Prevailing Wage Requirements in Government Construction Contracts

Friday, August 5, 2016
7:00 a.m. to 8:30 a.m.

Westin St. Francis Hotel
San Francisco, CA
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The Wage Rate Requirements (Construction) statute (formerly known as the Davis-Bacon Act) requires government construction contractors and subcontractors working on federal construction contracts in excess of $2,000 to pay their laborers and mechanics prevailing wages. Contractors who fail to comply can be subject to various penalties, including withholding of contract payments, termination for default, suspension and debarment, and potential False Claims Act liability. In addition, prime contractors and subcontractors can be held financially liable for underpayments by lower-tier subcontractors. This program will address:

- Prevailing wage requirements: who is covered (laborers and mechanics), the scope of coverage (site of the work, secondary site of the work), wage determinations, submission of certified payrolls, and use of certified payroll software.
- Red flags of non-compliance and best practices for verifying/monitoring compliance with prevailing wage requirements by contractors and subcontractors.
- Department of Labor audits of construction projects for compliance.
- The Circle C decision and False Claims Act liability for non-compliance with prevailing wage requirements.

**Program Panelists**

**Lori Ann Lange, Moderator**  
Peckar & Abramson, P.C., Washington, DC

**Margie Collins**  
FLC/Construction, Environmental Solutions & Government Contracts (CESGC), FTI Consulting, Rockville, MD

**Michael J. Schrier**  
Duane Morris, Washington, DC
American Bar Association  
Section of Public Contract Law  

2016 Annual Meeting  
August 4-5, 2016 – San Francisco, CA  

Section Chair, Annual and Quarterly Programs Co-Chairs, Annual Meeting  
Program Co-Chairs, and Luncheon Speaker  

David Ehrhart, Section Chair  

Dave Ehrhart is Associate General Counsel at Lockheed Martin Aeronautics Company in Fort Worth, Texas. He is the legal counsel for the F-35 Joint Strike Fighter Program advising the Joint Strike Fighter leadership and staff on all legal issues dealing with F-35 Global Production. Dave joined Lockheed Martin in 2009 as the Chief Counsel for Global Sustainment.

Before joining Lockheed Martin, Dave served over 33 years in the Air Force in numerous positions. His most recent jobs included Staff Judge Advocate for the Air Force Materiel Command at Wright-Patterson AFB OH, Assistant Judge Advocate General for Military Law and Operations in the Pentagon, and Commander of the Air Force Legal Services Agency in Washington D.C. He also served as the Staff Judge Advocate for US Air Forces in Europe and Commandant of the Air Force JAG School. Prior to becoming a Judge Advocate, Dave served as a Civil Engineer.

Dave received his Bachelor of Science degree in Civil Engineering from the United States Air Force Academy, his Master’s degree in Business Administration and Management from the University of Utah, and his Juris Doctor cum laude from the Creighton University School of Law in Omaha, Nebraska. Dave serves as the Chair of the American Bar Association (ABA) Section of Public Contract Law. He is also the Immediate Past Chair of the ABA Standing Committee on Legal Assistance for Military Personnel (LAMP) which includes the Military Pro Bono Program.

Dave is admitted to the practice of law in the State of Nebraska and the U.S. Court of Appeals for the Armed Forces. Dave and his wife, Chris, have three children and seven grandchildren.

Michael A. Hordell, Annual and Quarterly Program Co-Chair  

Michael A. Hordell is a partner in the Government Contracts and White Collar and Corporate Investigations Practice Groups of Pepper Hamilton LLP, resident in the Washington office. Mr. Hordell has a broad range of experience in government contracts matters. He also is a member of the firm’s Sustainability, CleanTech and Climate Change Team.

Mr. Hordell advises small and large business clients on a range of government contracts issues, including: proposal preparation and business counseling; GSA Multiple Award Schedule contracting, strategic alliances and subcontracting relationships; prosecution and defense of bid protests at the U.S. Government Accountability Office (formerly the General Accounting Office); the Federal Aviation Administration; the U.S. Court of Federal Claims and other forums disputes and contract closeouts; teaming agreements and joint ventures; rights in technical data and computer software mergers and acquisitions; procurement fraud; small business preferences grants; suspension and debarment matters compliance reviews; litigation.
American Bar Association  
Section of Public Contract Law  

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Program Co-Chairs, and Luncheon Speaker  

Mr. Hordell has a Top Secret/sensitive compartmented information clearance/access from the U.S. government, permitting him to assist contractors with classified matters. He helps clients identify contract or grant opportunities, and works with them as the client develops its proposal addressing the government’s needs as described in the solicitation documents.

Mr. Hordell is a frequent lecturer and author on a variety of government contracts topics. Among his publications is *Winning Proposals and Pricing/Cost Strategies: A Guide for the Federal Contractor*, a book designed to help companies doing business with the government and those who want to do business with the government.

Mr. Hordell is a past chair of the ABA’s Section of Public Contract Law. He also is a member of the Bid Protest and Health Care Contracting committees. Previously, Mr. Hordell was section chair (2006-07), chair elect (2005-06), vice chair (2004-05) and secretary (2003-04), and was a member of the Section’s Governing Council (1994-97) and an associate editor for the *Public Contract Law Journal* (1986-98).


**Education:** B.B.A., Insurance and Marketing, University of Cincinnati, 1970; J.D., Boston University School of Law, 1973

**Bar Admissions:** District of Columbia; Massachusetts  
**Court Admissions:** U.S. Court of Federal Claims; U.S. Court of Appeals, Federal Circuit; U.S. District Court, District of Columbia

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**Kristen E. Ittig, Annual and Quarterly Program Co-Chair**

Kristen Ittig is a partner at Arnold & Porter in Washington, DC. She counsels and represents large and small clients in government contracts matters, including compliance counseling, bid protests, investigations, audits and self-disclosures, claims and disputes, terminations, and other issues impacting government contractors and federal grantees.

Ms. Ittig counsels companies on compliance obligations relating to federal contracts and grants and assists companies in designing and implementing effective compliance programs. She also provides guidance on contract and subcontract negotiations, the formation and administration of teaming and strategic alliances, and performance disputes.

Ms. Ittig assists contractors and grantees in conducting internal investigations, and represents clients in audits and investigations conducted by the Department of Justice, the Government foreign firms in Accountability Office, and agency inspectors general, including providing advice on the FAR mandatory disclosure requirements. She has substantial experience in suspension/debarment proceedings, and in defending federal civil False Claims Act cases, including matters relating to GSA Schedule contract compliance.
Further, Ms. Ittig provides advice regarding small business matters, including maintenance of small business status and establishment of SDVOSB, EDWOSB and HUBZone eligibility. In this context, she litigates size protests and NAICS code appeals.

Ms. Ittig has substantial experience in domestic preference law, including the Buy American Act and the Trade Agreements Act. She litigates Freedom of Information Act (FOIA) and reverse-FOIA matters relating to the release of unit pricing and other sensitive contractor information.

Separately, Ms. Ittig represents clients in security clearance litigation matters before the Defense Office of Hearings and Appeals and other agency adjudicative authorities.

Education: JD, Vanderbilt University Law School, 1996; BA, American University, 1990
Admissions: Virginia, District of Columbia; Maryland

Sharon L. Larkin, Annual Meeting Educational Program Co-Chair

Sharon L. Larkin, a partner in Steptoe’s Washington office, has nearly 20 years of experience handling complex government contract matters. She holds a Secret clearance to assist clients with classified matters. Ms. Larkin is identified in Chambers USA 2015 and 2016 as a “Recognized Practitioner” among government contracts lawyers nationwide, and in 2016 as a Washington, DC “Super Lawyer” in government contracts.

