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Speaker 0 00:00:00 Welcome and thank you for joining today's conference, Office Hours: October 2023, Davis-Bacon Regulatory Update. This meeting is currently being recorded and all attendee lines are muted to reduce background noise. Before we get started, please make sure you've opened your chat panel by clicking the chat bubble icon at the bottom right corner of your screen. If you need any technical assistance, please send a chat message to the event producer. When we get to the Q&A portion of the call, we will stop recording and you may then send our chat questions to all panelists from the dropdown menu in your chat panel. With that, I'll go ahead and turn the call over to Melissa Schroeder, Technical Assistance Lead for the Office of State and Grantee Relations. Please go ahead.

Speaker 1 00:00:58 Thank you. So, I'm Melissa Schroeder. I'm with the Office of State and Grantee Relations, and we want to thank you for joining us today for our office hour session on the Davis-Bacon and Related Acts Final Rule provisions. We are joined today by Natalie Collins, who is a senior advisor with the Division of Government Contracts Enforcement and the wage in our division at the US Department of Labor. And she's going to walk us through some of the revisions and updates. And then, we will go through a couple of questions that were submitted prior to the call and, we'll open it up for questions in the chat as well. So, if you have questions as we're moving along, please feel free to submit them directly into the chat. And with that, I will turn it over to you, Natalie.

Speaker 2 00:01:48 Thanks, Melissa. we're just going to go through, hit the highlights of the final rule. but if there's an, if there are any provisions, that we don't discuss during today's session, don't feel like your questions have to be limited only, only to the provisions that we discuss. I'm happy to, to talk about any and all things David says. And final rule is, some of the people on this call have already heard. I do also want, before we get started, to put a link in the chat to, compare the comparison charts between the prior regulations and the existing regulations. again, the Davis-Bacon, and Final Rule Revisions. Were very comprehensive. not going to get through all 800 pages worth today, but, that is a really good resource. If there are any particular provisions that you are curious about that maybe aren't mentioned today or that you want to, look at them in a little bit more detail.

Speaker 2 00:02:50 I'm also going to drop the link for the General Final Rule webpage in there, just in case anybody needs it, which has some additional resources as well. All right, so with that, I'll go ahead and dive in before I start talking about any of the actual final rule provisions. Do you want to talk a little bit about the timing of how they apply? I think probably everybody on this call does know that the effective date of the final rule was October 23rd, this past October 23rd. It’s a huge celebrations, at least for us. But because the final rule was so comprehensive and did involve changes to so many different aspects of the program, we found that it's helpful to discuss how that effective date actually applies as a practical matter to the different kinds of changes that we have. So, the final rule does have several provisions that affect how the Department of Labor determines what the prevailing wage rates are.

Speaker 2 00:03:50 Those rates that we publish on the wage determinations that are then incorporated into Davis-Bacon contracts. and I think it's important to emphasize that those provisions that change how the wage rates are determined, will only apply to wage determinations where the department has both completed the data collection for that wage determination for that survey that we use to get information for the wage rates, and has then publishes the wage determination based on that survey after that October 23rd effective date. So you may have heard, about some of the changes to how the prevailing wage rates are, are calculated, for example, that, going from the, calculating the prevailing

wages based on a 50% majority to a 50 30 uh percent, and then, and only then doing an average, and that those wage rates may change, that is possible, but that's not something that's going to happen or apply to current wage determinations.

Speaker 2 00:04:54 That's not something that's going to affect any current contracts. Those are changes that are going to apply gradually as the Department of Labor collects data for new wage determinations and gradually publishes those wage determinations. and so, we'll talk about that with, with respect to just a couple of the specific provisions in a minute. But I did just want to emphasize that to the extent that you've heard that the final rule makes changes to how wage rates are determined and have some concerns as to how those wage rate changes will impact your current contracts, it's important to, to know that they won't in fact impact your current contracts, and that there's not going to be, and has not been an immediate change in wage rates as of October 23rd. It's more of a gradual, phase as those processes start being applied as new wage determinations are, are published on sam.gov.

Speaker 2 00:05:49 now because wage determinations generally don't change once they're properly incorporated into a contract, as I've mentioned, those changes to wage determinations, it'll generally take them a while to be, to be incorporated and to be applicable. the final rule does include certain provisions, they're at 29 CFR 1.6 that due, describe some exceptions to the general rule that a wage determination is good for the, the life of a contract and do require updating of wage determinations after contract award. We're going to discuss those in some detail later. But I did want to talk about how the effective date works for those, those updating requirements. There's updating requirements are going to apply both to, to new contracts and existing contracts, but only in those limited set of circumstances where the updating of wage determinations is required. It's really a very limited set of circumstances. It's not across the board for all contracts. and again, it's only going to apply prospectively going forward. If the con, if you have existing contracts that fall within, within that updating, category, you're going to have a year to get your contract updated to start applying, those updates going forward. It does not apply retroactively for any existing contracts. So, you may have an existing contract that may need to update a wage determination as a result of this rule, not guaranteed, but you might. but you'll only need to make those changes prospectively, not retroactively.

