excess of 8 hours a day or 40 hours a week and an additional $1 an hour for a crane with a boom length of over 275 feet. Under the agreement, an operator of a crane with such a boom length who works 9 hours a day, 5 days a week is entitled to $645 for the week ($480 for 40 hours at $12, plus $45 for 45 hours long-boom rate of $1, plus $120 for 5 overtime hours at $24). If paid in accordance with such an agreement the employee is paid in compliance with the FLSA and the CWHSSA. Under both acts, the regular rate or basic rate is $13 an hour, which includes the $1 per hour for the long-boom time. An additional payment of not less than $6.50 an hour as extra compensation for weekly overtime is required for 5 of the 45 hours worked (5 x 6.50 = $32.50 required overtime premium). Thus, the statutory requirements are met by payment of $60 (5 hours x $12 agreed double-time overtime premium rate). The agreed double-time overtime payment which is creditable (5 x $12 = $60) is more than enough to satisfy the statutory overtime pay requirement (5 x $6.50 = $32.50).

15k05 **Computation of overtime under CWHSSA when wage rate is higher than that required under DBRA or SCA.**

The wage rate actually paid an employee for non-overtime work, when it exceeds the applicable DBRA or SCA monetary wage rate, is the basic rate of pay on which not less than time and one-half for overtime must be computed under CWHSSA (*see* 29 CFR 5.32(c)(1)

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and (2)). The basic rate under CWHSSA is the rate on which time and one-half overtime compensation is computed and paid under section 7 of the FLSA.

15k06 Computation of overtime when fringe benefits are involved.

(a) Any SCA or DBA fringe benefit payments which are excludable from the regular rate under section 7(e) of the FLSA, or their cash equivalent, may be excluded in the computation of the basic rate under CWHSSA, as provided in 29 CFR 4.182 and 29 CFR 5.32, respectively.

(b) A question of fact may arise as to whether or not a cash payment made to laborers or mechanics to whom a DBRA wage determination is applicable is actually a cash equivalent made in lieu of fringe benefit or is simply part of the straight-time cash wage. In the latter situation, the cash payment is not excludable in figuring overtime compensation. *See* 29 CFR 5.32(c)(1).

15k07 FLSA overtime exemptions and CWHSSA.

An employee may perform work in a workweek within the scope of an FLSA overtime exemption and also perform work covered by the CWHSSA. In such cases, during any such workweek in which the employee works more than 40 hours per week *on contract work subject to CWHSSA*, the employee must be paid additional half-time overtime for all such contract hours in excess of 40 per week. However, during any such workweek in which the employee does not work more than 40 hours *on contract work subject to CWHSSA*, an otherwise applicable FLSA overtime exemption will not be defeated.

15k08 FLSA section 7(f) plans and CWHSSA.

An FLSA section 7(f) plan which is found to be valid may continue to operate during periods in which the work of an employee is subject to CWHSSA provided that during those periods the employee is paid in compliance with the overtime provisions of CWHSSA.

15k09 Use of the fluctuating workweek under CWHSSA.

An employer may compensate employees who are subject to the overtime standards of CWHSSA on the basis of the fluctuating workweek method of payment provided:

(1) the criteria set forth in 29 CFR 778.114 are met;

(2) the employees' regular rate of pay in any workweek does not fall below the applicable prevailing or minimum hourly rate required under the DBRA, SCA, and/or FLSA as applicable; and

(3) additional half-time overtime is paid for hours of work in excess of 40 per week.

15k10 Computing liquidated damages under CWHSSA.

The CWHSSA requires that "liquidated damages shall be computed, with respect to each individual employed as a laborer or mechanic in violation of any provision of this Act, in the sum of $10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime required by this Act."

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15k11 Computation examples.

(a) The following examples reflect the correct computations under DBRA and CWHSSA for an employee who worked 44 hours on a covered contract as an electrician, where the wage determination rate for an electrician is $12.00 (basic hourly rate) plus $2.50 in fringe benefits.