Ms. Larkin represents government contractors in the full spectrum of procurement matters, with particular emphasis on bid protests, claims litigation, and dispute resolution – areas where her role as a former judge hearing contract disputes informs her understanding and insight. She also advises and assists clients with contract negotiations, small business matters, data rights, investigations and compliance, and civil disputes. Her clients include both large and small contractors, and her particular areas of industry focus include health care and biotechnology, aerospace and defense, information technology, and construction.

Ms. Larkin’s experience as a judge and advocate enables her to take the most practical approach in solving her clients’ legal and business problems efficiently. She spent 12 years with the Government Accountability Office (GAO), where she served as a Judge on the GAO Contract Appeals Board and an Assistant General Counsel in the Procurement Law Division. Her experience at the GAO includes presiding over some of the most complex bid protests and contract appeals, including disputes involving the acquisition and performance of contracts for complex weapons systems, environmental remediation, healthcare services, information technology, and the modernization and renovation of the United States Supreme Court. During her time at GAO, she heard more than 1,600 cases, issued more than 425 public decisions, presided over more than 40 hearings and trials, and conducted more than 65 alternative dispute resolution sessions. Ms. Larkin won numerous awards for distinguished service, including the GAO Meritorious Service Award from the Comptroller General in 2007, and several Office of General Counsel Outstanding Achievement Awards.
Before and after GAO, Ms. Larkin was a government contracts attorney in private practice, where she counseled clients on a variety of procurement matters and litigated cases at the GAO, Court of Federal Claims, various other state and federal trial and appellate courts, and the boards of contract appeals. She has also served as an expert witness on procurement matters.

Ms. Larkin chaired the ABA Section of Public Contract Law in 2013 to 2014, where she led the Section through the federal government shutdown. She is a frequent lecturer on government contracting matters and has taught numerous classes on contract formation and administration, litigation practice, and alternative dispute resolution. Prior to going to law school, Ms. Larkin worked for several years in the field of medical technology in laboratory medicine.

Representative Matters

- Successfully defended a bid protest that affirmed a client’s win of a $199 million task order to support the US Department of Agriculture’s web-based supply chain management system—a system which supports food and nutrition programs serving over 30 million Americans and 280 million people worldwide.
- Successfully defended a bid protest that secured for a major government contractor a $1.2 billion contract award issued by the Marine Corps for amphibious combat vehicles.
- Represented a contractor in preparing a multi-million dollar claim against the District of Columbia government for outstanding payments due and owing the contractor for the development and implementation of the District of Columbia’s health care access exchange under the Affordable Care Act.
- Represented a small disadvantaged business in preparing a multi-million dollar claim against the Metropolitan Washington Airports Authority for costs incurred by owner-caused delays to the project.
- Retained as an expert to offer opinion and testimony on irreparable harm in an action for injunctive relief in Starlite Aviation Operations Ltd. v. Erickson Inc., No. 3:15-cv-00497 (D. Or. 2015).

Education: Suffolk University Law School, J.D., magna cum laude, Member, Suffolk University Law Review; Albany College of Pharmacy, B.S., Medical Technology in Laboratory Medicine


Bar & Court Admissions: District of Columbia; Maryland; Massachusetts; Virginia

US Court of Appeals for the Federal Circuit; US Court of Appeals for the Fourth Circuit

Professional Affiliations: Past-Chair and Fellow, American Bar Association Section of Public Contact Law; Faculty Member, Public Contracting Institute; Advisory Board Member, PubKLaw; National Association of Professional Women; Board of Contract Appeals Bar Association; Court of Federal Claims Bar Association

Rebecca R. Vernon, Annual Meeting Educational Program Co-Chair

Rebecca R. Vernon is an active duty judge advocate in the United States Air Force. She is currently assigned as the Executive Officer to The Judge Advocate General, Headquarters Air Force. Rebecca has served over 20 years as an active duty judge advocate.
During her career, Rebecca’s jobs included: Staff Judge Advocate, 1st Special Operations Wing, Hurlburt Field, FL; Instructor, Air Force Judge Advocate General’s School, Montgomery, AL; Special Counsel, Air Force General Counsel’s Office for Acquisition, Pentagon; Contract Trial Attorney, Air Force Legal Operations Agency, Washington, DC; and Program Counsel, Electronic Systems Center, Hanscom AFB, MA.

Rebecca received her Bachelor of Arts degree cum laude in English from St Anselm College, her Master’s Degree in National Security Strategy from The National War College, her juris doctor degree cum laude from New England Law, and her Masters of Laws degree highest honors in Government Procurement from the George Washington University Law School.

Rebecca is admitted to the practice of law in the States of Massachusetts and New Hampshire, the United States Supreme Court, the US Court of Appeals for the Armed Forces and the US Court of Federal Claims. Rebecca and her husband, Dan, have two children.

Kevin P. Mullen is a partner in the Government Contracts & Public Procurement Practice in the Washington, D.C. Office of Morrison & Foerster. Mr. Mullen has broad experience in numerous facets of government contracts matters including agency procurements, subcontracting, teaming and joint venture relationships, contract performance issues, intellectual property, compliance matters, due diligence for mergers and acquisitions, and procurement fraud matters. He represents clients in the preparation and litigation of contract adjustment claims and terminations for both government contracts and construction projects. Over the course of his 27-year career, Mr. Mullen has handled more than 200 bid protest cases, representing both protesters and contract awardees before the U.S. Government Accountability Office, the U.S. Court of Federal Claims, federal district courts and state protest forums.

Mr. Mullen is a Council member for the Public Contract Law Section of the American Bar Association, and he has served as a Co-Chair of the Contract Claims and Disputes Resolution Committee and the Bid Protest Committee, and as a Vice-Chair of the Acquisition Reform and Emerging Issues Committee. He also served on the Board of Governors of the U.S. Court of Federal Claims Bar Association.

Mr. Mullen has been recognized by Chambers & Partners USA as one of the leading lawyers nationwide in the area of Government Contracts and has been named a “Top Washington Lawyer” in Government Contracts Law by Washingtonian magazine. He was named to the BTI Consulting Group’s “Client Service All-Stars 2015” list, a registry of 354 of the legal profession’s client service elite.

Mr. Mullen received his J.D. from the University of Virginia School of Law in 1988 and his B.A. from the University of Virginia in 1984. He is admitted to practice in the District of Columbia and the state of Georgia, and before the United States Supreme Court, the United States Courts of Appeals for the Federal Circuit and the Fourth Circuit, and the United States Court of Federal Claims.
Education: University of Virginia (B.A., 1984); University of Virginia School of Law (J.D., 1988)
Bar Admissions: District of Columbia

Maynard A. Holliday, Luncheon Speaker

Maynard is Special Assistant to the Under Secretary of Defense for Acquisition, Technology and Logistics in Washington, DC. He has worked as a senior engineering and robotics professional in government and the private sector for the last 25+ years. He has extensive experience in managing interdisciplinary projects of international and commercial importance at Lawrence Livermore (LLNL) and Sandia National Labs, as well as various robotics start-ups in Silicon Valley.

Maynard assembled and led the joint Department of Energy (DOE)/NASA international Pioneer Project Team that designed and fabricated a radiation hardened telerobotic mobile vehicle for site characterization and remediation tasks at Chernobyl unit 4.

