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LABOR LAW

AMENDMENT OF DAVIS-BACON ACT

On July 2, 1964, Public-Law 88-349,[1] an amendment to the prevailing wage section of the Davis-Bacon Act, was promulgated. This amendment, the latest in a series of legislative alterations of the provisions of the original act,[2] expands the scope of the act in recognition of the part fringe benefits play as a form of compensation. The new provision includes fringe benefits, in addition to direct wage payments, in the computation of prevailing wage levels.

The original Davis-Bacon Act provided that each contractor or subcontractor granted a federal contract in excess of $5,000 for the construction, alteration or repair of public buildings must pay his mechanics and laborers not less than the wage rate prevailing in the city, town, county or other locality where the work was to be performed. The act was designed to counter various practices which occurred in the wake of the rapid expansion of federal construction projects. For example, contractors in cheap labor areas were able to underbid contractors where a higher wage rate prevailed and import their own work force, resulting in the unemployment of local labor, inability of local contractors to compete against distant ones for jobs in their own region, and the depression of local wage standards.

The original Davis-Bacon Act was relatively narrow in scope—it applied only to federal contracts for public buildings. It also presented serious administrative difficulties. The Secretary of Labor could decide disputes about prevailing wages when and if they arose, but could not determine the rates in advance; neither could the worker recover from the employer any underpayments once they were discovered.[3] Moreover, the law could be (and was) successfully circumvented by paying laborers in accordance with the prevailing wage rate and later extracting rebates or "kickbacks" from them.[4]

The 1935 amendment to the Davis-Bacon Act[5] lowered the jurisdictional minimum amount of federal contracts subject to the act to $2,000 and brought within its scope all public works operations as well as painting and decorating of public buildings. The amendment also authorized the present enforcement measures and established a system of predetermination of prevailing wage rates for the proposed construction locality, which provided that the required rates for the various classifications of workers to be employed should be made available to interested contractors before bids were submitted,

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[1] 78 Stat. 238 (1964).

[2] 46 Stat. 1494 (1931), 40 U.S.C. § 276a (1958).

[3] See Tyson, Prevailing Wage Determinations in the Construction Industry: Some Legal Aspects, 3 Lab. L.J. 776, 779 (1952).

[4] In 1934, Congress enacted the Copeland Anti-Kickback Act, 62 Stat. 740 (1934), 18 U.S.C. § 874 (1958), which provides a fine of not more than $5,000 and/or imprisonment for not more than five years for anyone convicted of inducing, by any manner whatsoever, any person employed in the construction or repair of any federal or federally-financed building or work, to give up any part of the compensation to which he is contractually entitled.

[5] 49 Stat. 1011 (1935), 40 U.S.C. § 276a (1958).

thereby enabling contractors to realistically estimate their approximate labor costs.[6]

The Davis-Bacon Act remained substantially unchanged until its latest amendment. In its present form[7] the act provides that advertised specifications for contracts over $2,000 to which the United States or the District of Columbia is a party, for construction, alteration and/or repair (including painting and decorating) of public buildings or other public works

> shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village or other civil subdivision of the State . . . in which the work is to be performed.[8]

The term "public buildings" is self-explanatory. The meaning of "other public works" has evolved through years of legislative and judicial definition. In *Peterson v. United States*,[9] "public works" was defined to include "any work in which the United States is interested and which is done for the public and for which the United States is authorized to expend funds."[10] This definition has been adopted by the Labor Department in administering the act,[11] and the act has been applied to such diverse projects as dams, bridges, breakwaters, canals, levees, pumping stations, slum clearance, urban renewal, public housing, defense housing, post offices, schools and hospitals.[12]

When a request for a determination of prevailing wages is received from a government contracting agency which is ready to advertise for bids on a public works project, the Solicitor of Labor appoints a referee to conduct an investigation in the locality of the proposed construction, which includes consultation of state labor departments, craft unions, general contracting associations and municipal officials.[13] The "locality" in which a wage rate may be found to prevail is taken to mean a city or town, but only if a survey can be taken of wages paid for similar skills on similar projects. In cities or towns where comparable construction does not exist, or where the work force does not include the skills in question, the rate is that which prevails in the nearest area (usually a large city) where such work and skills do exist.[14]

The 1935 amendment included a provision that if a contractor violates the act the government may terminate his right to proceed with the work and

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[6] Tyson, supra note 2, at 782.