(1) If the employer paid $12.00 in cash wages and $2.50 in fringe benefits, the electrician would receive:

44 hours x	$2.50 =	$110.00 in fringe benefits
44 hours x	$12.00 =	$528.00 for prevailing wages
4 hours x ½ x	$12.00 =	$ 24.00 for CWHSSA earnings
		$662.00 Total

(2) If the employer paid $10.00 in cash wages and $4.50 in fringe benefits:

44 hours x	$4.50 =	$198.00 in fringe benefits
44 hours x	$10.00 =	$440.00 for prevailing wages
4 hours x ½ x	$12.00 =	$ 24.00 for CWHSSA earnings
		$662.00 Total

(b) The following examples provide two methods for the computation of overtime premium pay required under CWHSSA and/or FLSA for an employee who worked in different job classifications and at different rates of pay in the same workweek:

An employee is hired to perform work on a covered construction contract in two job classifications: painter and electrician. The wage determination rate for an electrician is $12.00 (basic hourly rate) plus $2.50 in fringe benefits. The wage determination rate for a painter is $10.00 (basic hourly rate) plus $3.00 in fringe benefits. The payroll shows that the worker performed painting and electrical duties as follows:

	S	M	T	W	T	F	S
Painter hours		8	8	8			
Electrician hours				8	8	4	

(1) *Method 1: computation of the overtime premium based on the regular rate for the workweek*

Step 1: determine the straight time wages due, excluding fringe benefits

24 hours at the painter's rate of $10.00 =	$240.00
20 hours at the electrician's rate of $12.00 =	$240.00
Total straight time wages =	$480.00

Step 2: calculate the regular rate

($480.00 / 44 hours worked) = $10.91 regular rate

Step 3: compute the overtime premium due

½ ($10.91) x 4 overtime hours worked = $21.82

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(2) *Method 2: computation of the overtime premium based on the rate in effect when the overtime hours were worked (see FOH 15k01)*

In this example the 4 overtime hours occurred on a Saturday.

The overtime premium could be computed as follows:

½ ($12.00) x 4 = $24

Note: in some cases, a question arises over whether a cash payment made to a laborer or mechanic is paid in lieu of a fringe benefit contribution or whether it is simply part of the individual's normal straight time wages. In the latter situation, the cash payment is not excludable in computing the overtime pay obligation.

(c) CWHSSA liquidated damages

Liquidated damages are computed at $10.00 per day per employee for CWHSSA violations.

Although the contracting officer is required in all violation cases to compute liquidated damages, the decision on whether to assess the damages is made by the federal agency. (Liquidated damages in excess of $500 may be waived or adjusted only with the concurrence of the WHD.)

Scenario:

	M	T	W	T	F	S	S	Total
Regular time	10	12	13	9	8	3	0	55

In the above example, no overtime premium was paid. The 15 weekly overtime hours were worked on 3 calendar days, Thursday, Friday, and Saturday. Thus, $30.00 in CWHSSA liquidated damages would be computed.

(d) Overtime requirements under the FLSA, as amended

Laborers and mechanics performing work subject to the predetermined minimum wages may be subject to overtime compensation provisions of other laws which may apply concurrently to them, including the FLSA. *See* 29 CFR 778.6.

As a general standard, section 7(a) of the FLSA, as amended, provides that an employer shall not employ any employee to work in excess of 40 hours in a workweek unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed. *See* 29 CFR 778.101.

Unless specifically exempted, an employee who performs work on both federally funded/federally financed projects and commercial work in the same workweek must receive an overtime premium for hours worked in excess of 40 in the workweek. *See* 29 CFR 5.32 and in 29 CFR 778.

CWHSSA requires the payment of an overtime premium only if the laborer or mechanic works in excess of 40 hours in a workweek on covered contract(s). Overtime hours worked,

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which are not subject to CHWSSA, would be subject to the FLSA, unless otherwise exempted. The distinction is relevant in the assessment of liquidated damages as the FLSA does not provide for the assessment of liquidated damages.