While at LLNL Maynard was also awarded the American Association for the Advancement of Sciences’ (AAAS), Science Engineering and Diplomacy Fellowship, bringing him to Washington DC to work in technology policy at USAID and at DOE Headquarters.

As a DOE project manager for the U.S./Russia Nuclear Material Security Task Force, from 1996-1998 he led interdisciplinary 10 person expert teams in Russia to negotiate, and implement nuclear material security upgrades. He was awarded the DOE’s Meritorious Service Award, its highest, for his exceptional service in helping secure tons of weapons grade nuclear material.

He won scholarships to Stanford University and the International Space University in France and was a two-time finalist for the U.S. Astronaut Corp.

Maynard holds a Master of Science degree in Mechanical Engineering Design from Stanford University where he emphasized robotics and international security and arms control. He also has a Bachelor of Science degree in Mechanical Engineering from Carnegie Mellon University.

He is a Co-Founder of Robot Garden, the robotics themed hacker space in Livermore California. He also has been working with Bay Area public schools lecturing on robotics and teaching robotics through the Citizen Schools program in East Oakland. He was named Citizen Schools Volunteer of the Year for 2012 and was also recognized with a Presidential Volunteer Service Award from the White House for his efforts with Citizen Schools over the past several years.

He is currently a Presidential Appointee and Senior Technical Advisor to Frank Kendall the longest serving Undersecretary of Defense for Acquisition Technology and Logistics in the history of the Pentagon.
Lori Ann Lange is a Partner in the Washington, D.C. office of Peckar & Abramson, where she specializes in government contract law, construction law, bid protests, and corporate compliance counseling. She represents a range of government contractors, including construction contractors, major defense contractors, informational technology contractors, and service contractors. Ms. Lange has written and lectured on significant issues facing the government contracts and construction industries, including small business subcontracting, the Buy American Act, the False Claims Act, and corporate compliance.

Ms. Lange counsels government contractors in all aspects of contracting with the federal government. She has extensive experience with the review and interpretation of solicitations, and the drafting and negotiation of prime contracts, subcontracts, joint venture agreements and teaming agreements. She routinely counsels large and small businesses on the federal government’s small business and mentor-protégé programs. Ms. Lange also provides advice on government contract compliance requirements, assists in constructing and implementing mandatory compliance programs, provides ethics training, and performs compliance audits.

Margie Collins is a senior director in the FTI Consulting Forensic and Litigation Consulting practice, specifically the company’s practice segment of Construction, Environment and Government Contracts, and is based in Rockville, MD. She consults on government contract, construction, and litigation support matters, and provides contract claims assistance and litigation support services relating to the calculation of and approach to damages. These damages include breach of contract and requests for equitable damages in delay and disruption cases. Her primary emphasis is in the construction and government contracts industries, although she has experience consulting in other business sectors.

Ms. Collins has provided expert testimony, both in deposition and arbitration proceedings, in the area of contract disputes. This testimony has been provided in the International Centre for Dispute Resolution in Washington, DC, and the United States District Court for the District of Maryland.

Ms. Collins has extensive knowledge of federal labor law requirements and has performed labor audits of hundreds of contractors. She has assessed the impacts of the applicable requirements for both domestic and international clients. In addition to labor audits, Ms. Collins is frequently engaged in government compliance audits for large construction companies as well as compliance audits for a mass transit authority. She provides FAR, CAS and construction cost consulting services in government and construction contract claims. Furthermore, she has been involved in international arbitration matters for commercial aviation and government construction contractors.

Ms. Collins co-authored an article titled “Avoiding False Claim Allegations in Pricing” published by the American Bar Association Section of Litigation. During the Greater Washington Society of Certified Public Accountants Government Accounting & Compliance Conference, she conducted a break-out session on submitting cost/price proposals when cost or pricing data are required.
Ms. Collins is a CPA. Her prior experience includes work as an auditor for a public accounting firm and, prior to obtaining her CPA license, she worked as a process engineer for a large oil and chemical corporation. Ms. Collins received a B.S. in Chemical and Petroleum Refining Engineering from Colorado School of Mines.

**Education:** B.S. in Chemical and Petroleum Refining Engineering, Colorado School of Mines  
**Professional Affiliations:** American Institute of Certified Public Accountants; American Bar Association Section of Public Contract Law; Women in Government Contracting

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Michael J. Schrier is a Special Counsel at Duane Morris, LLP. Mr. Schrier has experience representing government contractors in Contract Disputes Act, Miller Act and breach of contract claims in federal and state trial and appellate courts and in bid protests before the U.S. Court of Federal Claims. In addition, he has advised government contractors and federal grant recipients on Federal Acquisition Regulations, facilities and security clearances, False Claims Act, Buy American Act, Davis-Bacon Act, Service Contract Act, Non-Displacement of Qualified Workers regulations, Fair Pay and Safe Workplace regulations, OFCCP, debarment/suspension and export control matters.

As a commercial litigator, Mr. Schrier has appeared in more than a dozen different federal district courts around the country representing clients in a variety of construction, trade secret misappropriation, securities fraud and toxic tort cases, as well as more traditional business tort and commercial litigation matters. He has also represented clients in uniquely federal contexts in Administrative Procedure Act and Hatch Act matters, as well as representing clients before a variety of federal and state administrative agencies.

Mr. Schrier also has significant experience defending employers against trade secret misappropriation, employment discrimination, retaliation, wrongful termination, Fair Labor Standards Act, ERISA, and unfair labor practice claims in federal and state trial and appellate courts and administrative hearings.

Mr. Schrier also has experience litigating trademark infringement, unfair trade and cybersquatting claims on behalf of educational institutions and corporate clients. Mr. Schrier is a 1993 graduate of George Washington University School of Law and a graduate of Cornell University.

**Education:** The George Washington University Law School, J.D., 1993; Cornell University, B.A., 1990  
**Admissions:** District of Columbia; Maryland; Virginia; Pennsylvania; U.S. District Court for the District of Columbia; U.S. District Court for the District of Maryland; U.S. District Court for the Eastern District of Virginia; U.S. District Court for the Western District of Virginia; U.S. District Court for the Western District of New York; U.S. District Court for the Central District of Illinois; U.S. Court of Appeals for the Third Circuit; U.S. Court of Appeals for the Fourth Circuit; U.S. Court of Appeals for the Fifth Circuit; U.S. Court of Appeals for the Seventh Circuit; U.S. Court of Appeals for the Eighth Circuit; U.S. Court of Appeals for the District of Columbia Circuit; U.S. Court of Appeals for the Federal Circuit; U.S. Court of Federal Claims  
**Professional Activities:** American Bar Association, Public Contracts Law Section and Employment Safety and Labor Committee, Co-Chair; Maryland State Bar Association
Recently several large construction companies in New York City have agreed to pay millions in restitution and penalties for defrauding clients and for engaging in overbilling schemes. The clients included federal, state and local government contracting and funding agencies for performance on public works contracts as well as private clients for work on private construction projects.