Speaker 2 00:07:33 All the other provisions, including all the enforcement provisions in part one, all the, the changes to things like, the definition of sight of the work or the definition of crime contractor, some of the changes in, in the enforcement mechanisms, those are only applicable to new contracts that are entered into after October 23rd. So, they won't apply to any contracts that have already been awarded as of that October 23rd date, even if the contract extends past October 23rd in terms of the period of performance. so just really wanted to emphasize that October 23rd date, which is when the, the rule becomes effective. But in terms of applicability, it is going to be a much more gradual application, to new contracts after that date to new wage determinations issued after that date. It is not, it's not a sudden change. did just also want to highlight, we're mostly going to be talking about the provisions of the final rule where we did make some changes.

Speaker 2 00:08:41 Obviously, the final rule did also do a lot of updating in terms of over the past 40 years, we've issued a lot of subregulatory guidance, much of which is now incorporated in the final rule and is part of the regulations. Although the final rule does not apply to contracts entered into before October 23rd, if we have existing subregulatory guidance, that applied, prior to the final rule, that that subregulatory guidance will continue to apply just as it always has. So, for example, the final rule, did

include language that specifically required in the regulations that contributions to fringe benefit plans have to be annualized. If the contractor wants to claim credit for them, they have to, which is an, a fancy way of saying this. The contractor wants to claim credit for contributions to health insurance or life insurance or other benefits. They have to divide those contributions by all the hours that an employee works to get a per hour credit. That is, was not previously in the regulation, but it's been part of our sub-regulatory guidance for a very, very long time. So that sub-regulatory guidance would still apply to contracts entered into prior to October 23rd.

Speaker 2 00:10:02 All right, so with that overview of the effective dates, we, I do just want to talk about a couple of the provisions, which were changed in 29 CFR part one, which is the, the regulations that talk about how the department determines what prevailing wages are when we're publishing those wage rates. I'm not actually going to talk about most of them today, partly because we have limited time, and I want to make sure to leave a lot of time for questions. But secondly, because although those changes are really important, they're important for change, improving the accuracy of the wage determinations and making those prevailing wage rates as, as accurate to, to the wages that locally prevail in a given area as possible, they, they aren't really going to change how an LEA incorporates wage determinations into a contract. so the wage determinations are still going to be published on sam.gov as they're updated, or when a new wage determination is published for a local area, and the LEAs or the, the other funding recipients or subrecipients, we'll pull them from sam.gov to new contracts or occasionally to update the wage determination in a contract, just like you always have.

Speaker 2 00:11:16 so if you're interested in how these changes are going to affect the way in which the Department of Labor determines the rates, have the link to comparison chart, you can look into that. But for the most part today, I'm just going to hit on in terms of the part one provisions, the provisions that we've gotten a lot of questions about, that there's been some confusion about, and that might have a little bit more of an effect on one day-to-Day operations as it was.

Speaker 2 00:11:44 So one of the, the changes that we have gotten a lot of questions about, that was a fairly big change that we're also very excited about, is there a vision that allows the wage and hour division to adopt state or local prevailing wage rates? Previously we could consider state or local prevailing wage rates and had to give due regard to information obtained from state highway departments for highway wage determinations specifically. But we weren't really authorized to adopt state or local rates, even when a state or locality had a really good system in place for surveying and obtaining data and, and determining what the prevailing wage rates for their own states or localities were. So now the final rule does expressly permit wage and hour to adopt those state or local prevailing wage rates for all categories of construction, not just highway when certain criteria are met for the sake of time, I'm not going to go into the criteria if you really want to see them, they're listed in 1.3 H, but what I do want to emphasize is that this provision really only applies to the Department of Labor.

Speaker 2 00:12:53 We can adopt when we're doing a survey to, to determine the wage rates that we're going to publish on a wage determination. We can adopt in totality, right, the state or local prevailing wage rates. We can basically say, oh, state X, you have an excellent survey methodology that meets all of our criteria, and you have lovely published rates for, let us say the building category in this locality. We are going to adopt those rates and incorporate them into our own wage determination so that when the Davis-Bacon wage determination publishes is going to show, it's going to list all of those state rates as our rates. They will be identified as state adopted rates, but they'll be on our wage

determinations. So that is going to be a big change in how, again, how we figure out what wage rates are going to be on our wage determinations.

Speaker 2 00:13:49 And we have a lot of hope that it'll make it more accurate and also thicker to get those, wage determinations out. But from the LEAs perspective, again, that's not going to change how the wage determinations and prevailing wage rates apply to, to your Davis-Bacon projects. You'll still be pulling the applicable wage determination for a Davis-Bacon project from sam.gov to incorporate into your contracts. The rates on that wage determination may or may not be determined from state or local data, rather than a Department of Labor survey, but they're still going to be published in the same way. They're still going to be available in the same way, and they're still going to apply right off of that sam.gov wage determination in the same way we've had a lot of questions. and so, we want to emphasize that, that this provision, while it's very important, it doesn't allow a contracting agency like an LEA or another agency to choose to use a state or local wage determination instead of the applicable Davis-Bacon wage determination, right?

Speaker 2 00:14:55 So you're still going to have to get the Davis-Bacon wage determination of sam.gov, and it, it may or may not have the same rates that are on your state or local wage determination. because like I said, there are criteria that have to be met for Davis-Bacon for us to adopt those state or local rates. So, you'll still have to, to pull that Davis-Bacon wage determination and incorporate it. And I also want to emphasize, provision, allows the Department of Labor to sort of wholesale adopt the state and local rates for a particular locality, but it, it doesn't allow an agency or contractor to use a rate for a classification from a state or local wage determination if that classification is missing from the applicable Davis-Bacon wage determination. There's been a lot of confusion about this. This is not, I'm sorry guys. This is not a substitute for the conformance process.

