

Appendix C – Selected DOL Davis-Bacon Review Materials

Chapter 15

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

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Chapter 15

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

15a GENERAL AND STATUTORY PROVISIONS - DBRA/CWHSSA

15a00 Purpose and use of FOH Chapter 15.

- (a) This Chapter supplements Regs, 29 CFR Parts 1, 3, 5, 6, and 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). The Related Acts are listed in Reg 1, Appendix A, and Reg 5.1. The Davis-Bacon Act, the Copeland Anti-Kickback Act, the Contract Work Hours and Safety Standards Act, and Regs 1, 3, 5, 6, and 7 are contained in FOH Vol. I.
- (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 (S/L) has coordination and oversight responsibilities, including the authority to investigate labor standards compliance as warranted. Pursuant to the authority under the Plan, the S/L has issued the Regs in (a) to coordinate the administration and enforcement of DBRA/CWHSSA labor standards. All Agency Memorandum No. 76, dated 5/31/68 (FOH VOL I), to Agencies Administering Statutes Referred to in 29 CFR, Subtitle A, Part 5, reflected an agreement between the DOL and the contracting agencies for administering the labor standards of DBRA/CWHSSA. Memoranda Nos. 118 and 129 were subsequently issued to remind all contracting agencies of their labor standards enforcement responsibilities.
- (c) Pursuant to an understanding with the Treasury Department, the S/L is solely responsible for the enforcement of the DBRA labor standards applicable to covered projects funded under the State and Local Fiscal Assistance Act of 1972 (Revenue-Sharing).

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 or the District of Columbia 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 contract the wage rates and fringe benefits determined by the S/L 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 section 5.5 (a) of Regs Part 5). 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 D-B 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 DBRA's in the Regs may not be completely up to date. Consequently, it may be necessary to consult the RO for verification of DBRA coverage.

15a03 The Contract Work Hours and Safety Standards Act (CWHSSA).

- (a) This Act contains weekly (after 40) OT pay requirements and applies to most Federal contracts which may require or involve the employment of laborers or mechanics, including watchmen and guards, and to which any agency or instrumentality of the United States or the District of Columbia or a Territory is a party. (See FOH 15g.) NOTE: Work performed prior to 1/1/86 on contracts covered by CWHSSA is subject to time and one-half OT pay for all hours worked on covered contracts in excess of 8 in a calendar day or 40 per week, whichever is greater. CWHSSA was amended by Public Law 99-145 effective 1/1/86 to eliminate the daily OT provisions.
- (b) Contracts for construction in excess of \$2,000, contracts for supplies between 2,500 and \$10,000, and other contracts, such as for services in excess of \$2,500, 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 15i.
- (d) Sec. 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 w/w (or, in excess of 8 hours in a calendar day on contract work prior to 1/1/86, if the number of such hours exceeds the hours over 40). 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 OT wages required by CWHSSA.
- (e) Section 107 of the Act provides health and safety standards on covered construction work which are administered by OSHA.

15a04 The Copeland "Anti-Kickback" Act.

- (a) The "Anti-Kickback" section of the Copeland Act makes it punishable by a fine up to \$5,000 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 "Anti-Kickback" Act, Copeland Act, WH Publication 1247, and Reg 3, FOH Vol. 1)
- (b) Regulations pertaining to Copeland Act payroll deductions are contained in Reg 3. Deductions permissible without application for approval by the S/L are explained in Reg 3.5; those which require approval are explained in Reg 3.6. Note in Reg 3.5 that certain deductions, including those which meet the requirements of FLSA Sec 3(m), Reg 531, can be made without the consent of the S/L. The Copeland Act and Reg 3.3 and 3.4 require the contractor or subcontractor to file a weekly "Statement of Compliance". Reg 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 the Government Printing Office at a nominal price, 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 section 1001 of Title 18 and section 231 of Title 31 of the U.S.C. 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. Reg 3, as explained above, applies only to payroll deductions made under contracts subject to Federal wage standards.

15a05 The Miller Act (40 U.S.C. 270a-270d).

- (a) This Act provides, in general, that Federal contracts in excess of \$25,000 for construction, alteration, or repair of any public building or public work of the United States, may not be awarded to any person, until such person furnishes to the United States 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) The Department of Labor 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 D-B Act, except for the \$25,000 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 under the Miller Act must be commenced within one year after the date on which the last of the labor was performed and must be brought in the name of the United States, for the use of the person suing, in the United States 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.

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 D-B labor standards, including but not limited to those listed in Regs Parts 1 and 5. However, if a statute authorizes assistance but does not include either directly or by reference the D-B labor standards clause, the DBRA does not apply. (See (b) below).
- (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 D-B wages.
- (c) The DBRA applies to construction projects financed through the use of revenue-sharing monies under the State and Local Fiscal Assistance Act of 1972, if 25 percent or more of the cost of the project is derived from that statute. If monies from that statute are supplemented by funds from another Federal statute which contains D-B labor standards to finance a particular project, the DBRA applies regardless of the amount of revenue sharing funds involved.
- (d) The Surface Transportation Assistance Act of 1982 (Pub. L. 97-424), effective January 6, 1983, expanded D-B coverage to all Federal-aid highway construction projects to include those involving resurfacing, restoration, rehabilitation, and reconstruction ("4-R" work). Previously, section 113 of Title 23, U.S.C., The Federal-Aid Highway Act, had been construed to exclude 4-R work from "initial construction."
- (e) 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 D-B is limited, by its terms, to the fifty states and the District of Columbia. 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 D-B 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 (PA) applies to the D-B Act. 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 case of willful violations), where such actions are judicially determined to be permissible under the law. However, it is the Department's position that the PA does not apply to administrative actions initiated through the ALJ hearing procedures, and thus, the PA does not preclude such corrective administrative action after two (or three) years.

- (b) Failure to pay the minimum rates specified in a D-B 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 PA and may be transferred to the Comptroller General and paid to the underpaid employee without regard to such time limit.
- (c) The PA does not apply to Federally-assisted projects (the Related Acts) on which D-B 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 six-year statute of limitations would apply in government enforcement actions (28 U.S.C. 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 Reg 5.2(k).

15b04 Site of the work - definition.

- (a) The D-B Act provides that every covered contract shall contain a stipulation that the contractor or subcontractor shall 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, Reg 5.5 (a)(1)(i) prescribes a contract clause which in effect extends the "site of the work" concept to the related statutes. The United States 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 United States Housing Act of 1937 or the Housing Act of 1949. (It should be noted that the OT requirements of CWHSSA apply to all laborers and mechanics performing contract work, regardless of the site of their employment. See FOH 15g03.)
- (b) The D-B Act limits coverage to laborers or mechanics employed on the "site of work" but does not define this term. The "site of work" definition stated below shall be followed by WH in all D-B and DBRA investigations:
 - (1) The "site of work" is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (2) below, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the "site" because of proximity. For example, if a small office building is being erected, the "site of work" will normally include no more than the building itself and its grounds and other land or structures "down the block" or "across the street" which the contractor or subcontractor uses in the course of his performance on the particular contract. In the case of larger contracts, such as for airports or dams, the "site of the work" is necessarily more extensive and includes the whole area in which the contract construction activity will take place.
 - (2) Except as provided in paragraph (3) below, fabrication plants, "mobile factories" 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 performance of the contract or project, and are so located in

proximity to the actual construction location that it would be reasonable to include them. A judgment must be made on all the facts and circumstances of the particular case and the views of the contracting officer should be taken into account.