1. In April 2012, Lend Lease (US) Construction LMB Inc. (formerly Bovis Lend Lease LMB Inc.) was charged with defrauding its clients, entered into a deferred prosecution agreement, and paid $56 million in restitution and penalties for engaging in a ten-year overbilling scheme.¹

2. In May 2015, Hunter Roberts Construction Group, LLC entered into a non-prosecution agreement and agreed to pay more than $7 million in restitution and penalties for engaging in an eight-year fraudulent overbilling scheme.²

3. In December 2015, Tishman Construction Corporation (Tishman Construction) entered into a deferred prosecution agreement and agreed to pay more than $20 million in restitution and penalties or fraudulently overbilling over a ten-year period.³

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Although the charges of fraudulent overbilling brought by the United States Attorney of the Eastern District of New York included overtime guarantees and the payment of hours recorded but not worked, one charge involved the overpayment of wages to a Particular Senior Foreman. The complexity of wage payments when federal, state, and local prevailing wage laws as well as CBAs regulate the payment of wages requires contractors to understand the hierarchy of the applicable prevailing wage laws and CBAs when determining the wage rates to be paid. CBAs often contain similar language to prevailing wage laws. Nevertheless, the interpretation of CBA language appears to be seen as a maximum wage rate as compared to the prevailing wage laws which set minimum wage rates. This adds an additional level of difficulty to identifying the applicable wage rate.

**BACKGROUND**

From at least 1999 through approximately October 2009, Tishman Construction together with others devised a scheme to defraud federal, state and local government contracting and funding agencies as well as private clients by falsely representing and otherwise making materially misleading statements and omissions in billing requisitions, certified payrolls and other documents submitted by Tishman Construction to agencies for public works contracts, and to its other clients on private construction projects, that (i) all of the hours for which Tishman Construction billed its clients and paid its Labor Foremen were for hours actually worked when, in fact, they were not; and (ii) that the hourly wage rates at which Tishman Construction billed its clients for the work of all of its Labor Foremen were in accordance with the General Conditions Contract Rate when in fact, they were not.

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With respect to point (ii), from approximately 2005 through 2009 for a Particular Senior Labor Foreman, Tishman Construction, without seeking approval from its clients, billed its clients and paid the Particular Senior Labor Foreman at wage rates that exceeded the General Conditions Contract Rate. Tishman Construction did not disclose this to its clients.

The pay rates for Tishman Construction’s union labor were defined by collective bargaining agreements that were negotiated and entered into with the Building Contractors Association (“BCA”). Tishman Construction along with other construction management firms and members of the BCA, renegotiate the provisions of these agreements and entered into successor agreements with the BCA approximately every four years (collectively, the “BCA Agreement”). The BCA Agreement governed the pay rates of Local 79 workers, including the Labor Foremen. Specifically, prior to July 2010, the BCA Agreement provided that the Labor Foremen were guaranteed a particular hourly rate of pay, but they were not to be paid on sick days, vacation, or unworked holidays.

The terms of the construction management contracts between Tishman Construction and its clients required Tishman Construction to: (i) bill clients for work actually performed by the Labor Foremen at the pay rates specified in the BCA Agreement (the General Conditions Contract Rate"); or (ii) seek prior approval from its clients to bill Labor Foremen at pay rates in excess of the General Conditions Contract Rate.

FEDERAL PREVAILING WAGE LAWS – CONSTRUCTION OF PUBLIC WORKS

The Davis-Bacon and Related Acts apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or

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5 Excerpted from 29 CFR Subtitle A, Part 5
repair of public buildings or public works. Davis-Bacon Act and Related Act contractors and subcontractors must pay their laborers and mechanics employed under the contract no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area. The specific provisions of the Davis-Bacon Act regarding wages state:

1) Minimum wages. (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination [Emphasis added] of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. (29 CFR Part 5, §5.5 Contract provisions and related matters)

Under Reorganization Plan No. 14 of 1950, (5 U.S.C.A. Appendix), the federal contracting or assistance-administering agencies have day-to-day responsibility for administration and enforcement of the Davis-Bacon labor standards provisions and, in order to promote consistent and effective enforcement, the Department of Labor (US DOL) has regulatory and oversight authority, including the authority to investigate compliance. The minimum wage rates contained in wage determinations (developed by US DOL) consist of basic hourly amounts of pay plus fringe benefits if required for each classification of work. These are the minimum rates that shall be paid by the employer for work performed on the project. Payment of a higher rate is not
prohibited and is a matter of policy of the firm or agreement between the employer and employees. Although precise hourly rates and fringe benefits are specified in the wage determination, the employer may vary these individual items as long as the total hourly amount paid for each class of work is equal to that required in the contract.

Violations of the Davis-Bacon contract clauses may result in the following penalties and sanctions:

1. Contract payments may be withheld in sufficient amounts to satisfy liabilities for underpayment of wages and for liquidated damages for overtime violations under the Contract Work Hours and Safety Standards Act (CWHSSA).

2. In addition, violations may be grounds for contract termination, contractor liability for any resulting costs to the government, suspension and debarment from future contracts for a period up to three years.

Furthermore, prime contractors may be held responsible for any underpayments of subcontractors.

STATE PREVAILING WAGE LAWS – CONSTRUCTION OF PUBLIC WORKS

In addition to the federal statutes, some states have adopted their own versions of prevailing wages, often referred to as “Little Davis-Bacon” laws, to set threshold requirements for payment of prevailing wages on state-funded public works projects. The state prevailing laws apply only to publicly-funded construction projects, such as roads or public buildings, when state dollars are involved. As with the federal act, the state prevailing wage laws apply only to construction workers in specific occupations, and then only if the contract was in excess of the state’s
established threshold. States with their own prevailing wage generally set their prevailing wage by conducting surveys of local wages and collective bargaining agreements, and referring to the federal prevailing wage for their area. Some simply use the federal prevailing wage.

For example, in New York State the Commissioner of Labor enforces the prevailing wage requirements on all projects authorized by the state or its political subdivisions with the exception of projects authorized by the City of New York. The Commissioner of Labor makes an annual determination of the prevailing rates. This determination is in effect from July 1 through June 30 of the following year. The Labor Department issues wage schedules on a county-by-county basis that contain minimum rates of pay for different work classifications. State law requires that these schedules be made part of all contracts between a government entity and a contractor.

The requirement to pay prevailing wages to laborers, mechanics and other workers on public projects is set forth in the New York State Constitution. For New York City public work projects, the New York City Comptroller is responsible for the enforcement of prevailing wage law.

“\textit{The wages and supplements to be paid and/or provided to laborers, workers and mechanics employed on a public work project shall be not be less than} [Emphasis added] \textit{those listed in the current Prevailing Rate Schedule for the locality where the work is performed.}”\textsuperscript{6}

The prime contractor is responsible for any underpayments of prevailing wages or supplements by any subcontractor. When the New York Bureau of Public Work finds that a contractor or

\textsuperscript{6} New York State Department of Labor, General provisions of laws covering workers on Article 8 Public Work Contracts (New York State Labor Law, Article 8, Section 220)
subcontractor on a public work project failed to pay or provide the requisite prevailing wages or supplements, the Bureau is to notify the financial officer of the Department of Jurisdiction (Contracting Agency) that awarded the public work contract. Such officer must then withhold or cause to be withheld from any payment due the prime contractor on account of such contract the amount indicated by the Bureau as sufficient to satisfy the unpaid wages and supplements, including interest and any civil penalty that may be assessed by the Commissioner of Labor. The withholding continues until there is a final determination of the underpayment by the Commissioner of Labor or by the court in the event a legal proceeding is instituted for review of the determination of the Commissioner of Labor.\footnote{Ibid.}

In the event that an underpayment of wages and/or supplements is found, the following penalties may apply:

1. Interest shall be assessed from the date of underpayment to the date restitution is made.

2. A Civil Penalty may also be assessed, not to exceed 25% of the total of wages, supplements and interest due.

3. Any contractor or subcontractor and/or its successor shall be debarred and therefore, ineligible to submit a bid on or be awarded any public work contract or subcontract with any state, municipal corporation or public body for a period of five years when:

   a. Two willful determinations have been rendered against that contractor or subcontractor and/or its successor within any consecutive six-year period.

