Policy Backgrounder: Labor Department Finalizes Davis-Bacon Update

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Insights for What's Ahead:

The US Department of Labor published its final rules updating the Davis-Bacon Act to raise wage standards for contractors on federally-funded construction projects.

- The rule is expected to impact 1.2 million construction workers employed on federally-supported projects worth an estimated $220 billion annually.
- The new prevailing wage rules threaten to raise the cost of Federal projects funded under the Infrastructure Investment and Jobs Act, the CHIPS and Science Act, and the Inflation Reduction Act, which are already expected to exceed initial estimates because of inflation.
- DOL announced that it will host compliance seminars in September to educate agencies, contractors, unions, workers, and other stakeholders to raise awareness on prevailing wage requirements and expedite compliance.

Final Rule for Federal Contractor Wages

Last week, the US Department of Labor (DOL) published its final rule on "Updating the Davis-Bacon and Related Acts Regulations," which will go into effect on October 23. The Davis-Bacon Act, originally passed in 1931, sets prevailing wage requirements for contractors on federally-supported projects in excess of $2,000 for the construction, alteration, or repair of public buildings or public works. The final rule will affect approximately 1.2 million construction workers, covering an estimated $220 billion in construction projects annually.

The Administration's update is intended to boost hourly wages of workers under Federal contracts. Construction groups responded that the cost of taxpayer funded infrastructure projects will increase as a result, with the proposed rules in March 2022 receiving nearly 41,000 comments from the construction industry and labor stakeholders. The rules are the first update to Davis-Bacon regulations in 40 years—coming at a time when the Infrastructure Investment and Jobs Act, CHIPS and Science Act, and Inflation Reduction Act offer large new sums of Federal funds to state and local projects.

The final rule reinstates the pre-1983 prevailing wage definition (also referred to the "three step process"), matching wages to the highest wage paid to at least 30 percent of workers in a construction trade in a particular locality. The Reagan Administration had shifted that level to 50 percent, where it had remained since 1983. Under the now-repealed rule, if 50 percent of workers in a given occupation and locality did not earn a single wage rate, the prevailing wage had been set equal to the average wage, which potentially pulled down wages because of the impact of considering lower earners. The shift back to 30 percent "makes it more likely that workers are paid a true prevailing wage," according to the Administration.

The new rules also make a number of changes to expand coverage and increase the wage floor. The new rule extends to include broadband, solar panels, electric vehicle charging stations, and

semiconductor manufacturing plants that receive Federal funding. This change will also impact private investment receiving incentives, including Ford's EV battery plants.

Another change will allow DOL's Wage and Hour Division to use state and local wage determinations to set Federal prevailing wage requirements in certain situations instead of using surveys of Federal contractors. Historically, wages have been determined at the county level. The new rule will allow DOL to issue multi-county project wage determinations with a single wage rate per classification based on data from relevant counties where the project will be performed. While most projects will continue to county-level prevailing wages, in cases where that data is insufficient, data from nearby counties can be used.

The Congressional Budget Office in 2022 estimated that the repeal of the Davis-Bacon Act would save the federal government $24.3 billion over the decade 2023-2032. DOL's methodology for wage determinations has been repeatedly criticized by both the Government Accountability Office and DOL's Office of Inspector General.

Under the Inflation Reduction Act, "bonus" tax credits are five times larger for projects that pay prevailing wages, threatening to enlarge the cost of Federal investments that are already expected to exceed earlier estimates because of inflation. In an April report, Goldman Sachs estimated that the impact of Federal incentives (including tax cuts) could total $1.2 trillion by 2032—more than three times the $391 billion estimated initially at the time of enactment for the period until 2027.

Those concerns were vocalized by Republicans in Congress. Rep. Virginia Foxx (R-NC), Chairwoman of the House Education and the Workforce Committee called the new rule "wrong" in a statement, saying the rules "will also drastically increase the costs of federal construction projects, leading to fewer completed infrastructure projects and a greater burden on taxpayers."

Conclusion

The updated Davis-Bacon rules are the latest move by the Administration seeking to bolster standards for workers through rulemaking by the Department of Labor, National Labor Relations Board, and Equal Employment Opportunity Commission. Employers still expect forthcoming final rules that will expand overtime pay requirements and that will produce a tighter definition of which employees can be classified as independent contractors. (Those two rules would apply to a broader set of workers beyond those employed on Federal contracts.)

These proposals, including the Davis-Bacon update, are expected to face court challenges—including some that may seek to invalidate the proposals by contesting DOL Deputy Secretary Julie Su's ability to continue to serve as Acting Secretary. (The Administration argues that Su has the right to serve as Acting Secretary until a new Secretary is confirmed, even if Su herself is the nominee for Secretary.) The 2024 election casts additional uncertainty on the permanence of new workplace regulations. If the 2024 election swings to Republicans, the new rules would be vulnerable to either the Congressional Review Act by a Congressional majority or to a new Administration that could keep the rules from taking effect or seek to repeal them

Still, the Administration is touting the importance of Federal infrastructure and manufacturing investments and their role in powering job creation. In a statement, Vice President Harris stated, "[i]n light of the new jobs created by these once-in-a generation infrastructure investments, DOL's new rules are more important than ever to ensure fair wages for workers."

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