Speaker 2 00:15:49 This provision does not say, Hey, if, if you need to know what rate to pay an iron worker, and there's no iron worker rate on the Davis-Bacon wage determination, but there's a state or local wage determination for that locality, you can just pull the iron worker rate from that. That is, is not how it works in that circumstance. If there is no, no rate for a classification on the wage determination, although I will say we have made some changes to, make to reduce the, the number of times when that happens, but you will still have to follow the conformance process. So, adoption of state or local rates, it's a, it's a very big change. It's a very important change, but it is, is really an internal DOL process change, not, not something that allows agencies or contractors to pull state or local rates on their own.

Speaker 2 00:16:44 Whoops, the technology. There we go. Okay. Also, just wanted to mention quickly, periodic rate adjustments, which is another, another topic that we've gotten some concerns about and some questions about under the prior regulations. if collectively bargained rates prevailed for classifications on that wage determination. So, if union rates prevailed, those rates could be updated, annually, whenever the collective bargaining agreement for that union that prevailed whenever their rates updated, they could send them into us, and we would update the rates on the wage determination. But if we had to use an average rate on the wage determination, those rates that are identified by SU on the wage determination, we didn't have any way to update them until we did a new survey and published a new wage determination. So, the final rule does fix that. We're now authorized to do periodic adjustments to out of date, prevailing wage rates.

Speaker 2 00:17:47 Even if they're their survey rates, we can index them, every three years. and so that will keep rates from getting outdated. That will keep them up to date. generally, that does mean

over time, that those rates will increase, and we'll still be able to have those increases take place even if we don't get enough survey data to really publish a, a new updated wage determination. So, this is an exciting change too. It is an internal process change, but we've gotten a lot of questions and concerns from, from agencies who are concerned that they are going to have to do the indexing. So, they have a wage determination they incorporated into their current contracts, and they're concerned that now as of October 23rd, they're going to have to go through and index the rates and raise them on all of their contracts, or that we're going change all of the rates and all of our wage determinations on October 23rd.

Speaker 2 00:18:45 And those new rates are going to have to be incorporated into all the new contracts. And that, I just want to emphasize, that's really not the case. Yes, there is going to be indexing of some out of date rates, but again, those are updates that are going to be rolled out gradually. I only wish that we had the resources to be able to look at all of the counties and all of the states across all the categories of construction nationwide and like the course of a month, figure out which wage rates need to be indexed and, and roll them out all at once. But we really don't <laugh>. That's a process that's going to take some time, some time. and we, we are looking at the rollout and making sure that it is done in a gradual way so that there's not a sudden impact on any, you know, local area or, or type of contract. So, you'll see those updates on wage determinations gradually over time, but those are not all going to kick in. And the wage rates aren't all suddenly going to update like this year. It is going to be a gradual process.

Speaker 2 00:19:57 the other provision that I wanted to talk about in part one before I move over, move on to some of the, the provisions that relate to, Davis-Bacon coverage and Davis-Bacon compliance and oversight, which I know, I know that you all will have, have probably some questions about is updating wage determinations after contract award. So, the first thing I want to emphasize is, you know, the general longstanding rule that once you incorporate a wage determination into a contract, it's good for the life of the contract. That is still the general rule. Updating wage determinations after contract award is going to be still limited. There's really only going to be three circumstances when wage determinations need to be updated after contract award. So again, you may have heard that there's going to be updates, there's going to be annual updates, there are going to be some updates after contract award, but they are limited.

Speaker 2 00:20:54 And some of these updates were already required under our, our current guidance. So, the first two situations apply, to all types of contracts in certain limited circumstances. And those are the ones discussed on this slide. So, if you have a contract or an order, like a task order or purchase order, and you enter into that contract, you incorporate the wage determination, everything's going good, but then after the, the contract order is awarded, you make a substantial change to that contractor order. So now the contractor's required to do additional substantial construction that wasn't within that original scope of work. The wage determination needs to be updated to the wage determination that's in effect on the date when the contract was modified to make that substantial change. So that's our current guidance, that's our existing guidance. That's now the final rule. Like if you change your contract to add a whole bunch of work or to change the nature of the work that's being done, you're going to need to update the wage determination at that time.

Speaker 2 00:22:00 And the updated wage determination will not apply retroactively, but it'll apply to the work that then remains for the rest of that project. As of that, that contract changed. Secondly, if you

have a contract that that includes the exercise of options, right? It has pre-negotiated options to extend the contract. when, whenever an agency exercises an option to extend a contract, the wage determination in that contract has to be updated. Again, that's not new, right? We have all agency memorandum 1 57, that that already provided guidance to that effect. It's now included in the regulation. So, it's, it's regulatory, it's codified, but it's not new.