   b. There is any willful determination that involves the falsification of payroll records or the kickback of wages or supplements.
4. Willful violations of the Prevailing Wage Law (Article 8 of the Labor Law) may be a felony punishable by fine or imprisonment of up to 15 years, or both.\(^8\)

**COLLECTIVE BARGAINING AGREEMENT**

The language contained in the federal wage determinations and state prevailing rate schedules indicate that the wage rates for are minimum wage rates with no maximum wage rates specified. The language “\textit{not less than}” is understood as the minimum wage rate which can be paid to a mechanic/laborer, i.e., including foremen meeting certain criteria as described later, in accordance with prevailing wage laws. However, most CBAs indicate wage rates for foremen in addition to journeymen and apprentices. The wage rate language in some CBAs with regard to foremen appears to mirror that of the federal and state prevailing wage laws “\textit{not less than},” which could be interpreted as a minimum wage rate when compared with federal and state prevailing wage laws. However, it appears that the interpretation of the CBA covering Tishman Construction union employees is that the wage rates represent the minimum and maximum rates to be paid.

For example, the Trade Agreement between the BCA and the Mason Tenders District Council of Greater New York (Locals 78 and 79) effective July 1, 2001 through June 30, 2006, states that “Effective July 1, 2001, the wages of Mason Tenders shall be $25.55 per hour during regular

\(^8\) Ibid.
working hours.” The CBA provides for increases to this rate every six months through June 30, 2006. Foremen rates are stated as follows:

“The rate for Foremen and for Assistant Foremen (Deputies) shall be [Emphasis added] $35.00 per day and $25.00 per day, respectively, above the prescribed rate for Mason Tenders.”

However, Article VIII, Section 3 of the Agreement uses the following language of “shall not be less than” rather than “shall be”:

“All Mason Tender Foremen shall be paid a weekly salary which shall not be less than [Emphasis added] $35.00 per day above the prescribed rate for Mason Tenders in this Agreement. Mason Tender Assistant Foremen shall be paid a weekly salary which shall not be less than [Emphasis added] $25.00 per day above the prescribed rate for Mason Tenders in this Agreement.”

In Article VI of the agreement, the wage rate appears to be specific and in Article VIII, the rate could be interpreted as a minimum wage rate when compared to federal and state prevailing wage laws with the same language. The United States Attorney of the Eastern District of New York appears to have concluded that 1) the wage rate for foremen in the BCA was specific and a maximum rate to be paid to foremen, and 2) the CBA wage rate was in excess of any federal, state and local prevailing wage law requirements for performance on public works contracts with federal, state and local government contracting and funding agencies.

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9 Trade Agreement between the Building Contractors Association, Inc. and the Mason Tenders District Council of Greater New York, July 1, 2001 through June 30, 2006, Locals 78 and 79, Article VI, Section 1.
10 Ibid.
“...prior to July 2010, the BCA Agreement provided that the Labor Foremen were guaranteed a particular hourly rate of pay...”\textsuperscript{12} and Tishman Construction “...paid the Particular Senior Labor Foreman at wage rates that exceeded the General Conditions Contract Rate [BCA].”\textsuperscript{13}

Federal and state prevailing wage laws do not specify a minimum wage for foremen. In accordance with Davis-Bacon contract clauses, foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties are laborers and mechanics for the time so spent, and must be paid at least the appropriate wage rates specified in the wage determination. If foremen work as bona fide supervisory employees (less than 20 percent of their time to mechanic/laborer duties), they are not regulated under the Davis-Bacon and Related Acts but under the Fair Labor Standards Act.\textsuperscript{14} State prevailing wage laws are similar to the federal statutes. For example in New York State, supervisors and foremen working with the tools must be paid at the prevailing rate for the classification of work being performed. When strictly overseeing workers, supervisors or foremen are not covered under Article 8 prevailing rate requirements.\textsuperscript{15} Both federal and state prevailing wage laws have special requirements for apprentices.

**HIERARCHY OF PREVAILING WAGE LAWS AND CBAs**

The BCA contained the following paragraph regarding the applicable hierarchy of federal and state prevailing wage laws and the CBA:

\textsuperscript{12} *The United States v. Tishman Construction Corp.*, Criminal Docket No. 15-617 (CBA), paragraph 4, page 2.

\textsuperscript{13} *The United States v. Tishman Construction Corp.*, Criminal Docket No. 15-617 (CBA), paragraph 9, page 4.

\textsuperscript{14} 29 CFR, Subtitle A, Part 5, Subpart A, §5.2 (m)

\textsuperscript{15} Article 8 (Public Construction) of the New York State Labor Laws, New York State Department of Labor
“No provision of this Agreement shall supersede any Municipal, State or Federal law which imposes more stringent requirements as to wages, hours of work, or as to safety, sanitary or general working conditions than are imposed by this Agreement.” 

With or without such a clause in the CBA, the contractor must pay the prevailing wage of the Davis-Bacon Act and, generally, satisfy the state prevailing wage requirements if either is higher than the union CBA. (State exemptions are discussed below.) On the flipside, if the union contract rate is higher than the federal or state prevailing wage rates, then the contractor must pay the union CBA rate unless the CBA provides that the contractor need not pay that rate in the event that the federal or state prevailing wage rates are lower. The prevailing wage laws do not provide a defense to contract violations. Federal and state prevailing wage laws provide for not less than the prevailing wage rate to be paid.

In most cases, compliance with prevailing wage laws requires the contractor to follow the law that has the most restrictive or stringent requirement, or the one that is most beneficial to the employee. For example, Oregon’s prevailing wage rate law has stricter overtime requirements than the federal Davis-Bacon Act (in excess of 8 hours per day rather than 40 hours per week). On a project subject to both state and federal prevailing wage rate laws, employers must follow Oregon’s stricter overtime requirements. If a union CBA specifies payment for work on Sundays at double time, then the CBA requirement would be followed rather than a federal or state prevailing law mandating time and a half for hours in excess of 40 hours in a week or for hours in excess of 8 hours a day, respectively. Again, the prevailing wage laws do not provide a defense to contract violations.

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17 Bureau of Labor and Industries, Oregon Revised Statutes, ORS 279C.540
In some states, exemptions exist for contractors with CBAs. For example, Oregon exempts contractors who are signatories to a CBA in effect with any labor organization from the state’s overtime pay requirements. However, this exemption does not apply to workers who are not covered by the terms of the CBA or when the labor organization has no jurisdiction in the geographical area where work is being performed.

LESSONS LEARNED

When mechanics and laborers perform work under a public works contract, it is imperative that contractors understand the effects of federal, state and local prevailing wage law requirements on the provisions of any CBAs in order to determine the applicable wage rates and overtime requirements. Significant penalties may be incurred as a result of prevailing wage law violations or contract violations.

1. Generally, compliance with prevailing wage laws requires the contractor to follow the law that has the most restrictive or stringent requirement, or the one that is most beneficial to the employee.

2. If the federal and state prevailing wage determinations and schedules require minimum wage rates which are in excess of CBA wage rates, the federal wage rate will set the threshold minimum wage rate and overtime requirements unless state prevailing wage laws are more restrictive or more beneficial to the employee. Contractors should determine if any state exemptions exist.