- (3) Not included in the "site of work" are permanent home offices, branch plant establishments, fabrication plants, and tool yards 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. This is so even though mechanics and laborers working at such an establishment may repair or maintain machinery used in contract performance, or make doors, windows, frames, or forms called for by the contract while continuing normal commercial work. Regardless of the activities performed at such establishments, the wage determination does not apply because they do not constitute the "site of work". In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial supplier or materialman which are established by a supplier of materials for the project before opening of bids and not on the project site are not included in the "site of work". Such permanent, previously established facilities are not a part of the "site of work", even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract. (See Reg 5.2(1) and FOH 15e15.) On the other hand, if mechanics or laborers working at such establishments that are not a part of the "site of work" are required to go to a place which is the "site of work" to perform activities on the contract there, the WD is applicable for the actual time so spent at the site of work, not including travel.
- (c) Once the limits of "site of work" have been determined, the wage determination is applicable only to those mechanics and laborers employed by a contractor or subcontractor within such limits (that is, upon the site of the work).
- (d) Earlier, guidance was provided that any investigations of contractors/subcontractors on a Davis-Bacon project, who had employees employed as truck drivers hauling materials/supplies from commercial suppliers to the worksite, should be suspended until further notice. On May 4, 1992, an Interim Final Rule was published, effective that date, implementing the "Midway" decision. This rule is applicable to "all pending cases." As a result, the suspension was lifted. Guidance regarding such investigations is provided as follows:
 - (1) Our traditional enforcement position regarding employees of materialmen is not affected (see FOH 15e15).
 - (2) Time spent by employees engaged in transporting materials/supplies to and from the site is not covered.
 - (3) Time spent on the site loading or unloading materials/supplies is covered.
 - (4) Time spent driving on the site is covered.
 - (5) Time spent hauling on a dedicated facility and between a dedicated facility and the site is covered.
 - (6) Time spent driving between two or more unrelated sites is not covered.
 - (7) Time spent by such employees performing any other activity on the site as a laborer or mechanic is covered.

15b05 "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 D-B Act. However, any part of the work not done under "force account" but contracted out is subject to DBRA/CWHSSA in the usual manner. (See FOH 15e12.)
- (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). 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.

15b06 Lease arrangements.

- (a) Where the Government enters into a lease/purchase agreement D-B applies, because the cost of the construction is eventually paid for by the Government. D-B 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) Postal Service lease agreements are governed by the Postal Reorganization Act (39 U.S.C. 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 DB labor standards for any construction, modification, alteration, repair, painting, decoration, or other improvement of the facility covered by the agreement.

15b07 Post exchange contracts.

The D-B Act 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.

15c EXCLUSIONS FROM COVERAGE UNDER DBRA

15c00 Exceptions to coverage.

- (a) Section 4 of the D-B provides that "this Act shall not be construed to supersede or impair any authority otherwise granted by Federal 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 D-B Act 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) Title I of the Housing and Community Development Act of 1974 - rehabilitation of residential property designed for fewer than 8 families.
 - (2) Section 802 of the Housing and Community Development Act of 1974 - construction of residential property designed for fewer than 8 families.
 - (3) Section 8 of the U.S. Housing Act of 1937 - fewer than 9 units.
 - (4) Sections 220 and 233 of the National Housing Act - fewer than 12 units.
 - (5) Sections 221 and 235(j) (1) of the National Housing Act - fewer than 8 families.
- (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, 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 which are subject to HUD-determined (not DBRA) rates. HUD has issued guidance to its field offices and public housing agencies (and Reg. 24 CFR 968.3), 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 shall be referred through channels to the NO. WH 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 D-B labor standards and are not covered if there is no other federal assistance containing D-B 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 D-B 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 Davis-Bacon Act.
- (b) Pursuant to authority under section 107(d)(2) of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5301 et seq.), the Secretary of HUD has waived the DB/CWHSSA labor standards requirements in connection with Community Development Block Grants for Indian Tribes and Alaskan Native Villages (24 CFR 571.603).

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

15d00 Carpet laying and installation of draperies.

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. The 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.

15d01 Clean-up work.

- (a) 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.)
- (b) Particular attention should be given to local area practices when assessing BWs for clean-up work. In some localities, the area practice is for some classification other than construction laborers to perform the clean-up work. Where applicable, conformance procedures (Reg 5.5(a)(1)(ii)) may be appropriate. Guidance should be obtained from the RO or NO, if necessary.

15d02 Demolition work in relation to construction.

Demolition, standing alone, (except for demolition work under Urban Renewal projects authorized pursuant to the Housing Act of 1949, as amended) is not 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.

15d03 Drilling work in various situations.

- (a) The application of the Act to a contract for drilling work would turn upon whether the contract is one for "construction" or "public works" within the meaning of the Act.
- (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 works". The word "works" in the term "public works" refers typically to improvements, such as buildings, canals, or roads, 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 nor funds 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 also FOH 14b03.) 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. (Also see FOH 14b04.)

(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 (the dismantling of the above-ground equipment), incidental to construction, or well drilling (the rerunning of the tubing and replacement of the cement plugs).

15d04 Landscape contracting.

- (a) 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 D-B Act, without any requirement that it be related to other construction work (Reg 5.2(i)). Landscaping which is not covered by the D-B Act is work to which the SCA may be applicable. (See Reg 4.116.)
- (b) Particular attention should be given to local area practices when assessing BWs for landscape work. In some localities, the area practice is for some classification other than construction laborers to perform landscape work (e.g., "landscape laborer"). Where applicable, conformance procedures (Reg 5.5(a)(1)(ii)) may be appropriate. Guidance should be obtained from the RO or NO, if necessary.

15d05 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.

15d06 Public utility installation.

- (a) Whether or not the employees of a public utility, who perform construction-type work in connection with Federal and federally-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 (e.g., relocation of utility lines or installation of utility lines which are to become the property of the project sponsor), such work would be subject to the DBRA labor standards requirements of the construction contract.
- (c) For example, DBRA wage provisions of the United States 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 D-B Act. 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 D-B Act.

15d07 Sewer repair service.

- (a) The internal inspection of sewer lines for leakage and damage through the use of closed circuit T.V. 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 (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 performed this type of work, the use of a conformed classification and rate would be appropriate. (Reg 5.5(a)(1)(ii).)

15d08 Shipbuilding, alteration, repair, and maintenance.

The building, alteration, and repair of ships under Government contract is work performed upon "public works" within the meaning of the Davis-Bacon Act. Wage determinations for shipbuilding under the D-B 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" (U.S. Navy and U.S. Coast Guard vessels) is subject to 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 14d03.)

15d09 Steam and sand blast cleaning.

A Government contract requiring steam and sand blast cleaning and bird proofing is covered by the D-B Act. 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 D-B Act.

15d10 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 nonconstruction work called for by the contract (see Reg 4.116(c)(2))). For example, D-B 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 accommodate 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 (such as 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 nonconstruction 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.
- (d) Coverage questions which cannot be resolved in accordance with the above principles should be directed to the NO.

15e INTERPRETATIONS - APPLICATION OF DBRA TO TYPES OF EMPLOYEES

15e00 Definition of laborers and mechanics.

The terms "laborer" and "mechanic" are defined in Reg 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 also FOH 15e14). Generally, mechanics are considered to include any worker who uses tools, or who is performing the work of a trade.

15e01 Apprentices.

- (a) An apprentice (Reg 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 Bureau of Apprenticeship and Training (BAT), Employment and Training Administration, U.S. Department of Labor or if no such recognized agency exists in a State, under a program registered with the BAT 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 BAT 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 journeymen. To be employed in compliance with the Regs the following guidelines must be observed:
- (b) Allowable ratio - apprentices to journeymen.
- (1) The allowable ratio of apprentices to journeymen employed on the contact work in any craft classification shall not be greater than the ratio permitted the contractor as to his entire work force under the registered program. (See Regs 5.5(a)(4)(i).) The allowable ratio is to be applied on a daily basis. However, BW's will not be assessed for minor, temporary, and inadvertent ratio imbalances which are promptly corrected. 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 journeymen 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 journeymen 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:

<u>Journeyman</u>	<u>Allowable Apprentices</u>
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 journeymen (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) Notwithstanding 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 Reg 5.5(a)(4)(i)).
- (4) A working foreman, supervisor, or owner may be counted as a journeyman for ratio purposes provided such a worker spends the majority of his or her time 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 journeyman's rate or has utilized an excessive number of apprentices who are also entitled to the journeyman's rate, such employees cannot then be counted as "journeyman" 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 his approved plan and it is disclosed that he is employing five apprentices on the project, the first three apprentices employed on the project shall be considered within the quota; the last two employed shall be considered improperly employed and BW's are due these two employees. As a practical matter, if it is impossible to determine which apprentices were first employed on the project for the purposes of BW computation, any equitable formula 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, and compute the BW's for the remaining two employees in a manner which distributes the BW's as equally as possible.

(d) Evidence of bona fide apprenticeship registration.

Reg 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. The CO should check with the contractor for such written evidence of bona fide apprenticeship if apprentices are employed on the contract.

(e) Unregistered apprentices.