Speaker 2 00:22:49 the third type of updating that is going to be required for wage determinations after contract award, is annual updating. So, you may have heard that now contracts have to have their wage determinations updated annually, but this only applies to certain specific types of contracts. And so, this is going to be contracts that extend over a period of time. Sometimes it can be quite a long period of time. and Davis-Bacon, we do sometimes get even 50 year contracts. The contracts can be very long, but that period of time isn't tied to the completion of any particular project or, or item of construction work. So, we're talking about contracts like indefinite delivery, indefinite quantity contracts, long-term maintenance and operation contracts, that also require the contractor to perform repairs or alterations. some privatization contracts are like that. We're talking about contracts when, you award a contract and you say to the contractors, I don't know exactly what work needs to be performed, but you're agreeing that during this extended time period, if any work arises, it might be work of a particular kind, but still, if any work arises, you're going to do it based on this agreed upon price, right?

Speaker 2 00:24:12 So when you award the contract, you don't know what the work's going to be exactly. You don't know when it's going to occur exactly. which makes it a little bit difficult for wage determination purposes, right? and, and agencies don't necessarily have to include options in those contracts, or sometimes those contracts will have options, but the base period and the option periods will be very long, much longer than a year, five years, 10 years. So those wage determinations need to be updated in those contracts because to reflect the fact that they're very long-term contracts and that you don't really know when the construction's going to start, when those contracts are awarded. but how wage determinations have been updated in those contracts has been very inconsistent across types of projects across agencies. Geographically, there's just been a lot of inconsistency. So, the final rule now requires agencies, to update the applicable wage determinations for those types of contracts, but only those types of contracts annually on the anniversary date of the contract.

Speaker 2 00:25:21 Okay? Unless you get written approval from DOL to do it differently, that updated wage determination, it's going to be updated in the master contract. And then if you have, if it's a contract that uses task orders or purchase orders or other similar documents to actually direct the contractor, okay, here's the specific item of work I want you to do right now, that updated WEI determination will flow down into any of those task orders or purchase orders that are begun or awarded during that year. And it will then lock in for the task order, right? It'll apply until that task order is completed, even if the task order takes more than a year, unless the task order has one of those two changes that we talked about in the previous slide. The task order has a substantial change in scope, has the exercise of options. So, this change does apply to existing contracts, but only contracts of that sort of indefinite delivery, indefinite quantity type.

Speaker 2 00:26:24 but even if you have contracts of that type that are existing, the final provisions relating to updating only apply to that contract. If it's indefinite duration, like the contract's awarded, it doesn't have a specific end date, you don't know how long it's going to go on, or if more than a year is left in the period of performance for that contract. In those circumstances, contracting agencies like LEAs

are going to have to amend their contracts to include those annual updating procedures within one year of the effective dates. So, you, you effectively have until October 23rd, 2024, to get those contracts changed so that you can do those annual updates. And then in any new contracts that you award, since October 23rd, going forward, should have those provisions. And there to let contractors know, hey, this is one of these specific types of contracts that requires annual wage determination updates.

Speaker 2 00:27:27 We're going to be updating these wage determinations annually, but for most of your contracts, you are not going to have to do annual updates. And I, I just want to emphasize that again, because we've gotten a lot of questions like, Hey, I have a project for, you know, an office building for a school for a, you know, utility plant for an all these different types of projects, and it's going to take me longer than a year to build. Am I going to have to update the wage determinations every year? No, you are not that type of project where you enter into a contract and when you enter into the contract, you're able to say to the contractor, this is the work I want you to do. This is when I expect you to do it. Here's what I'm paying you for it. that sort of stereotypical, in a way, David speaking contract does not require annual updating. It's only those, those indefinite, long-term contracts that require that annual updating.

Speaker 2 00:28:29 All right? So that was the speed run on the, the changes to how we as determinations are, are, are figured out and published by us and how they're incorporated. and now I'm going to switch to providing an overview of some of the main changes in terms of how Davis-Bacon applies, to contracts and some of the compliance, procedures, and also some of the ways that, that you guys can perform oversight and that we can do enforcement together of the Davis Beacon requirements. So, most of the changes I'm going to be talking about from here on out, just for reference, are going to be in 29 CFR part five, right? So, the first change that I want to mention is kind of a biggie. one occasion I've, you know, agencies including LEAs, although very rarely, can fail to include the contract clauses or wage determinations in Davis-Bacon cover contracts, or sometimes mistakes are made, and the incorrect wage determinations are included into a contract.

Speaker 2 00:29:36 The prior regulations did direct that. When that happens, agencies such as LEAs do need to incorporate the missing contract clauses or wage determinations into their contracts interactively. So back to the beginning of the contract, but the prior regulations didn't really address what happens if, if for whatever reason, an agency doesn't make that correction. and so, because of that lack of precision, shall we say, for some contracts that resulted in the wage and hour division being unable to enforce the prevailing wage requirements, which resulted in workers not getting the prevailing wages they were due. So obviously that was, that was a matter of concern. And the final rule changes that. and so now the final rule specifically states that even where contract clauses or wage determinations are not included in a contract where that contract is covered under the Davis-Bacon prevailing wage requirements, those clauses, and that wage determination or determinations, depending on the contract, still apply anyway as a matter of law, they will still apply retroactively to the beginning of the contract.