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18 Bureau of Labor and Industries, Oregon Revised Statutes, ORS 279C.540(4), Oregon Administrative Rules, OAR 839-025-0054
3. State prevailing wage law exemptions for contractors who have CBAs may not apply to workers not covered by the terms of a CBA or union employees in which the labor organization has no jurisdiction in the geographical location in which the work is performed.

4. If CBA wage rates and requirements are exceed, more restrictive, or are more beneficial than the minimum thresholds set by federal and state prevailing wage laws, the CBA wage rate and other requirements must be paid to covered employees unless a provision in the CBA provides that the contractor need not pay that rate in the event that the federal or state prevailing wage rates are lower. Prevailing wage laws are not a defense to contract violations.

5. Frequently the CBA wage rates are equal to the federal and/or state prevailing wage rates. This is a result of unions historically responding in greater numbers than open-shops to the wage surveys conducted by US DOL and state departments of labor. In these instances in which the wage rates are the same, it appears from the Tishman Construction matter that even “shall not be less than” language in the CBA may set a cap on the wage rates paid to laborers and mechanics performing work on public contracts even though the federal and state prevailing wage laws envision the wage rates as minimum thresholds when “not less than” language is included. This appears to be a legal interpretation which would behoove contractors to seek the advice of counsel if, as with Tishman Construction, Hunter Roberts and Bovis, the contractor considers paying a union employee at a higher rate than the CBA rate when federal and/or state prevailing wage laws do not require a higher wage rate.
The Davis-Bacon Act: Continued Efforts To Avoid Its Exclusive Administrative Enforcement Scheme And Remedies

Presented By:

Michael J. Schrier, Esq.
Duane Morris, LLP
505 9th Street, N.W., Suite 1000
Washington, DC 20004

I. Davis-Bacon Act Basics

The Davis-Bacon Act (“DBA”) applies to “every contract in excess of $2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia and which requires or involves the employment of mechanics or laborers.” 40 U.S.C. § 3142(a). Each covered contract “shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics.” Id.

Central to the DBA is a requirement that contractors and subcontractors pay the “prevailing wage” to classes of mechanics and laborers performing work on covered construction projects. The “prevailing wage” is administratively established by the U.S. Department of Labor. 40 U.S.C. § 3142(b); see 29 C.F.R. § 5.22 (“The Davis-Bacon Act . . . confer[s] upon the Secretary of Labor the authority to predetermine, as minimum wages, 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 in which the work is to be performed.”); see also Wage Determinations Online, available at http://wdol.gov (last visited June 15, 2016) (providing copies of all current and historical DBA wage determinations for all geographic areas of the United States.). The prevailing wage consists of two components – “the basic hourly rate of pay” and fringe benefits. 40 U.S.C. § 3141(2). Contractors and subcontractors are required to pay all mechanics and laborers weekly for all wages and fringes. 40 U.S.C. § 3142(c)(1); 48 C.F.R. § 52.222-6(b).

The government requires contractors and subcontractors on DBA-covered contracts to make weekly payroll reports containing specified wage and employment data – including each employee’s name, address, social security number, classification, hourly rates of wages paid, daily hours worked, deductions made, and actual wages paid. 48 C.F.R. § 52.222-8(a). The weekly reports – which include the required “Statement of Compliance” – are colloquially known as “Certified Payrolls” or “CPs”. The contractor is required to submit its and its subcontractor’s CPs each week to the Contracting Officer. Id. § 52.222-8(b)(1). The CPs, typically prepared on Form WH-347, are to be accompanied by a “Statement of Compliance” certifying that all payroll information provided is correct and complete and all employees have
been paid all wages earned at the proper wage rate. 29 C.F.R. § 5.5(a)(3); 48 C.F.R. § 52.222-8(b)(2).

The DBA applies not only to contractors in direct contract privity with the federal or District of Columbia governments, but it also applies to all subcontractors with “subcontracts for construction, alterations or repairs within the United States.” 48 C.F.R. § 52.222-11(b). To ensure overall compliance, the general contractor “shall be responsible for compliance by any subcontractor or lower tier subcontractor performing construction within the United States.” Id. § 52.222-11(c). To accomplish this, the general contractor is required to insert, or “flow down,” the requirements of 48 C.F.R. § 52.222-11 into all subcontracts on DBA-covered contracts. This, by definition, also includes flowing down the following FAR clauses into subcontracts:

- 48 C.F.R. § 52.222-6 Construction Wage Rate Requirements
- 48 C.F.R. § 52.222-7 Withholding of Funds
- 48 C.F.R. § 52.222-8 Payrolls and Basic Records
- 48 C.F.R. § 52.222-9 Apprentices and Trainees
- 48 C.F.R. § 52.222-10 Compliance with Copeland Act Requirements
- 48 C.F.R. § 52.222-11 Subcontracts (Labor Standards)
- 48 C.F.R. § 52.222-12 Contract Termination—Debarment
- 48 C.F.R. § 52.222-13 Compliance With Construction Wage Rate Requirements and Related Regulations
- 48 C.F.R. § 52.222-14 Disputes Concerning Labor Standards
- 48 C.F.R. § 52.222-15 Certification of Eligibility
- 48 C.F.R. § 52.222-14 Contract Work Hours and Safety Standards – Overtime Compensation*

*(to the extent included in the prime contract)

Contractors and subcontractors failing to comply with DBA prevailing wage requirements are liable for any underpayments to their employees. See 29 C.F.R. § 5.6. Should any tier subcontractor fail to comply with its DBA obligations, the general contractor remains ultimately liable for ensuring laborers and mechanics are paid the correct prevailing wage. To ensure compliance, the government may withhold funds owed to the general contractor on the subject contract or even on another contract the general contractors may have with the federal government. See 40 U.S.C. § 3144(a)(1); 48 C.F.R. § 52.222-7. Finally, the government may seek debarment against any contractor or subcontractor that has “disregarded their obligations to employees and subcontractors.” 40 U.S.C. § 3144(b)(1). Debarment is usually sought by the Department of Labor for contractors and subcontractors that willfully violated their DBA obligations. The period of debarment for DBA violations is three years. Id. § 3144(b)(2).

II. Contract Work Hours and Safety Standards Act (CWHSSA) Basics

Working in tandem with DBA is the Contract Work Hours and Safety Standards Act (“CWHSSA”). CWHSSA applies to “any contract [greater than $100,000] that may require or involve the employment of laborers or mechanics on a public work of the Federal Government, a
territory of the United States, or the District of Columbia.” 40 U.S.C. § 3701(b)(1)(A) and (b)(3)(A)(iii). Whereas DBA provides for prevailing wages and fringe benefits, CWHSSA mandates that laborers and mechanics shall be paid “at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of a 40 hours in the workweek.” 40 U.S.C. § 3702(a) (2006); see also 29 C.F.R. § 5.5(b)(1); 48 C.F.R. § 52.222-4(a). Failure to comply with CWHSSA’s overtime requirements will result in “the contractor and any subcontractor responsible for the violation [being] liable (A) to the affected employee for the employee’s unpaid wages; and (B) to the Government, the District of Columbia, or a territory for liquidated damages.” 40 U.S.C. § 3702(b)(2); see also 48 C.F.R. § 52.222-4(b). Liquidated damages are computed at ten dollars ($10.00) per employee per calendar day the employee “was required or permitted to work in excess of the standard [forty hour] workweek without payment of the overtime wages required by this chapter.” 40 U.S.C. § 3702(c). Intentional violations of CWHSSA may be subject to criminal penalties of fines or imprisonment. 40 U.S.C. § 3708. As with the DBA, contractors and subcontractors are required to “flow down” the CWHSSA FAR clauses to lower tier subcontractors to the extent the CWHSSA clauses are in the prime contract. 48 C.F.R. § 52.222-4(e).