Reg 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 shall 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 agreements contain percentages which are applied to a stipulated wage rate (contained in the agreement and established by BAT), 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 WD and the percentages should be computed against the journeymen's basic rate found in the WD. Some apprenticeship agreements may specify dollar amounts, rather than percentages of the journeymen's rate, for various levels of progress. For this type of apprenticeship training agreement, in order to determine whether the apprentice is properly paid it is necessary to convert the dollar amounts to a percentage of the journeymen's basic rate in the training agreement. This is then applied to the rate specified in the WD. For example, where the journeymen's rate contained in the apprenticeship training agreement for a particular craft is \$8.00 per hour and the apprentices are to receive \$4.00, \$5.00, \$6.00, or \$7.00, depending on their level of progress, the percentages to be applied against the journeymen's rate in the WD 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 WD for their classification, unless the Adm determines that a different practice prevails in the locality of the construction project for that particular apprentice classification.

15e02 Trainees.

- (a) A trainee 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 the Department's Employment and Training Administration (BAT). State apprenticeship agencies have no authority over trainee programs. (See Regs 5.2(n), 5.5(a)(4)(ii), 5.16, and 5.17.)
- (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 journeyman hourly rate specified in the applicable WD. 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 WD for the craft. NOTE: An exception to this rule has been provided in Reg 5.5(a)(4)(ii)(1983) if the Adm 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 shall be paid trainees in accordance with the corresponding apprenticeship program.
- (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.
- (d) A contractor employing participants under the Comprehensive Employment and Training Act (CETA) or the Job Training Partnership Act (JTPA, which repealed and replaced CETA) on a DBRA covered contract must pay such individuals the applicable prevailing wage rate for the classification of work performed unless the requirements in Reg 5.5(a)(4)(ii) have been met and the particular training program has been approved by ETA (BAT); however, JTPA trainees performing construction work funded solely under JTPA are specifically exempted from DBRA requirements.
- (e) There are a number of ETA on-the-job training programs (for example, WIN) established to train and hire the unemployed. Unless the requirements of the Regs are met, individuals enrolled in such programs must be paid the applicable prevailing wage rate for the classification of work performed on covered work.
- (f) The requirements of Reg 5.5(a)(4)(i) and (ii) do not apply to apprentices and trainees performing on Federal-aid highway construction contracts subject to 23 U.S.C. 113 and enrolled in programs certified by the Secretary of DOT, because they are specifically exempted from DBRA by the Federal-Aid Highway Act.

15e03 Summer youth employment.

- (a) Under the guidelines set forth in All Agency Memorandum Nos. 71 and 96, DOL will take no exception to the practice of paying less than the predetermined laborer or journeyman'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. 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 Adm by the contracting agency.

15e04 Helpers.

Helpers are permitted on a DBRA contract if the helper classifications are specified in the applicable WD or conformed rates are approved pursuant to Reg 5.5(a)(1)(ii). In each case, area practice will determine the allowable duties of helpers and their use is not restricted in a ratio to the number of journeymen employed by the contractor on the job site. It should be noted that a request to the NO for a conformed helper wage rate will be 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 can be differentiated from those of the journeymen. 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 journeyman. (Note: As of date of issuance of this FOH position, a regulatory proposal which would substantially revise the policy on helpers is pending.)

15e05 Air balance engineers.

In general, air balance engineers are not considered laborers or mechanics within the meaning of the Davis-Bacon Act. 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 traditional craftsmen, they would be considered laborers or mechanics for the time so spent.

15e06 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 Reg 541. (See FOH 15e12.)

15e07 Convict labor.

While the D-B contains no prohibition against the employment of convict labor, section 4082 of Title 18, U.S.C. imposes certain conditional limitations on the employment of Federal prison inmates to protect against their exploitation and unfair competition. Similarly, Executive Order 11755 permits the employment of non-Federal prison inmates under work-release programs on Federal contracts under terms and conditions comparable to those applicable to inmates of Federal prisons under 18 U.S.C. section 4082. The Department of Justice is responsible for administering these provisions. Questions or complaints pertaining to the above provisions should be directed to the local U.S. Attorney's Office.

15e08 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 as seaman on a dredge or a tugboat are not laborers or mechanics. (See FOH 15e22.)

15e09 Flaggers and traffic directors.

- (a) All Agency Memorandum No. 141 (8/19/85) set forth DBRA coverage of employees engaged as flaggers on DBRA contracts entered into pursuant to invitations for bids issued or negotiations concluded as of October 18, 1985. Prior to that date, such employees were not generally considered to be laborers or mechanics for purposes of DBRA, unless they performed other manual or physical duties as laborers or mechanics in a different classification. On reconsideration, 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 a materialman/supplier whose employees would not be subject to DBRA, unless particular employees spend a substantial amount of time (20% or more) in the workweek on the covered sit or sites. (See FOH 15e15.)

15e10 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 WD rate.

15e11 Helicopter pilots.

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

15e12 Housing authority employees.

The United States 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 local HUD office. 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 15b05 and 15c00(c)).

15e13 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 workers perform other duties as laborers or mechanics, they must be paid the WD rate for the particular classification involved for the time so spent.

15e14 Managerial and professional employees.

- (a) An individual employed in a bona fide executive, administrative, or professional capacity, as defined in FLSA Reg 541, is not a laborer or mechanic for purposes of DBRA.
- (b) A supervisory employee who is not exempt under Reg 541 and who spends more than a substantial amount of time (20 percent) in a given w/w 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 employee spends 60 percent or 24 hours of a 40 hour w/w 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.

15e15 Materialmen and 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 "materialmen" 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 materialmen are not considered contractors under DBRA. Thus, their employees are not subject to DBRA labor standards. (See also FOH 15b04 and 15e21.)

- (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" or "materialman". 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 w/w at the site of work would be covered by the DBRA and due the applicable wage rate for the classification of work 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 site. For enforcement purposes, if such an employee spends more than 20% 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) Reg 5.2(1) 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 which 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 be dedicated exclusively, or nearly so, to the performance of a contract. (See FOH 15b04(b) and Reg 5.2(1).)

15e16 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 allegedly paid, but only the notation "Owner-operator". This position does not pertain to owner-operators of other equipment such a 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.

15e17 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.

15e18 Repairmen - tire repair companies and heavy equipment dealers.

(See FOH 15e15(c).)

15e19 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 United States 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, instrumentman or transitman, rodman, chainman, party chief, etc., 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.

15e20 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 WD rate for the particular classification involved for the time so spent.

15e21 Truck drivers.

- (a) Truck drivers employed by a construction prime contractor or subcontractor to transport materials or equipment to a DBRA project, or from a DBRA project to return materials to the contractor's or subcontractor's plant or yard, are covered. Drivers employed by a prime contractor or subcontractor transporting materials or equipment from one DBRA project to another DBRA project are also covered, and the time so spent is compensable at the DBRA rate required to be paid on the latter project. Drivers employed by a prime or subcontractor transporting materials or equipment away from a DBRA project to another project of the contractor or subcontractor are also covered, even where the latter project is not subject to DBRA.
- (b) Truck drivers engaged in hauling excavated material, debris, dirt, asphalt for recycling, etc., away from a DBRA-covered construction site are covered for the time spent loading at the site, transporting the material and unloading. All truck drivers engaged in such activities are covered regardless of their employer's status as a materialman or a construction contractor. It makes no difference whether or not an employer who is engaged in such activities pays for the materials being transported away from the construction site. Such truck drivers are covered because they are engaged in activities which are required by the construction contract.
- (c) In situations where truck drivers are employed by an independent contractor or a bona fide materialman to haul material to a covered project from a non-covered supply source (e.g., sand or gravel pit, asphalt plant serving the public in general), such drivers would not be covered.
- (d) In situations where truck drivers are employed by an independent contractor or a materialman to haul materials from covered supply sources (e.g., batch plants or borrow pits, stockpiles etc., which have been established to serve exclusively, or nearly so, the covered project), such drivers would be covered for the time so spent.

15e22 Tugboat operators, tugmasters, captains and deckhands.

In general, tugboat personnel are considered to be seamen, engaged in navigational transportation, and are not considered to be laborers and mechanics. However, for example, if a crewman on a dredging project is performing work directly related to the covered construction project such as connecting, extending, and controlling the pipelines through which dredged material is being pumped, the individual would be considered a laborer or mechanic for the time so spent and entitled to the applicable prevailing wage rate. (Also see FOH 15j00.)

15e23 Volunteers.

There are no exceptions to DBRA coverage for volunteer labor unless an exception is specifically provided for in the particular D-B Related Act under which the project funds are derived. Furthermore, DOL does not have the authority to grant waivers for volunteer labor. (See FOH 15c01.)