Speaker 2 00:30:52 So, in essence, like the Davis-Bacon requirements are now going to be like the overtime requirements, even if they get left out of a contract, even if the wage determination gets left out of a contract, we are still going to be able to enforce it, whether it's in there or not. Now, obviously, we're, we're going to let the agency know, right? If we are investigating a contract that was entered into by an LEA, the wage and hour division will still make a request to the LEA saying, hey, this, this contract

was covered. It's missing clauses, it's missing a wage determination. Oops, this was the wrong wage determination. It should have been more recent, different category, whatever mistakes happen to us all. and the agency will still have 30 days to make that change just like they do under the prior regulation. Even if that change is not made at the end of that 30 days, the clauses and wage determinations are still going to imply, and we're going to be able to enforce it where this operation of law provision applies. and, and the new provision at 29 CFR 5.5 E does specify this, the prime contractor still has to be compensated for any resulting increase in wage rates in accordance with applicable law.

Speaker 2 00:32:13 So if an agency such as an LEA would've had to provide compensation to the contractor if they had retroactively incorporated the clauses and wage determinations through a contract action, as directed, the agency is similarly going to have to provide compensation if the clauses and wage determinations have to be incorporated by us as a matter of law. So I just want to emphasize this change because not only does it make enforcement more straightforward, it also makes it very even more important that if you have any questions about whether a contract is covered or whether a wage determination is correct, flow them up to your state agency, flow them up to DOL, get those questions answered as soon as possible. Or if a contractor comes to you with questions and says, hey, I think this is the wrong wage determination, you know, I think there, there's a problem here. Look into those as quickly as possible. Because if, if the mistake was made and Davis-Bacon does apply, even though it's not in the contract, it's still going to be enforceable. and, and so potentially there could be, some, some monetary liability there. So please, please, if you have any questions about coverage, bring those to, to us or, or to your state, contact or to the Department of Education, as soon as possible. because we want to make sure that, that, those questions get answered.

Speaker 2 00:33:50 do you want to also touch on a change that happened in the final rule regarding site of work? under the previous regulations of a significant portion of a building or work, such as, say for example, a modular building unit was being constructed at another site, that site was only considered a site of work for Davos Beacon purposes, like the prevailing wage requirements only applied to that site if it was established specifically for that contractor project, which was a, a pretty narrow definition. and the final rule does expand that definition a little bit to say that, that those sites, those secondary sites, where a significant portion of that building or work are being constructed will be considered a site of work, even if they're not established specifically for that project, as long as that existing site is dedicated exclusively or nearly exclusively to that project for a period of time.

Speaker 2 00:34:48 So a period of time, we're talking about a period of weeks or months or more, not when a site that that does work for multiple projects and multiple customers, you know, just shifts its production capacity to single project for a few hours or a few days because deadlines, deadlines happen to solve, in a significant portion of the project. Again, we're talking about one or more whole portions or modules of the completed construction project, but that does include modular units or rooms or modular building units, when they're meant for specific use in that building or work and only require installation or final assembly on site. So, we're not talking about prefabricated components or parts or materials that are available to the general public, but we're talking about, you know, substantial portions of a construction project. I don't want to spend too much time on this, but I did want to flag this change because to the extent that modular units or similar structures are used for school district projects.

Speaker 2 00:35:47 So for example, they add a modular unit, to, to the school property to be able to add a few classrooms in a separate building from the main school building. I think at least three schools

that my <laugh>, my three kids have gone to different schools across in their time, at least three of those schools had that sort of couple of modular buildings just because of space requirements. or at use a modular building unit to provide some athletic facilities outside of the school building or, or some similar project. wanted to, to make sure that everyone was aware of this change because if the requirements and the definition of the secondary site are met, the prevailing wage requirements would apply at the facility where there modular units were constructed. So again, if, if you have a project where modular units are being used and there is any question as to whether the facility where those modular units are being constructed is going to be a secondary site of the work, please flow those questions up to us as early in the contracting process as possible so that we can help you pin that down.

Speaker 2 00:36:58 I also want to talk a little bit about, how the final rule talks about the coverage of drivers, particularly drivers who are coming on and offsite, which is the case for a lot of different types of construction projects. and the final rule did make some changes to certain extent it incorporated longstanding guidance, but it did make some changes. So, I just want to go over those briefly just because that, again, drivers coming on and offsite is very common across different types of construction projects, and it is an area where, some oversight from the contracting agency is probably going to be very helpful. so, for, for my LEAs especially who are seeing a lot of truck drivers on certified payrolls or perhaps are not seeing a lot of truck drivers on certified payrolls, but know from, from their oversight of the project that there are a lot of truck drivers out there, there, this is something that can be important.

Speaker 2 00:37:54 So the final rule does incorporate our long standing guidance. The truck drivers who are performing work for a construction contractor or subcontractor, which does include a trucking or hauling company that subcontracts with a contractor if their work requires them to go on and offsite, such as when drivers pick up materials from offsite to bring them on site, or maybe they pick up debris from the construction site, you know, stuff that's no longer needed from demolition or, whatever the case may be, and haul them off site, those drivers are covered for all their time spent on site for those trips. As long as that time is more than di minimis, di minimis is generally just a few minutes, right? And that, again, is longstanding guidance. The final rule discusses, and the preamble is that when determining whether a driver's on site time is more than di minimis, we are not just looking at the amount of time per trip.