III. Enforcement Issues

The enforcement scheme for determining whether there has been a violation of the DBA or CWHSSA is, by statutory design, exclusively administrative. See 40 U.S.C. § 3703(b)(1) (“The amount of unpaid wages and liquidated damages owing under this chapter shall be determined administratively.”); 29 C.F.R. § 5.6. By regulation, the investigative responsibilities are divided between Department of Labor’s Wage and Hour Division (“WHD”) and the federal agency contracting for the particular construction services at issue. 29 C.F.R. § 5.6. Typically, however, the WHD conducts the investigation and simply reports its findings to the contracting agency.

The typical DBA/CWHSSA investigation will involve the WHD presenting a comprehensive document request to the contractor or subcontractors that employed the laborers and mechanics at issue. Among the documents requested are CPs; payroll records; the applicable prime contract and relevant subcontracts; and other documents reflecting employee classifications and wages paid. The WHD then compares the documents collected to the statements provided by laborers and mechanics and their representatives regarding alleged misclassifications or underpayments. During the investigation, such employee statements are not disclosed to the contractor or subcontractors and are generally deemed exempt from Freedom of Information Act requests or other attempts to acquire them. See 5 U.S.C. § 552(b)(7) (“records or information compiled for law enforcement purposes” are exempt from FOIA). Employee statements are typically afforded great weight during the investigation. And it is not unexpected to find WHD determinations of DBA/CWHSSA violations based primarily on undisclosed witness statements.

To aid in enforcement and to ensure that there are funds available to pay mechanics and laborers, the DBA provides that:
There may be withheld from the contractor so much of accrued payments as the contracting officer considers necessary to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by the laborers and mechanics and not refunded to the contractor or subcontractors or their agents.

40 U.S.C. § 3142(c)(3); see 29 C.F.R. § 5.5(a)(2); 48 C.F.R. § 52.222-7. CWHSSA has similar provisions on withholding. 40 U.S.C. § 3703(b)(2); see 29 C.F.R. § 5.5(b)(3); 48 C.F.R. § 52.222-4(c). The WHD generally works with the contracting agency early in the investigative process to withhold contract funds once WHD gets a general sense of the size of alleged underpayments. If the contractor or subcontractor, as appropriate, pays the employees their appropriate back wages, then these withheld funds are released back to the contractor. If the contractor and/or subcontractors refuse or are unable to pay, then the Government “shall pay directly to laborers and mechanics from any accrued payments withheld under the terms of a contract any wages found to be due laborers and mechanics under this subchapter.” 40 U.S.C. § 3144(a)(1); 29 C.F.R. § 5.5(a)(2); see 40 U.S.C. § 3703(b)(3) (The Comptroller General “shall pay the amount administratively determined to be due [under CWHSSA] directly to the laborers and mechanics from amounts withheld on account of underpayments of wages.”).

At the conclusion of the WHD’s investigation, the WHD typically holds a “final conference” with the contractor/subcontractors to present the WHD’s investigation findings. To the extent the WHD finds a violation of DBA or CWHSSA, it will present the contractor/subcontractors with a Form WH-56 identifying each employee underpaid and listing the amount of underpayment. At this point, the contractor/subcontractors have the option to agree to pay the laborers and mechanics in the amounts calculated by WHD or to challenge WHD’s determinations.

To the extent an employer disputes the investigative determination of a DBA violation, the employer or the WHD may initiate administrative hearings before the Administrator of the Wage and Hour Division, to be held in accordance with 29 C.F.R. Part 6, to adjudicate the dispute. 29 C.F.R. § 5.11. Appeals from the Administrator’s decision concerning DBA liability are taken to the Department of Labor’s Administrative Review Board. 29 C.F.R. § 5.11(c)(3). Challenges to CWHSSA liquidated damages withholding requires various levels of exhaustion of administrative remedies before the contractor or subcontractor may seek judicial review in the Court of Federal Claims. 40 U.S.C. § 3703(d).

IV. Employee Lien Rights

To aid in the enforcement of a prior administrative decision declaring a DBA violation, the DBA specifically provides:

If the accrued payments withheld [by the government] under the terms of the contract are insufficient to reimburse all the laborers and mechanics who have not been paid the wages required under this subchapter, the laborers and mechanics have the same right to
bring a civil action and intervene against the contractor and the contractor’s sureties as is conferred by law on persons furnishing labor or materials.

40 U.S.C. § 3144(b). By its plain language, this statutory provision grants the employees “mechanic’s lien” rights against their employers, but only to the extent that “the accrued payments [administratively] withheld . . . are insufficient to reimburse all the laborers and mechanics.” Id. § 3144(a). In other words, this statute provides a private enforcement mechanic’s lien to ensure a viable remedy only after the WHD – exercising its exclusive jurisdiction – has administratively determined that a DBA violation exists and administratively determined the amount of any underpayment of wages. U.S. ex. rel. Krol v. Arch Ins. Co., 46 F. Supp. 3d 347, 353-54 (S.D.N.Y. 2014).

CWHSSA contains a private remedy enforcement provision nearly identical to that discussed above in the DBA, creating “mechanics lien” rights to enforce a prior administrative determination of a CWHSSA violation. Compare 40 U.S.C. § 3703(c) (“If the accrued payments withheld under the terms of the contract are insufficient to reimburse all the laborers and mechanics who have not been paid the wage required under this chapter, the laborers and mechanics, in the case of a department or agency of the Government, have the same right of action and intervention against the contractor and the contractor’s sureties as is conferred by law on persons furnishing labor or materials.”) with 40 U.S.C. § 3144(a)(2) (discussed above).

V. No Private Causes of Action

Over the years, the plaintiff’s bar has attempted to bypass the exclusive administrative remedies set in statute by Congress and go directly to federal and state courts with private causes of action under the DBA, CWHSSA, or related statutes. There is nothing in the plain language of the DBA creating an express private cause of action for employees. Similarly, there is no implied private DBA cause of action for employees to sue their employers asking for a judicial determination that a DBA violation exists. See, e.g., Duran–Quezada v. Clark Constr. Group, LLC, 582 F. App’x 238, 239 (4th Cir. 2014); Grochowski v. Phoenix Constr., 318 F.3d 80 (2d Cir. 2003); Operating Eng’rs Health & Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 617 (9th Cir. 1998); Bane v. Radio Corp. of Am., 811 F.2d 1504 (4th Cir. 1987)(unpublished); Weber v. Heat Control Co., 728 F.2d 599 (3d Cir. 1984); United States f/b/o Glynn v. Capeletti Bros. Inc., 621 F.2d 1309 (5th Cir. 1980); Horne v. Scott Concrete Contractor, LLC, No. 12-cv-01445-WYD-KLM, 2013 WL 3713905 (D. Colo. Apr. 24, 2013); Ibrahim v. Mid-Atlantic Air of DC, LLC 802 F. Supp. 2d 73 (D.D.C. 2011).

As a secondary line of attack, employees frequently attempt to disguise what really is a DBA claim as a Fair Labor Standards Act or a parallel state law claim. DBA claims disguised as FLSA or state law claims are typically premised on an alleged failure to pay the required “minimum wage”. In such claims, plaintiffs confuse the FLSA “minimum wage” with the DBA “prevailing wage”. The FLSA requires “employers” to pay their “employees” no less than the hourly minimum wage established by law. 29 U.S.C. § 206(a). The term “prevailing wage” does not appear anywhere in the FLSA. See 29 U.S.C. § 203(m) (only defining the term “wage”). Instead, the term “prevailing wage” is a construct of the DBA. 40 U.S.C. § 3141(2). The DBA “prevailing wage” is set by the U.S. Department of Labor pursuant to its DBA authority, and not pursuant to any FLSA authority. See supra at 6-7.