[7] The 1964 amendment, as shown infra, adds and defines terms but does not alter the basic structure of the act.

[8] 46 Stat. 1494 (1931), 40 U.S.C. § 276a (1958).

[9] 119 F.2d 145 (6th Cir. 1941).

[10] Id. at 147.

[11] See Price, A Review of the Application of the Davis-Bacon Act, 14 Lab. L.J. 614, 619 n.12 (1963).

[12] Id. at 616, n.5.

[13] 29 C.F.R.1.3 (1964).

[14] 29 C.F.R.1.4 (1964).

hold him liable for any excess costs incurred in the completion of the work by the government.[15] In addition, the Comptroller General may withhold payments from the contractor and pay to his employees any sums found to be due them resulting from a violation of the act. The Comptroller General is directed to distribute a list of violating contractors to all government agencies, and a contract may not be awarded to such a contractor for three years.[16] Finally, if accrued payments withheld from the contractors are insufficient to reimburse workers, they have the "right of action and/or intervention against the contractor and his sureties."[17]

The third of a century which has passed since the Davis-Bacon Act became law has seen basic changes in the medium of exchange by which a worker is compensated for his services. In 1931 wages were paid almost entirely in the form of cash. But today 110 million persons rely on benefits from welfare and pension plans,[18] and 70% of all building tradesmen are covered by such plans.[19] In the construction industry alone there are over 4,000 welfare and pension funds, and these are primarily financed by employer contributions.[20] In 1963, according to a United States Chamber of Commerce survey, the average employer's expenditure for fringe benefits totaled 25.6% of the total payroll.[21] Because of these deferred wage payments in the form of fringe benefits, direct wages alone are no longer an accurate measure of compensation. Thus the Davis-Bacon Act was no longer effective to prevent the very occurrences which it was designed to prevent. A contractor who paid fringe benefits incurred higher costs and was unable to compete with a contractor whose workers did not expect fringe benefits. Since Davis-Bacon established a minimum as to direct payment only, both contractors could be fulfilling their obligations under the act, but the contractor who also paid fringe benefits, which are generally regarded as socially desirable, was thereby penalized in bidding on federal construction jobs. The 1964 amendment to the Davis-Bacon Act recognizes this change, and is designed to modernize the act by including fringe benefits within the term "wages," thereby bringing the standards of the act into conformity with modern wage payment practices.

The amendment provides that the obligation of a contractor to make payment in accordance with the prevailing wage rate may be discharged in any combination of three ways:

(1) direct payment;
(2) the making of an irrevocable contribution to a trustee or third person pursuant to a fund, plan or program for providing bona fide fringe benefits;
(3) assumption of an enforceable commitment to provide such benefits

[15] 49 Stat. 1011 (1935), 40 U.S.C. 276a-1 (1958).
[16] 49 Stat. 1011 (1935), 40 U.S.C. 276a-2(a) (1958).
[17] 49 Stat. 1011 (1935), 40 U.S.C. 276a-2(b) (1958).
[18] Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 88th Cong., 2d Sess. 2 (1964).
[19] H.R. Rep. No. 308, 88th Cong., 1st Sess. 2-3 (1963).
[20] Ibid.
[21] See 57 Lab. Rel. Rep. 48.

under a financially responsible plan which was communicated to the workers in writing.[22]

The fringe benefits specifically recognized in the amendment include retirement or death pensions, medical or hospital care, workmen's compensation, life, disability, illness or accident insurance, unemployment benefits, vacation and holiday pay and defraying costs of apprenticeship. An "open end" provision allows for the inclusion of other bona fide fringe benefits which may come to be widely accepted.[23]