Speaker 2 00:39:01 You are looking at that time in the aggregate in a typical day or typical work week. So, if a driver spends maybe, you know, 10 minutes per trip on site, but over the course of the day they have made 15 trips on and offsite, you are going to look at that total time, oh, that, that they spent altogether, let us say 175 minutes on site. That's nearly three hours. That's not de minimus, right? That's a pretty substantial chunk of the workday. So, the final rule is clear that that time is aggregated. So, if you have contractors who have drivers going on and off site who are, who are saying, hey, they're only spending a de minimus time on site, and you're like, they're here all the time. They're making all kinds of trips, they're making, you know, 40 or 50 trips a week, you can now point them to the final rule, to the discussion of the preamble so that you can show them this time has to be aggregated.

Speaker 2 00:40:04 You have to keep track of this. because we need to be able to see how much time they're spending on the site altogether. which is, not so much a change, but it wasn't in the regulation. So, it, it was sometimes difficult to make that argument. I know to contractors now, there is an exception, for truck driver coverage. So unlike drivers who work for, for contractors who are actually doing the construction on the site, drivers who work for bona fide material suppliers have generally not

been covered under Davis-Bacon, even when they come on site to deliver materials. there's a lot of court cases and I'm not going to get into here, but they're just not considered to be contractors. But there has been a lot of confusion as to when a driver is considered to be working for a material supplier versus when they're working for a construction contractor.

Speaker 2 00:41:02 And so, in an attempt to resolve this confusion, the final rule has a definition of material supplier and a, a lot of preamble discussions to how to apply that definition. And so, here's the bottom line. A, a business is only going to be a material supplier if their only job relating to that contract is to deliver materials or supplies and perform activities that are purely incidental to that delivery. So, loading and unloading, waiting, you know, to be able to unload or unload and make the delivery. It can include picking up materials, but only as part of a delivery. So, you know, a material supplier makes a delivery as part of that delivery. Maybe there's packaging or other materials that are no longer needed, and they take those back away with them, that's fine. But entity that only picks up and hauls away materials is not a material supplier. I'm a construction contractor. I contracted with a trucking company to come and haul my debris away to a landfill or somewhere. That hauling company is not a material supplier. They're not making deliveries, they're just taking stuff away. So, we're only talking about companies whose only job is to make deliveries.

Speaker 2 00:42:20 If workers for a company perform any construction work on site, though that company is not only solely limited to making deliveries, they're doing construction. They're not going to be considered a material supplier anymore, and their workers are going to be covered for all their time spent on site. Again, as long as it's more than de minimis. Our, in our previous guidance workers, for companies that were claiming to be material suppliers had had a 20% threshold of wiggle room, they could spend up to 20% of their time performing construction, and we would still allow the company to be considered a material supplier that is gone. There is no 20% threshold for drivers anymore, even if they're driving for a material supplier, if they're doing construction on site, they're not working for a material supplier and they're covered. If they're not doing construction on site, the only thing they're doing is delivery.

Speaker 2 00:43:17 They're not working for a construction contractor, and they're not covered. So, so that's really the distinction there. and I just wanted to highlight those changes or to a certain extent, clarifications on these two slides because I know coverage of truck drivers has been an area where there has been a lot of confusion. hopefully these changes in the final rule make it easier to understand, make it clear cut in the long run. But some of this is going to be new to contractors especially that, that elimination of the 20% threshold. so, where you have construction projects that will involve truck drivers coming on and off site, and again, many projects do, this is really a good spot where a little extra oversight and guidance may be needed to make sure that the contractors on these projects are paying their drivers correctly, right? This is an area where a little extra attention, like I said, to those certified payrolls to be like, Hmm, where are the drivers <laugh>? Like, I know that you guys have been hauling away debris or, or, you know, whatever, the work may be, but I don't see the drivers on the certified payroll. A little follow up there, could be helpful, especially while contractors are getting used to these changes.

Speaker 2 00:44:37 The final rule also had a definition included a new definition for prime contractor. under the prior rule, there was no definition. This could be really problematic, when more than one entity had responsibility for the construction project, we have a definition, now it's any person or entity

that enters into the contract with the agency and also the controlling shareholders or members of, of the entity that holds the prime contract if it's a joint venture or partnership includes the joint ventures or partners. if a company enters into a contract like a developer, but hires a gen another contractor, such as a general contractor and delegates responsibility for overseeing all the construction of that general contractor, they're also going to be considered a prime contractor. This isn't going to be important for, for you all for the state agencies and LEAs because it really expands the scope of responsibility. So, for example, there's violations on a contract. the LEA entered into that contract with a joint venture that was formed specifically for that project, right? And for whatever reason, let us say that cross withholding is necessary to obtain the back wages for the workers. There's not enough money left on that project for the back pay for the workers. We're going to with have, have to withhold funds from another contract with the same prime contractor.

Speaker 2 00:46:05 We can request and require cross withholding from other contracts held by any of the, the prime contractors. So not just that joint venture, but any of the companies that formed the joint venture that were partners in that joint venture, we could potentially debar any of them if the circumstances warranted. So, all of those prime contractors are responsible for, their compliance and their subcontractor's compliance. But we have gotten some questions. Does this mean that each of the prime contractors has to submit certified payrolls? No. the contractors who've hired workers to perform work on the contract, we'll submit certified payroll for their workers. But if these prime contractors under these new definitions don't have workers on the project, they won't submit certified payrolls, which is in accordance with the current practice. All right, move it along, try and speed up a little.