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 Reg 5.5 relating to minimum wages, apprentices, trainees, withholding, payrolls and basic records, and liabilities and penalties for violations.
- (b) The labor standards clauses in Reg 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 Reg 5.5 provided they attach copies of the applicable WD and labor standards clauses to the subcontract form.
- (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 contract 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 D-B Act itself and the prevailing wage provisions of the related Acts confer upon the S/L the authority to predetermine, as MW, those wage rates found to be prevailing for corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the area where the 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 D-B Act. (See Reg 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) General wage determinations.

General WDs are published in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts." (See Appendix C of Reg Part 1.)

- (c) Project wage determinations.

Project WDs are issued in response to specific requests from contracting agencies when there is no general WD (from the GPO document) applicable to the type of construction in the geographical area for the project involved.

15f03 Use and effectiveness of wage determinations.

- (a) General WDs contain no fixed expiration date. Once issued, they remain valid until modified, superseded, or canceled by publication of a notice in the Federal Register. 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 WD.
- (b) Project WDs are effective for 180 calendar days from the date they are issued. If the contract for which a project WD is requested is not awarded within the 180 days before the WD expires, the contracting agency must request a new WD or obtain an extension of the expiration date from the Adm. A project WD 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 WDs, notice of which are published in the Federal Register (for general WDs) or received (for project WDs) 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 Reg 1.6(c).)
- (d) In addition, Reg 1.6(c)(3)(iv) provides that if a contract to which a general WD has been applied is not awarded within 90 days after bid opening, any modification, notice of which is published in the Federal Register prior to contract award is effective, unless the agency obtains an extension of the 90-day period from the Adm. Reg 1.6(e) provides that if a bid solicitation is found to contain a wrong WD, or if a WD is withdrawn as a result of a Wage Appeals Board decision, notification to the contracting agency of such a finding is effective immediately, provided notification is made prior to contract award. Further, Reg 1.6(f) provides a mechanism to require contracting agencies to utilize a WD after award if it is found that the agency failed to include any WD in a covered contract or used a WD which clearly does not apply to the contract. Reg 1.6(g) contains guidelines for the application of WD's 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 WD's included in a contract are effective for the life of the contract.

15f04 Payrolls and reporting requirements.

Payrolls and basic records relating thereto must be maintained and preserved as required by Reg 5.5(a)(3). Regs 3.3, 3.4, and 5.5(a)(3) contain the reporting requirements relative to submission of the weekly "Statement of Compliance" and payrolls to the contracting agency.

15f05 Area practice - determining proper classification of various work and type of construction.

- (a) Questions as to the proper classification for the work performed by a laborer or mechanic, or the proper type of construction (i.e., building, heavy, highway or residential) for work performed on a project with multiple wage schedules, are resolved by making an area practice survey. Such surveys, when necessary, are conducted under the guidance of the RO Wage Specialist.
- (b) The Wage Appeals Board ruled in Fry Brothers Corp. (WAB Case No. 76-6, 6/14/77) 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 WD.

NOTE: For area practice surveys involving building and residential construction wage schedules, it is first necessary to determine from the RO WS whether DBRA projects were included in the survey data which formed the basis for the wage rates issued in the applicable WD in order to determine whether to include in the area practice survey any data from such federal DBRA projects.

The extent of the information required for making area practice determinations will depend on the facts in each case. If, for example, 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). However, if all parties do not agree (i.e., jurisdictional dispute between two unions, or management does not agree with union), it will be necessary to determine by a "full" area practice survey which classification actually performed the work in question on similar projects in the locality, normally the county, during the period one year prior to the start of construction of the DBRA project.

(c) How to conduct a limited area practice survey to determine the proper classification of work.

- (1) First, determine whether the applicable WD contains union negotiated rates or open shop (nonunion) rates, or whether it is a mixed schedule (e.g., union electricians and open shop laborers), for the classifications in question.
- (2) If the applicable WD reflects union rates for the classifications involved, the unions whose jurisdiction the work may be within should be contacted to determine whether the respective union performed the work in question on similar projects in the county in the period one year prior to the beginning of construction of the project at issue. If so, each union should be asked how the individuals who performed that work were classified. If no union performed any of the work in question in the county in the period one year prior to the beginning of construction, the RO should be contacted for further guidance. In addition, the information provided by the unions should be confirmed with collective bargaining representatives of management (e.g., contractors' associations such as local chapters of the Associated General Contractors of America, the Associated Builders and Contractors, the National Electrical Contractors Association, etc.). If all parties agree as to the proper classification for the work in question, the area practice is established.
- (3) If the applicable WD reflects open shop rates for the classifications involved, open shop contractors should be contacted and asked whether they performed the work in question on similar projects in the county in the period one year prior to the beginning of construction of the project at issue. If so, these contractors should be asked how the employees who performed this work were classified. If all contractors agree, or if a clear majority of the contractors agree, the area practice is established. If no open shop contractor performed the work at issue in the county in the time period one year prior to the beginning of construction, the RO should be contacted for further guidance.
- (4) If the applicable WD reflects a mixed schedule of rates, it is necessary to contact the unions and union and open shop contractors (and/or their associations) to determine who performed the work at issue on similar projects in the area in the period one year prior to the beginning of construction of the project. If all parties agree, or if a clear majority of the parties agree on the classification, the area practice is established. The RO should be contacted if no work of the type at issue was performed in the county during the applicable time frame discussed above.

- (5) For any type of wage determination (whether based on union rates, open shop 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 conduct a full area practice survey as set forth in (d) below to determine which classification actually performed the work in question on similar projects in the area.
- (d) How to conduct a full area practice survey to determine the proper classification of work.
- (1) In conjunction with the RO Wage Specialist, identify similar projects in the same geographical area as the project under investigation (usually the county) which were in progress during the period one year prior to the start of construction of the project under investigation. If no similar projects were built in the area during that time frame, contact the RO for advice in expanding the survey in time (two or three years) and/or to contiguous counties. The RO should contact the NO, if necessary.
 - (2) Determine what firms performed the work in question on these projects and contact those which are either open shop or union depending on the basis for the wage rates issued in the applicable wage determination.
 - (3) From each firm contacted, determine the week in which the greatest number of employees performed the work in question on these projects (i.e., "peak week") and determine how such employees were classified.
 - (4) Compile all information received and total the number of employees in each classification which performed the work in question. The classification which has the clear majority of employees performing the work in question is the proper classification. However, if it is found that only 51% to 60% of the employees in a classification performed the work in question, contact the RO for further guidance. The RO should contact the NO, if necessary. If no common, single classification practice is found to be predominant in the area or if no project involving work of a similar character is found, we will not take exception to the contractor's particular practices.
 - (5) While the Dictionary of Occupational Titles published by the Bureau of Labor Statistics may be used as reference material, it cannot be relied on for making employee classification determinations.
- (e) How to conduct an area practice survey to determine the proper type of construction.
- (1) All Agency Memorandum Nos. 130 and 131 give general, broad outlines of the proper categories of the various types of construction (building, heavy, highway and residential) subject to "local or area practice". For example, where a contract for a project (such as a sewage treatment plant) contains multiple wage schedules (e.g., building and heavy), it may be necessary to resort to area practice to determine which schedule of rates applies to the various parts of a project.
 - (2) The survey is conducted in essentially the same manner as described in 15f05(d), except that the task is to determine which rates were paid on similar projects for the type of work in dispute rather than which particular classification of laborer or mechanic performed a specific task. In conducting such a survey, all projects of a character similar are generally considered.

However, in the case of either building or residential construction wage schedules, whether DBRA projects may be included in the area practice survey must first be determined from the RO WS. This will depend upon whether such DBRA projects were included in the wage survey which served as the basis for issuing the wage rates in the applicable WD.

15f06 Discharging MW and FB obligations under DBRA.

A contractor or subcontractor performing work subject to a DBRA wage determination may discharge its MW 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 MW required under the determination to satisfy its fringe benefit obligations. (See Reg 5.31.) This may be done, for example, in the following ways:

MWD

Basic Hourly Rate	\$10.00
Health & Welfare	.50
Pension	.50
Total MW/FB Obligation	\$11.00

- (1) \$11.00 in cash wages;
- (2) \$10.00 plus \$1.00 in pension contributions or other "bona fide" fringe benefits;
- (3) \$9.00* plus \$2.00 in pension contributions or any combination of "bona fide" fringe benefits.