The amendment does not change the method of determining the prevailing wage rate, except that the Secretary of Labor must now make a separate finding as to the basic hourly rate of pay and the fringe benefit contribution for each job classification.[24]

By the use of the words "fund, plan, or program," the law intends any arrangement commonly used to provide fringe benefits through employer contributions.[25] The trustee administering the program must assume the usual fiduciary responsibilities imposed by law. Although contributions must be irrevocably made, the contractor may recover sums paid to the trust in excess of the funds actually required by the plan.[26] The third possible method of payment, the so-called "unfunded" plans, to qualify for inclusion under the act must represent a legally enforceable commitment, must be reasonably anticipated to provide the described benefits, and must be carried out under a financially responsible plan, the "actuarial soundness" of which may be guaranteed by the Secretary of Labor by directing the contractor to set aside assets sufficient to meet future obligations.[27] The overtime rate continues to be based on the rate of direct payment, exclusive of the cost of fringe benefits.[28]

The Davis-Bacon Act has long been the object of criticism by business interests. The objections are twofold: first, that the minimum wage determinations of the Labor Department are arbitrarily final and not subject to any review,[29] and second, that contrary to fulfilling its intended function of stabilizing local wage levels, the act actually operates to inflate local wages. For example, when a public works project is contemplated in a rural area which lacks the requisite number of laborers, the prevailing wages on that

[22] 78 Stat. 238 (1964).

[23] Ibid.

[24] Proposed regulations to implement the amendment, 29 Fed. Reg. 12373 (1964). Also printed in 56 Lab. Rel. Rep. 459 (Aug. 31, 1964).

[25] 29 Fed. Reg. 12373 (1964).

[26] Ibid.

[27] Ibid.

[28] 29 Fed. Reg. 12374 (1964).

[29] In the face of demands for judicial review under Davis-Bacon, the Secretary of Labor established a three-man Wage Appeals Board, to hear appeals from wage determinations under Davis-Bacon and related statutes. See BNA WHM 99: 2045-49 (April 11, 1964). The House Subcommittee on Proposed Davis-Bacon Reforms has declared a one-year waiting period on considering further reforms in order to enable the lawmakers to observe the new board in action. Rep. Roosevelt, the Subcommittee Chairman, felt that the new Board "should be allowed to function for some time" before changes in the act would be considered. See 56 Lab. Rel. Rep. 286.

project will be based on the wages that prevail in the nearest large city. These wages will almost certainly be higher than those which actually prevail at the job site, yet many local laborers from the rural community itself will work on the project and will have to be paid at the higher metropolitan wage rate. The contractor is required to spend more for labor than would otherwise be necessary, and the cost of the project to the taxpayer is artificially and unnecessarily increased. It is therefore argued that Davis-Bacon constitutes a needless expense to the taxpayer, since the worker and the prevailing wage level are today protected by other controls on the contractor, notably collective bargaining.[30]

The new amendment will undoubtedly serve to intensify these objections to the operation of the act itself. A contractor who is not unionized will be forced, if he desires to compete for public contracts, to pay fringe benefits which heretofore only unionized contractors paid; thus it can be argued that the amendment, in operation, will promote the use of union labor on federal construction projects, to the detriment of non-union contractors. It is argued by contractors[31] that the rural worker may, for a combination of many reasons, not be as productive as the metropolitan worker, and that forcing a rural contractor to pay his workers "city" fringe benefits puts the contractor at an undue disadvantage.

The fringe benefit amendment was undoubtedly necessary to adjust Davis-Bacon to today's world and to enable the act to continue to fulfill its function of preventing the depression of local wage standards through the spending of federal funds. The question now is whether the amendment and its parent act prevent depression of local wage levels by fostering the inflation of those wage levels, thereby creating new and possibly greater inequities. Perhaps by the time Congress again addresses itself to this question,[32] the operation of the new amendment will have done much to clarify the answer.

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[30] See, e.g., "The Davis-Bacon Act. Questions and Answers on this Shotgun Law," a pamphlet published by the United States Chamber of Commerce.

[31] See, e.g., Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess. 246-49 (1963).

[32] See note 29, supra.