Speaker 2 00:47:05 we hit some of the important final rule changes, relaying coverage. Want to talk about a few of the changes relating to compliance of oversight. These, mostly the final rule did not change the requirements as to how prevailing wages have to be paid. but there were some record keeping changes, certified payroll provisions, that contractors may have questions about or that you all might have some concerns about that I did, did want to address. So basic record requirements, contractors are now required to maintain workers' last known phone numbers and email addresses as part of their records. They were already required to maintain their last known physical address. And in this modern day <laugh> of, you know, communications, they now have to keep phone numbers and email addresses as well. They should not be putting them on the certified payroll, but they do have to maintain a record of them.

Speaker 2 00:47:58 this, this information is, is frequently really necessary to be able to conduct sufficient interviews to establish whether contractors are in compliance with prevailing wage requirements. As projects go on. some, some contractors are no longer working on site. some categories of, classifications of workers are no longer on site because their workers performed earlier in the project. So, we do frequently need to be able to contract workers who are no longer on site. So, this is very important. The final rule also clarifies that contractors have to maintain copies of, of their contracts, their subcontracts contract modifications, other similar documents. That's, that's based on DOL enforcement experience. The contractors and subcontractors who maintain these documents generally have fewer issues with flowing down their clauses and wage determinations using incorrect wage determinations, other issues like that. So, we are requiring them to keep those contracts and subcontracts. That doesn't mean that we won't still ask the LEA to provide copies of their contract to us as well. Sometimes it can be very helpful to see whether what the contractor provides us with matches what the agency actually issued. but contractors are required to maintain these documents.

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Speaker 2 00:49:20 The final rule also clarifies the contractors have to keep all of their required records for a period of at least three years after all the work on the prime contract has been completed, even if this results in the records having to be kept for a period longer than three years. And this requirement applies to subcontractors as well. So even if a subcontractor's work is completed in earlier point in the project, they still have that three year after the end of the work on the project as a whole, is still there, period for record retention. And the final rule clarifies that this is also the same time period that agencies are responsible for keeping the records that they're required to maintain. So, the contract documents, the certified payrolls and so on, again, hold onto those for at least three years after all the work on the prime contract is completed.

Speaker 2 00:50:10 one additional thing that I wanted to mention relating to records and timeframes, although not record retention timeframes. The final rule also makes it very clear that if a contractor doesn't provide required records within a reasonable timeframe of a request from wage hour, the contractor is, is precluded. They're barred from trying to use those records later, let us say at a withholding hearing or some other similar, proceeding debarment and so forth. So the, while this is a sanction that can only be applied by the wage legion hour division, if you have contractors that are being non-responsive to your records requests, because you guys are allowed to ask for records too, right? If you're reviewing certified payroll and you're like, I have some questions about how these fringe benefit contributions are, are being made, or, wow, those hours on these certified payrolls don't look right. I mean, you can ask for these records that they're required to, to provide.

Speaker 2 00:51:11 and if you're making these requests and they're being non-responsive, please document that, contractors are already subject to withholding and potentially debarment for failing to provide those records to your request or our request. But that, that documentation of non-responsiveness can also help show that, hey, this contractor had ample notice that they were required to provide such records. They still haven't even now that that, that you all have asked us to come in and request them. This is a circumstance where that sanction may be appropriate. So do please, keep track of those lack of responses when you get them. Couple things about certified payrolls as well. Y'all probably know we have a longstanding guidance that certified payrolls have to be signed with a handwritten signature or valid electronic signature, not just a scanner. A copy of a signature. for all of you who have told that to a contractor and had a contractor say, well, where does it say that in the regulations?

Speaker 2 00:52:12 It now says that in the regulations at 29 CFR, 5.5, A three two E. so you now have that citation to show them. And the preamble also has a discussion of what's a legally valid electronic signature. That's any electronic process that indicates acceptance of the certified payroll and includes an electronic method of verifying signer's identity. That last part being what the scanned and copied <laugh>, like scans and copies of the signatures are, are lacking. But again, that's very common. A lot of software has it. Adobe PDF has it for crying out loud, very easy for the contractor to do, and now you can show them in the regulations where it's required.

Speaker 2 00:52:56 The final rule also includes language now for, for agencies. And that could be federal funding agencies like the Department of Education or, or recipients like the state agencies or the LEAs. anywhere all of whom can have, the contractors submit certified payroll through an electronic web-based system. We've always encouraged that, although we, we don't require because we're not the ones having to get them. but the final rule, makes that, makes that option, within the rule itself and it

provides some criteria. So, it now expressly says, hey, electronic submission still requires that legally valid electronic signature. The agency does have to permit other, other methods of submission if a contractor's not able to use or access an electronic system. So, you know, reasonable accommodation should be made. and this electronic system used does have to allow, not just the agency who set up this system, but also the contractor and the wage and hour division to be able to access those certified payrolls. not necessarily whenever they want, but at least upon request, again, for at least that three year period after their work on their prime contract's been completed. but if those requirements are met, feel free to make those contractors, submit those certified payrolls and any electronic system that you like, electronic systems really can be a huge benefit for monitoring certified payroll.