*Note - OT must be paid at time and one-half the basic hourly rate of \$10.00. (See Reg 5.32.)

15f07 Salaried employees.

In many cases salaried employees perform work on DBRA covered projects and noncovered projects in the same w/w. 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 \$200.00 per week would be paid at the rate of \$5.00 per hour. If this same employee is entitled to a prevailing rate of \$6.50 per hour for DBRA covered work, he or she would be entitled to an additional \$1.50 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., Reg 541) salaried employee is only due the applicable DBRA rate for those hours actually spent performing laborers' and mechanics' duties. (See FOH 15e14(b).)

15f08 Hourly paid employees.

The same type of problem as discussed in FOH 15f07 may be encountered with regard to hourly paid employees working on DBRA covered work and noncovered work in the same w/w. The contractor may not arbitrarily change the employee's hourly wages to meet its DBRA obligations. For example, assume an employee's regular rate of pay is \$5.00 per hour and the prevailing wage under DBRA is \$6.50 per hour. In a week in which both DBRA and noncovered work are

performed, the employer cannot reduce the employee's regular rate of pay of \$5.00 per hour on nongovernment 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 WD rate for each of the actual hours worked in each classification (Reg 5.5(a)(1)(i)).

15f09 Piece rate employees.

In determining whether piece rate employees have been properly paid under DBRA, it is necessary to divide the total hours worked in the w/w into the total wages paid.

15f10 Crediting of fringe benefit payments.

- (a) Reg 5.5(a)(1)(i) requires 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) Contributions made to a fringe benefit plan for Government work may not be used to fund the plan for periods of non-government work.
- (c) A contractor must make payments or incur costs in the amount specified in the applicable WD 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 prevailing wage rate and fringe benefit amounts set forth in the applicable WD, the balance due must be paid in cash to each of the employees underpaid.
- (d) Contractors and subcontractors are required to pay fringe benefits for all DBRA covered work in the w/w. Unlike SCA, fringe benefits for D-B must be paid for both ST and OT hours. However, fringe benefit payments are not included in the basic/regular rate of pay for CWHSSA OT purposes. (See also 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 WD.
- (f) 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 Reg 5.5(a)(1)(iv).
- (g) Where a particular fringe benefit or benefit plan is not of the conventional type described in the preceding paragraph (f), 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 Reg 5.28. Contractors or subcontractors seeking credit under the Act for costs incurred for such plans must request specific permission from W-H under section 5.5(a)(1)(iv).

- (h) A contractor may not take credit for any benefit required by law, such as social security contributions or workers compensation.
- (i) Generally W-H will make BW and fringe benefit payments directly to the underpaid employees. However, in some cases where violations occurred because the contractor failed to make the payments in the required amount to a bona fide fringe benefit plan, it may be appropriate to allow a contractor to direct payments to the fringe benefit plan on behalf of the underpaid employees. Such action should be considered only upon request of the contractor or the fringe benefit plan (if a third party), and payments should be made to the plan only when the following conditions are met:
 - (1) The employees continued to be covered by the plan despite the contractor's failure to make payments to the plan. The burden of proof to show that coverage continued rests with the contractor or representatives of the plan. W-H should verify the legitimacy of any claim made by the contractor or representative of the fringe benefit plan.
 - (2) The employees were aware of the fringe benefit plan and that their fringe benefit coverage was continuing during this period and any claims filed during this period (as in the case, for example, of a health insurance plan) were honored and paid.
 - (3) The contractor specifically authorizes W-H to make direct payments to the fringe benefit plan, or if an ALJ orders direct payments to the plan after a hearing in a RTP case.
 - (4) The full amount of all other violations (e.g., unpaid wages, vacations, holidays, etc.,) have been satisfied. In other words, all violations involving direct payment to the employees have priority over payments to a fringe benefit plan.

If there is any doubt concerning the propriety of a plan's claim, the question should be directed to the NO.

- (j) Situations may be encountered when employers have claimed credit for fringe benefit payments which in fact were never made. If a payment claimed by the employer cannot be verified through company records, the CO should contact the insurance carrier or other third party recipient to determine if the payments were made.

15f11 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 noncovered) 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 bi-weekly, 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 a 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 noncovered) 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 nongovernment 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 15f10(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 (FOH 15f10(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 \text{ 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 used 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 noncovered 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.
- (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.

15f12 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 employee 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.

15f13 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 Regs 5.26 and 5.27. In accordance with Reg 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. (Reg 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 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) If a contractor's pension or profit sharing plan providing for pension benefits does not meet the required standards of the FOH and Regs Part 5, and the contractor is willing to make the necessary changes to correct the plan, the contractor should be allowed to make the changes and no back wages should be charged. However, if the contractor does not correct the plan, back wages should be charged.
- (e) "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 W-H's position that such provisions are permissible under the Act if they meet the requirements of the Employee Retirement Income Security Act (ERISA).
- (f) "Forfeitures" are fringe benefit monies which monies which have been contributed on behalf of terminated, nonvested 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 Davis-Bacon Act. However, the contractor may not use such forfeitures as a credit toward meeting the requirements of an applicable Davis-Bacon wage determination. To do so would allow the contractor to take double credit for the same contributions.

- (g) (1) For defined contribution pension plans that provide for a higher hourly rate of contributions to be made for DBRA work for noncovered 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% 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 of 25% of the employee's annual compensation.
- (2) For all defined benefit pension plans and defined contribution pension plans which do not provide for immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), Davis-Bacon 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 a pension contribution, 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 contribution for the pension benefit was 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 \$1,500 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 D-B credit for fringe benefit payments results from the fact that employers are prohibited from using contributions made for work covered by DBRA to fund the plan for periods of non-DBRA work.

15f14 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 Reg 5.28. Reg 5.28 provides that an unfunded fringe benefit plan will be considered to be a bona fide plan for Davis-Bacon purposes if the plan 1) reasonably can be anticipated to provide benefits described in the D-B Act; 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. When it is found that a contractor's unfunded plan does not meet these regulatory requirements, the firm may be required to establish an escrow account into which the contractor deposits weekly, or not less often than quarterly, the appropriate vacation and sick leave benefit contributions. 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 (d) below). The contractor should be advised to consult ERISA regarding possible additional requirements involving escrow accounts for the future.
- (b) If an employee should terminate prior to becoming eligible under a vacation or sick leave plan, and amounts have been paid into an escrow 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 escrow 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 \$750.00 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 \$.50 per hour against the DBRA prevailing wage ($\$750 / 1500$ hours).

15f15 Holiday pay.

- (a) The principles set forth in FOH 15f14 regarding vacation and sick leave plans apply equally to holiday pay.
- (b) If 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. (See (c) below.) 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.
- (c) Situations may be encountered where the wage determination requires the employee to work the day before the holiday and the day after. If it can be established that the employer arbitrarily lays off employees the day before and/or the day after the holiday to avoid payment of the holiday fringe benefit, back wages should be computed for failure to pay the holiday fringe benefit. By the same token, if it can be established that an employer transfers employees from a DBRA project to commercial work during a week in which holiday pay is due to avoid payment of the holiday pay, payment for the holiday should be requested. An indication of this type of violation may be a situation where the employer worked on the DBRA project the week before and the week after the holiday week.

15f16 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 BAT or the BAT 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 WD, 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 cost 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 WD 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 \$450 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 nongovernment 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 \$0.01 per hour ($\$450 / 45,000$) against the prevailing wage obligations for all carpenters and carpenters' apprentices working on the DBRA project.

15f17 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 Davis-Bacon Act. 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.

15f18 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 Regs 3.5(j).

15f19 OT payments not required by DBRA

No OT requirements are included in DBRA; OT payments to employees subject to the DBRA will depend on coverage under CWHSSA or FLSA.

15g CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - CWHSSA

15g00 Scope of CWHSSA coverage - general.

The scope of CWHSSA is set out in Sec. 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 per week to any contract which may require or involve the employment of laborers or mechanics upon a public work of the United States, any territory, or the District of Columbia, and to any other contract which may require or involve the employment of laborers or mechanics if such contract is one:

- (1) to which the United States or any Agency or instrumentality thereof, or any territory, or the District of Columbia is a party; or
- (2) which is made for or on behalf of the United States, any agency or instrumentality thereof, any territory, or the District of Columbia; or
- (3) which is a contract for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the United States or any agency or instrumentality thereof, under any statute of the United States providing wage standards for such work. (But see FOH 15i00(1).)

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 Reg 5.5(b), into a contract does not preclude CWHSSA coverage.

15g03 Site of work.

The CWHSSA has no job site limitation as does the D-B Act. 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), would be considered subject to CWHSSA.

15g04 Statute of limitations.

The Portal-to-Portal Act does not apply to the Contract Work Hours and Safety Standards Act. Employee suits authorized by Sec. 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 Comptroller General in order to pay unpaid workers without regard to any statute of limitations.

15h INTERPRETATIONS - APPLICATION OF CWHSSA TO TYPES OF WORK AND CONTRACTS**15h00 Concessionaire contracts.**

- (a) Post exchanges are considered agencies of the United States 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 contract other than a construction contract exceeds \$2,500, 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 \$2,500 or less (for example, where the contractor pays a post exchange a percentage of the amount collected for cleaning, etc., rather than receiving payment from the Government). (See also 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 parks, 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 nonconstruction contracts with States or political subdivisions in the same manner as the contracts with private employers, in the absence of administrative action under Sec. 105 of the Act varying such application. For the application of CWHSSA to "force account" construction work (that is, work performed "in-house" with Federal funds by employees of a Government agency or a State or political subdivision thereof), see FOH 15b05.

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.

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 (i.e., 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 therefrom 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, 14d03, 15d08, and Sec. 7 of R&I No. 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 Sec. 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. (Also see FOH 15i01(c).)

15h11 Vending machine concession agreements.

The open market exemption under Sec. 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.

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 (Sec. 103(a) and (b)) or by administrative order issued by authority of the S/L under Sec. 105 of the Act. These include (the first five are statutory):

- (1) work under a contract described in FOH 15g00(3) where the assistance from the United States or any agency or instrumentality is only in that nature of a loan guarantee, or insurance (see FOH 15i01(b));
- (2) contracts for transportation by land, air, or water (this includes, for example, mail haul contracts);
- (3) contracts for transmission of intelligence;
- (4) contracts for the purchase of supplies or materials or articles ordinarily available in the open market;
- (5) work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act;
- (6) construction contracts of \$2,000 or less;
- (7) purchases and contracts other than construction in the aggregate amount of \$2,500 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.
- (8) 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;
- (9) certain sales of surplus power by TVA; and
- (10) contract work performed in a work place within a foreign country or certain other areas. This exemption follows Sec 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) Sec. 103(a) (3) of 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 United States or any agency or instrumentality thereof under any statute of the United States providing wage standards for such work...". 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 P.L. 566, known as 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.
- (b) Sec 103(a)(3) also provides that Sec. 102 of the Act (labor standards and wage and liquidated damages liabilities) shall not apply "to work where the assistance from the United States or any agency or instrumentality as set forth above is only in that nature of 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 Department of Housing and Urban Development 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 are 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 purposes 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 (d) above) 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. For example, if a contract for materials is more than \$2,500, but not in excess of \$10,000, laborers or mechanics engaged in the contract work may be subject to CWHSSA if no CWHSSA exemption applies; or, if a contract in excess of \$10,000 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 Sec. 105 of the Act, the Secretary or authorized representative, the Adm, 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. Reg 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, pursuant to Sec. 105, individual exemptions, variations, and tolerances under the CWHSSA have been granted to certain categories of workers on specified contracts. However, such workers are to be paid OT compensation as may be required by any other applicable law. If a contractor claims that an exemption from CWHSSA has been granted for a particular contract, the NO, which maintains files on the exemptions granted, should be contacted.

15j INTERPRETATIONS - APPLICATION OF CWHSSA TO TYPES OF EMPLOYEES

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

Section 103(a) of 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 workmen performing services in connection with dredging or rock excavation in any river or harbor of the United States, or any territory, or the District of Columbia, but does not include any employee employed as a seaman. (See also FOH 15e00 and 15e22.)

15j01 Flight instructors.

- (a) Flight instructors may qualify for exemption as teachers under Reg 541.3(a)(3) of the FLSA if the requirements are met. (See FOH 22d19.) 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 (see FOH 14e03(b)), 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 \$2,500.

15j02 Medical and hospital occupations.

Employees such as orderlies, porters, and maids are laborers and mechanics. However, those rendering professional services, and those whose work is clerical, supervisory, or nonmanual 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 Reg 5.15(d).)

15j04 Supervisory, professional, and clerical personnel.

The CWHSSA does not generally apply to supervisory, professional, and clerical personnel. (See also FOH 15e14.)

15k APPLICATION OF OVERTIME STANDARDS UNDER CWHSSA

15k00 OT standards.

The CWHSSA provides OT pay standards of not less than time and one-half the basic rate of pay for all hours worked in excess of forty in a w/w for laborers or mechanics employed on contracts subject to the Act. NOTE: Work performed prior to 1/1/86 on contracts covered by CWHSSA is subject to time and one-half OT pay for all contract work hours in excess of 8 in a calendar day or 40 per week, whichever is greater. CWHSSA was amended by Public Law 99-145 effective 1/1/86 to eliminate the daily OT provisions.

15k01 Basic rate of pay.

The CWHSSA contains no MW standards; MW standards result from the application of DBRA prevailing wage rate determinations, SCA prevailing wage rate determinations, or the FLSA MW. The "basic rate of pay" under the CWHSSA means the straight-time hourly rate. Under Reg 5.15(c)(1), it may be computed for OT purposes in the same manner as the FLSA regular rate as provided in IB 778 (taking the rules excluding fringe benefits payments into consideration). (See FOH 15k06.)

15k02 "Calendar day".

The term "calendar day" as used in the CWHSSA means the period from 12:01 a.m. to midnight.

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 OT 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 OT 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 OT 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 OT for all such hours worked in the w/w in excess of 40 in a week (or, in excess of 8 hours in a calendar day on contract work performed prior to 1/1/86, if the number of such hours exceeds the hours over 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 (FOH 32b05 and 3h).

15k04 Computation of OT when other premium payments are involved.

- (a) Collective bargaining agreements frequently provide an established basic or regular rate with an additional premium payment for employees performing hazardous, arduous, or dirty work. Such premium payments are not creditable as premium OT work and must be included as part of the basic or regular rate in computing OT 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 OT under FLSA Secs 7(e)(5), (6), or (7) which are computed as a multiple of the contractual base rate specified by the agreement, the extra compensation paid for such OT which is in excess of the statutory "regular rate" may be credited, under Sec 7(h) of the FLSA, toward the 50 percent premium compensation for OT which is required by the Act's provision for an OT rate of "not less than one and one-half times" the statutory "regular rate". A like rule applies under the CWHSSA.
- (b) For example, a collective bargaining agreement provides a "basic" rate of \$6 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 a "premium" of \$1 an hour for a crane with a boom length of over 275 feet. An operator of a crane with such a boom length who works 9 hours a day, 5 days a week is entitled to \$345 for the week (240 for 40 hours at \$6, plus \$60 for 5 OT hours at \$12, plus \$45 for 45 hours long-boom premium of \$1). If paid in accordance with such a contract the employee will receive all the pay required under the FLSA or the CWHSSA. Under both Acts, the "regular rate" or "basic rate" is \$7 an hour, which included the long-boom premium. An additional payment of not less than \$3.50 an hour as extra compensation for weekly OT is required for 5 of the 45 hours worked. Thus, the statutory requirements are met by payment for 45 hours at \$7 (\$315) plus OT premiums of \$17.50 (5 x \$3.50), or a total payment of \$332.50. The premium portion of the collective bargaining contract double-time OT payment which is creditable (\$60 - \$35 = \$25) toward the premium portion of the employee's pay for OT at the time and one-half rate required by the statute is more than enough to satisfy the statutory OT pay requirement (5 x \$3.50 = \$17.50).

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

The wage rate actually paid an employee for non-OT work, when it exceeds the applicable DBRA or SCA MW rate, is the "basic rate" of pay on which not less than time and one-half for OT must be computed under CWHSSA. (See Reg 5.32(c)(1) and (2) and FOH 32j01.)

15k06 Computation of OT when fringe benefits are involved.

- (a) Any SCA or D-B fringe benefit payments which are excludable from the regular rate under Sec. 7(e) of the FLSA, or their cash equivalent, may be excluded in the computation of the basic rate under CWHSSA, as provided in Reg 4.182 and Reg 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 OT compensation. (See Reg 5.32(c)(1).)

15k07 FLSA OT exemptions and CWHSSA.