Speaker 2 00:54:30 Oh, I have already gone way over my time and I'm sorry. I am going to talk about a couple of enforcement mechanisms really quickly that have changed in the final rule. The first is anti-retaliation. I want to highlight this because this is a huge change. This is an important change. Previously, Davis-Bacon had no anti-retaliation provisions for workers. So, if a contractor retaliated against a worker fired and demoted them, whatever for, because the worker raised a potential violation, the contractor could potentially be debarred, maybe even some criminal enforcement if there were Copeland AG violations involved. But we had nothing in our regulations that helped the worker who'd been retaliated against, which was kind of a big gap. The final rule has added those anti-retaliation protections. So, you've got the very legal language on the slide for reference, but the key takeaway is that this protective language is very broad.

Speaker 2 00:55:25 So protective actions aren't just making a complaint to wage JER or raising a potential violation to the LEA or to the Department of Education. It's includes also raising potential issues with a contractor or mentioning potential, potential, prevailing wage issues to other workers. And the protections apply not just to current workers, but to job applicants as well. So, if I lose my mind and apply for a job as a construction worker, despite the fact that I would probably electric execute us all, and, I apply as an electrician con and the contractor's like, well, you get paid these, these wage rates, which I know are labor wage rates. And I say, well, shouldn't I be paying paid electricians? Right? Isn't this a Davis-Bacon job? And the contractor says, well, we don't hire people who are picky about how they're paid on this contract. And yes, I'm pretty much quoting from a case I had. now that job applicant is protected too, right? And we can get remedies for that job applicant because they were discriminated against because they raise the prevailing a Davis-Bacon prevailing wage issue with the contractor.

Speaker 2 00:56:31 the remedies for retaliation are broader than typical remedies under the Davis-Bacon requirements. We can seek not only back wages, but we can seek compensatory damages for other losses that the worker may have occurred. And remedial actions such as hiring a worker or rehiring them if they were terminated, rescinding disciplinary actions, providing mutual job references, all kinds of things we can, we can require to make this worker whole if they were retaliated against. So, I want to emphasize, if when you're doing oversight on your projects, you think you have encountered retaliation against one or more workers, please, please refer that issue to us as soon as possible because now we can do something about it. but there's certain due process procedures that, that do have to be followed. And also, all retaliation cases are potential department cases. So should be referred to us in accordance with all agency memo Miranda 180 2 and two 15.

Speaker 2 00:57:30 So please do send those our way if you run across it. And one last thing that I wanted to talk about. One last major change. Under the prior regulations, there were two different

standards for debarment. One for federal contracts under the Davis-Bacon Act, and then a another standard, a stricter standard, a more difficult to meet standard for, violations on related act. Federally funded projects. Previously did debar a contractor for Davis-Bacon violations on related ACT projects like projects funded by the Department of Education. We had to be able to show that the contractor had committed aggravated or willful violations no longer. So, the final rule has harmonized the two debarment standards. There is now just one DEBARMENT standard, whether the contractor has disregarded their obligations to their workers or their subcontractors. And the final rule does also make it plain that prime contractors with upper tier contractors can be debarred for disregarding their obligations to subcontractors.

Speaker 2 00:58:31 That was always the case, but it's now emphasized. So, failing to flow down clauses or wage determinations, sort of directing or encouraging subcontractors to engage in, shall we say, non-compliant practices and so on. So, for this reason, if during your oversight of your projects, right, you find that you have a particular contractor and they're repeatedly failing to flow down those clauses or wage determinations to their subcontractors. Or you notice, hey, when I go out on site, like they never have the Davis-Bacon poster and the wage determinations posted for their, their, their workers and their, and their subcontractors to see, or there's a pattern of noncompliance and their subcontractors now seem to have the same kind of violations PD send those our way so that we can determine whether debarment for disregarding their obligations to their subcontractors is warranted, even if they don't have any workers one site that they're paying incorrectly, but they're, they're disregarding their obligations to the subcontractors and that's having a negative effect on compliance. And then additionally, the final rule does apply that that mandatory three-year debarment period to related acts. It’s not up to three years now. It is three years period. There is no longer any early removal from the debarred list.

Speaker 2 00:59:55 So that was the speed run, at the 800 plus pages. That is our final rule. Obviously that was just the highlights. There are, I know I gave you a couple resources earlier, a couple links. There are in slides, some additional resources where you can go to get more information. And I'm sorry, I know I talked really long, but if there's questions and people still want to hang, it was such a short presentation when I practiced <laugh> and then I'm talking to people and I get really excited, and it gets longer. I'm sorry.

Speaker 3 01:00:31 Well, Natalie, we are at time, as you said <laugh>. sorry. No, it's okay. No, we, we really, really appreciate the, this great presentation and your willingness to share your expertise and time with us at the Department of Education and with our grantees. but because we are at time, what I want to suggest is, if folks have questions, why don't they submit them to their state mailboxes and then we can talk with Natalie and, and get you some answers. there, a reminder, your state mailbox is your state name dot oe@ed.gov. And so, like Wyoming dot oe@ed.gov. So, if you can submit questions, through your state mail, I promise you, we will get you an answer. And, we really appreciate everyone's attendance in this meeting and especially Natalie's time and sharing. I, I learned a lot and I thought this was really helpful and I hope you did too. So, thanks everybody. Thank you.

Speaker 2 01:01:31 And yes, any questions, I'll get answers as soon as possible.

Speaker 0 01:01:41 Okay. Thank you so much for joining. That's going to conclude our conference and you may now disconnect.