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

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

An FLSA Sec 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 OT provisions of CWHSSA.

15k09 Use of the fluctuating w/w under CWHSSA.

An employer may compensate employees who are subject to the OT standards of CWHSSA on the basis of the fluctuating w/w method of payment provided: (1) the criteria set forth in IB 778.114 are met; (2) the employees' regular rate of pay in any w/w 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 OT is paid for hours of work in excess of 40 per week.

15k10 Computing liquidated damages under CWHSSA.

- (a) Sec.102(b)(2) of the CWHSSA, as amended by Public Law 99-145 (effective 1/1/86), 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." Prior to its amendment 1/1/86, CWHSSA required OT pay at time and one-half for all contract work hours in excess of 8 in a calendar day or 40 in a w/w, depending upon which is greater in number. Thus, for contract work performed on or after 1/1/86, the computation of liquidated damages is based solely upon weekly OT standards, and \$10 is due for each calendar day on which each laborer or mechanic was required or permitted to work in excess of 40 hours without payment of time and one-half OT. (For example, if an employee worked six 11-hour days and was paid no OT, \$30 in liquidated damages would be computed - \$10 for each of three calendar days of the w/w on which hours over 40 were worked and not paid for at one and one-half OT rates.) With respect to contract work performed prior to 1/1/86, the principles in paragraphs (b) and (c) below shall be followed for computing liquidated damages. Note that, in all cases, liquidated damages are also required to be computed in situations where an employee is paid overtime at an incorrect basic hourly rate of pay.

- (b) When computing liquidated damages for contract work hours performed prior to 1/1/86, such damages must be computed consistent with the wage payment obligations in the Act. Thus, since the Act required prior to its amendment that a contractor or subcontractor pay either weekly or daily OT, depending upon which was most beneficial to the laborer or mechanic, liquidated damages shall be computed for work performed prior to 1/1/86, to the extent that the contractor failed to meet those obligations. These principles are best illustrated by the following examples where no OT was paid for contract work performed prior to 1/1/86:
- (c) If the daily OT hours equal or exceed the weekly OT hours, liquidated damages should be computed for the calendar days upon which daily OT is worked. On the other hand, if the weekly OT hours exceed the daily OT hours, liquidated damages should be computed for the days on which the weekly OT hours were worked. Thus:

Example 1

Computation of Overtime

	MTWTFSS	<u>Daily</u>	<u>Weekly</u>
OT	1 2 3 4 2 0 0	12	12 (no OT paid)
ST	8 8 8 8 8	40	40

In the above example, where the daily OT hours equal the weekly OT hours, liquidated damages should be computed for the calendar days upon which daily OT is worked. In this case \$50 in liquidated damages would be computed.

Example 2

Computation of Overtime

	MTWTFSS	<u>Daily</u>	<u>Weekly</u>
OT	2 3 4 2 0 0 0	11	3 (no OT paid)
ST	8 8 8 8	32	40

In this case, the daily OT exceeds the weekly OT so liquidated damages would be computed for Monday, Tuesday, Wednesday, and Thursday, or \$40.

Example 3Computation of
Overtime

	MTWTFSS	<u>Daily</u>	<u>Weekly</u>
OT	2 4 5 1 3 0	15	23 (no OT paid)
ST	8 8 8 8 8 8	48	40

In the above example, liquidated damages would be computed for the weekly OT hours, because they exceed the daily OT hours. Weekly OT hours were worked on three calendar days, Thursday, Friday, and Saturday and thus \$30 in liquidated damages would be computed.

In some cases, the contractor may pay weekly OT (after 40 or 42 or 44 hours per week) but not daily OT. If the daily OT hours in such cases equal or exceed the weekly OT hours, the weekly OT hours for which payment has been made may be used to offset the daily hours as they accrue. On the other hand, if the weekly OT hours exceed the daily OT hours, liquidated damages should be computed for the days on which the weekly OT hours not paid for at time and one half were worked. The following examples will illustrate the application of this principle.

Example 4Computation of
Overtime

	MTWTFSS	<u>Daily</u>	<u>Weekly</u>
OT	3 1 1 0 0	5	2 (2 hours OT paid)
ST	8 8 8 8 5	37	40

In the above example the employer paid weekly OT after 40 hours per week thus, the 2 weekly OT hours paid for at time and one half will offset only 2 of the daily OT hours worked on Monday, still leaving Monday as an "OT" day. Therefore, liquidated damages should be computed for Monday, Wednesday, and Thursday and would be \$30.

Example 5Computation of
Overtime

	MTWTFSS	<u>Daily</u>	<u>Weekly</u>
OT	1 1 3 0 0	5	2 (2 hours OT paid)
ST	8 8 8 5 8	37	40

In the above example the employer paid weekly OT after 40 hours per week. Thus, the 2 weekly OT hours paid for at time and one half will offset all the daily OT hours worked on Monday and Tuesday. Therefore, liquidated damages should be computed for Friday only and would be \$10.

Example 6Computation of
Overtime

	MTWTFSS	<u>Daily</u>	<u>Weekly</u>
OT	3 4 4 0 0	11	11 (7 hours OT paid)
ST	8 8 8 8 8	40	40

In the above example, the contractor paid weekly OT after 44 hours in the w/w. The 7 weekly OT hours paid for at time and one half will offset the daily OT hours on Monday and Wednesday. Therefore, liquidated damages should be computed for Friday only, or \$10.

Example 7Computation of
Overtime

	MTWTFSS	<u>Daily</u>	<u>Weekly</u>
OT	1 1 5 0	2	7 (3 hours OT paid)
ST	8 8 8 8 8		

In this example, the contractor paid weekly OT after 44 hours in the w/w (3 hours at time and one-half). Weekly OT hours not paid for at time and one half occurred on Saturday only and thus \$10 would be computed in damages.

FRINGE BENEFITS

Definition (29 CFR 5.2(p)):

The term “wages” means:

- The basic hourly rate of pay.
- Any contribution irrevocably made by a contractor or subcontractor to a trustee or third party pursuant to a bona fide fringe benefit fund, plan or program.
- The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated to the employees in writing.

The statutory language regarding fringe benefits is in section 1(b)(2)(b) of the Davis Bacon Act, and is reiterated at 29 CFR 5.23.

In practice:

The Davis-Bacon “prevailing wage” is made up of two interchangeable components—a basic hourly wage and fringe benefits. Along with the basic hourly rate listed on the wage determination, a fringe benefit will be listed for any classification for which fringe benefits were found prevailing. The total, including any fringe benefits listed comprises the “prevailing wage” requirement.

- This obligation may be met by any combination of cash wages and creditable “bona fide” fringe benefits provided by the employer:
 - The total, including any fringe benefits listed for the classification, may be paid entirely as cash wages;
 - Payments made or costs incurred by the contractor for “bona fide” fringe benefits may be creditable towards fulfilling the requirement; or
 - A combination of cash wages paid and “bona fide” fringe benefits may be used together to meet the total required prevailing wage.

Example

A Davis-Bacon wage determination requires:

Basic hourly rate	\$10.00
Fringe benefit	<u>1.00</u>
Total prevailing rate	\$11.00

The contractor can comply by paying:

1. \$11.00 in cash wages;
2. \$10.00 plus \$1.00 in pension contributions or other “bona fide” fringe benefits; or
3. \$9.00 plus \$2.00 in pension contributions or any combination of “bona fide” fringe benefits.

Note: Under DBA/DBRA (unlike SCA) monetary wages paid in excess of the basic hourly rate may be used as an offset or credit to satisfy fringe benefit obligations, and vice versa. (If fringe benefit contributions are credited towards fulfilling the basic hourly rate requirement in the wage determination, at least the basic hourly rate listed in the contract wage determination must be used in computing overtime pay obligations.)

Please provide to our office proof of how your company offers fringe benefits to your employees. At a minimum, this proof must be provided one time per project for each employee and should be submitted with the certified payrolls. If you are unable to provide proof via certified payroll a separate worksheet should be submitted (sample copy attached).

Application to all hours worked

Under Davis-Bacon, fringe benefits must be paid for **all** hours worked, including the overtime hours. However, the fringe benefit amounts may be excluded from the half-time premium due as overtime compensation.

For example:

An employee worked 44 hours as an electrician. The wage determination rate was \$12.00 (basic hourly rate) plus \$2.50 in fringe benefits. He would be due:

$$\begin{array}{rcl} 44 \text{ hours} \times \$14.50 & = & \$638.00 - (\text{straight time pay}) \\ 4 \text{ hours} \times \frac{1}{2}(\$12.00) & = & \underline{24.00} - (\text{overtime pay}) \\ & & \$662.00 \end{array}$$

Crediting fringe benefit contributions to meet DBA/DBRA requirements:

The Davis-Bacon Act (and 29 CFR 5.23), list fringe benefits to be considered.

Examples:

- » Life insurance
- » Health insurance
- » Pension
- » Vacation
- » Holidays
- » Sick leave

The use of truck is not a fringe benefit; a Thanksgiving turkey or Christmas bonus is not a fringe benefit. (See *Cody-Zeigler, Inc., WAB Case No. 89-19, April 30, 1991.*)

No credit may be taken for any benefit required by federal state or local law, such as:

- » Workers compensation
- » Unemployment compensation
- » Social security contributions
- » Health benefits required under Hawaii state law

Funded fringe benefit plans

- The contractor's fringe benefit contributions made irrevocably to a trustee or third party pursuant to a fund, plan or program, can be credited toward meeting the prevailing wage requirement, without prior DOL approval. For example:
 - Contractor pays for health insurance monthly premiums without employee contributions. (Where payroll deductions for employee contributions are involved, additional rules apply).
 - Contractor makes quarterly contributions to retirement plan trust.
 - The amount of contributions for fringe benefits must be paid irrevocably to the trustee or third party.

- Contributions to fringe benefit plans must be made regularly, not less often than quarterly. [This requirement is specified in the standard Davis-Bacon Contract clauses at 29 CFR 5.5(a)(1)(i)].
 - ▶ Annual contributions into a plan do not meet this requirement. While profit sharing plans are bona fide within the meaning of the Act, profits are not determined until the end of the year. Therefore, the DOL requires contractors to escrow money at least quarterly on the basis of what the profit is expected to be.
- The contractor must make payments or incur costs in the amount specified by the applicable wage decision **with respect to each individual laborer or mechanic**. Thus, the amount contributed for each employee must be determined separately, and credit can be taken accordingly towards the prevailing wage requirement for each individual. (It is not permissible to take credit based on the average premium paid or average contribution made per employee.)
- Credit may not be taken for fringe benefit contributions made on behalf of employees who are not eligible to participate in the plan (e.g., those excluded due to age or part-time employment).
 - ▶ Some plans provide that contributions and allocations under the plan will only be made on behalf of participants who are employed on the last day of the plan year. No credit is permitted for such participants for whom no contribution is made or for contributions made for employees whose accounts receive no allocation solely because they are not employed on the last day of the plan year.
 - ▶ On the other hand, it is not required that all employees participating in a fringe benefit plan be entitled to receive benefits from the plan at all times. For example, an employee who is eligible to participate in an insurance plan may be prohibited from receiving benefits from the plan during a 30-day waiting period. Contributions made on behalf of these employees would be creditable against the contractor's fringe benefit obligations.
- A pension plan that meets the Employment Retirement Income Security Act (ERISA) requirements may be considered "bona fide" for DBA /DBRA purposes.
- Some pension plans contain "vesting" requirements. Where an employer contributes to the plan, employees may be required to

complete a certain length of service before they have a nonforfeitable right to benefits based on the employer's contributions to the plan.

Thus, an employee who leaves employment before completing the specified length of service may forfeit all or part of the accrued benefit. Such forfeitures are permitted, provided the plan is a bona fide plan that meets applicable requirements under ERISA, including minimum vesting requirements. Forfeited Davis-Bacon contributions may not revert to the employer, but should be distributed among the remaining plan participants.

Unfunded plans

- A fringe benefit plan or program under which the cost a contractor may reasonably anticipate in providing benefits that will be paid from the general assets of the contractor (rather than funded by payments to a trustee or third party) is generally referred to as an **unfunded plan**. These generally include:
 - » Holiday plans
 - » Vacation plans
 - » Sick pay plans

- No type of fringe benefit is eligible for consideration as an unfunded plan unless it meets the following criteria:
 1. It can be reasonably anticipated to provide benefits described in the Davis-Bacon Act;
 2. It represents a commitment that can be legally enforced;
 3. It is carried out under a financially responsible plan or program; and
 4. The plan or program has been communicated in writing to the laborers and mechanics affected.

- To ensure that such plans are not used to avoid compliance with the Act, the Secretary of Labor directs the contractor to set aside, in an account, sufficient assets to meet the future obligation of the plan.

Annualization

- Davis-Bacon credit for contributions made to fringe benefit plans are allowed based on the effective annual rate of contributions for all hours worked during the year by an employee, regardless of whether or not the hours were worked on a Davis-Bacon project.

Examples:

- ▶▶ For a defined benefit pension plan, or for a defined contribution pension plan which does not provide for immediate or essentially immediate vesting, if a contractor wishes to receive \$2.00 per hour credit for a pension contribution, the contractor must contribute at this same rate for all hours worked during the year. If this is not done, the credit for Davis-Bacon purposes would have to be revised accordingly.
- ▶▶ If the firm's contribution for the pension benefit was computed to be \$2,000 a year for a particular employee, the employee worked 1,500 hours of the year on a Davis-Bacon covered project and 500 hours of the year on other jobs not covered by the Davis-Bacon provisions, only \$1,500 or \$1.00 per hour would be creditable towards meeting the firm's obligation to pay the prevailing wage on the Davis-Bacon project. (Annual contribution - \$2,000, divided by total hours worked – 1,500+500 = 2000; i.e. \$2,000/2000 hours = \$1.00 per hour.)
- For contributions made to defined contribution pension plans which provide for immediate participate and immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), and also certain supplemental unemployment benefit plans, a contractor may take Davis-Bacon credit at the hourly rate specified by the plan. Under such plans, contributions are irrevocably made by the contractor, most, if not at all, of the workers will become fully vested in the plan, and the higher contributions made during Davis-Bacon work result in an increase in the value of the individual employee's account. The amount of contributions to such plans should be in conformance with any limitations imposed by the Internal Revenue Code.

Example:

An employee works as an electrician where the wage determination rate is \$12.00 (basic hourly rate) plus \$2.50 in fringe benefits.

- ▶ Where the employer provides the electrician with medical insurance in the amount of \$200 per month (\$2,400 per year), the employer would divide the total annual cost of the benefit by 2,080 hours (40 hours x 52 weeks) to arrive at the allowable fringe benefit credit.

$(\$200 \times 12 \text{ months}) \text{ divided by } 2080 \text{ hours} = \1.15 per hour.

- ▶ If the employee in this example receives no other “bona fide” fringe benefits, then for each hour worked on a covered contract the individual is due \$12.00 (basic hourly rate) plus \$1.35 paid as cash (the difference between the \$2.50 per hour fringe benefit required under the applicable wage determination and the credit allowed for the provision of medical insurance.) Thus,

Basic hourly rate	\$12.00
Medical insurance benefit	1.15
<u>Additional cash due</u>	<u>1.35</u>
Total due per hour	\$14.50 (\$12.00 + \$2.50)

Project: _____ Job #: _____
County: _____

Week ending: _____
p/r affidavit

SAMPLE

Job classification	Name	Usual pay rate	Fringe benefits rec from Contractor	Total wage/fringe	DB Base Rate	DB fringe Rate	Total DB Rate	Additional base pay rate	Additional fringe
Sign installer		15.00	1.18	16.18	11.78	4.19	15.97		
Unskilled		11.50	0.91	12.41	12.80	2.77	15.57	1.30	1.78
Sign installer		15.00	1.18	16.18	11.78	4.19	15.97		
Sign installer		12.70	3.30	16.00	11.78	4.19	15.97		
Sign installer		14.50	6.20	20.70	11.78	4.19	15.97		
Sign installer		12.75	5.22	17.97	11.78	4.19	15.97		

BENEFITS BASED ON 35 WEEKS AT 43 HOURS/WEEK=1505 HOURS

VACATION	2.50%	1HR/40HRS
HOLIDAYS	2.66%	40 HRS
COMP TIME	2.66%	40 HRS
PROFIT		
SHRNG	15.00%	

401K MATCH 4.00%

MEDICAL INS	\$2.28	\$4283/YR @	80%/1500 HRS
LIFE INS	\$0.03	\$60/YR @	80%/1500 HRS
	\$2.31		

***As their base pay increases so does their fringe by .0782**