The federal minimum wage is currently set at $7.25 per hour. See 29 U.S.C. § 206(a)(1)(C). Therefore, so long as contractors and subcontractors pay their employees at least the federal minimum wage for all hours worked, there should be no factual or legal basis for any FLSA claims arising from DBA covered employment.¹

Attempts to shoehorn what should be DBA claims into state law constructs are similarly doomed as improper attempts to make an end run around the DBA’s exclusive administrative enforcement scheme. See Grochowski, 318 F.3d at 86 (“the plaintiffs’ state-law claims are indirect attempts at privately enforcing the prevailing wage schedules contained in the DBA. To allow a third-party private contract action aimed at enforcing those wage schedules would be inconsistent with the underlying purpose of the legislative scheme and would interfere with the implementation of that scheme to the same extent as would a cause of action directly under the statute.”); Johnson v. Prospect Waterproofing Co., 813 F. Supp. 2d 4, 9-10 (D.D.C. 2011) (dismissing D.C. Wage Payment and Collection Law and the D.C. Minimum Wage Act claims as an impermissible attempt to bypass the exclusive administrative remedies of the DBA).

VI. The False Claims Act and the Davis-Bacon Act

Instead of using various employment-related statutes to obtain DBA relief through other means, employees have been increasingly turning to the False Claims Act (“FCA”) in an attempt to bypass the DBA’s exclusive administrative remedies.

The FCA provides, in relevant part, that any person who

¹For federal contractors and subcontractors, however, the minimum wage is $10.15 per hour. See 29 C.F.R. § 10.5. The new federal contractor minimum wage regulations, however, provide for exclusive administrative review and remedies and do not create any private causes of action. 29 C.F.R. § 10.1(c) (“Neither Executive Order 13658 nor this part creates or changes any rights under the Contract Disputes Act or any private right of action. The Executive Order provides that disputes regarding whether a contractor has paid the minimum wages prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under the Order. However, nothing in the Order or this part is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. The Order similarly does not preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.”).
(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-4101), plus three (3) times the amount of damages, which the Government sustains because of the act of that person. See 31 U.S.C. § 3729(a)(1); see also id., § 3729(a)(2) (If certain mitigating factors are present, “the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.”).

The typical FCA/DBA plaintiff alleges that he was underpaid based on either a misclassification using the proper Wage Determination or was paid a wage not even listed on any applicable Wage Determinations. The plaintiff then alleges that the CPs reflected the underpayments. Because the CPs include a Statement of Compliance made under penalty of perjury, the CPs are prime fodder for FCA claims for either (i) falsely certifying the wages and fringes actually paid or (ii) accurately certifying the wages and fringes paid, but those wages and fringes were insufficient to comply with the DBA. Either way, the contractor is alleged to have knowingly presented or caused to be present a false or fraudulent claim for payment or knowingly made or used a false record or statement material to a false or fraudulent claim. See 31 U.S.C. § 3729(a)(1).

Employees and unions are the most likely candidates to file FCA claims involving alleged DBA violations by contractors. The FCA permits persons to “bring a civil action for a

A. Doctrine of Primary Jurisdiction

There is an initial threshold question here of whether a federal district court, under its FCA jurisdiction can even make a determination of the underlying DBA or CWHSSA violation or whether that should be committed to the WHD’s exclusive jurisdiction. Frequently, plaintiffs will attempt to have the federal courts make the threshold determination of a DBA or CWHSSA violation and without any input from the U.S. Department of Labor or its exclusive administrative enforcement of DBA/CWHSSA. The Fourth Circuit recently discussed the application of “the doctrine of primary jurisdiction” to this issue.

The doctrine of primary jurisdiction “is designed to coordinate administrative and judicial decision-making by taking advantage of agency expertise and referring issues of fact not within the conventional experience of judges or cases which require the exercise of administrative discretion.” Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 789 (4th Cir.1996). The doctrine of primary jurisdiction “requires the court to enable a ‘referral’ to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.” Reiter v. Cooper, 507 U.S. 258, 268, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993). Notably, such a referral of an issue to an administrative agency “does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice.” Id. at 268–69, 113 S.Ct. 1213.

Smith v. Clark/Smoot/Russell, 796 F.3d 424, 431 (4th Cir. 2015). It is important to note that “the doctrine of primary jurisdiction” is entirely discretionary. Federal courts are not required to defer to the WHD, but contractors may be wise to seek deferral to ensure that WHD’s expertise is applied to the threshold questions of applicability and quantum of wages owed.

The Ninth Circuit did not concern itself with the doctrine of primary judgment in dismissing a FCA/DBA claim not grounded in any actual prevailing wage determinations. In U.S. ex. rel. Local 342 Plumbers and Steamfitters v. Dan Caputo Co., 321 F.3d 926 (9th Cir. 2003), the appellate court noted that there was no actual prevailing wage determination issued by the U.S. Department of Labor, but instead there was only a series of disputed letters between the Department of Labor’s district director and counsel for the union. The Court noted that “[f]or a false claim suit to succeed, the plaintiff must show that the claim was false, that is, contrary to an existing state of things. The union in this case has not shown that the defendants failed to pay the prevailing wage” because the union could not point to any official “prevailing wage.” Id. at 933. While this is a rare situation, the absence of an applicable prevailing wage determination should necessarily doom any DBA based FCA claims.

B. Original Source Required

Assuming there is a DBA/CWHSSA violation that can serve as the predicate to a FCA claim, then there is a question as to whether a union or individual mechanics and laborers have
standing as an “original source” for asserting an FCA claim. Any employee or union that has filed suit faces the prospect of dismissal because each may not be an “original source” of the FCA allegations.

(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, “original source” means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section


In *U.S. ex. rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1995), the appellate court ruled that the union FCA plaintiff gained its knowledge of alleged DBA violations from “copies of publicly-filed payroll records indicating these employees were not being paid electricians’ wages.” *Id.* at 703-04. While the employee FCA plaintiff did have firsthand knowledge, the Court ruled that because he did not “voluntarily provide” the information regarding Ridgedale’s alleged fraud to the government prior to filing suit as required by 31 U.S.C. § 3730(e)(4)(B)” he did not have “original source status and his suit was properly dismissed.” *Id.* at 704.

C. Proper Measure of FCA/DBA Damages

Once there is a proper determination of a DBA violation, by either the WHD or the Court, in an FCA case the next – and perhaps most important – question is the measure of damages. According to the FCA, the government is entitled to recover three times its “actual damages.” 31 U.S.C. § 3729(a)(1)(G). Historically, the government calculated its damages using the “taint theory” – meaning the entire amount the government paid for the work performed by the contractor violating the FCA. At least in the context of DBA premised FCA claims, the taint theory may no longer apply.
In U.S. ex. Rel. Wall v. Circle C Constr., LLC, 813 F.3d 616 (6th Cir. 2016), the Court analytically separated the value of the construction from the amount of DBA underpayment. Circle C Construction, LLC (“Circle C”) was the general contractor building forty-two warehouses at Fort Campbell, KY. Circle C’s electrical subcontractor, Phase Tec, failed to comply with the DBA when it underpaid its electricians a total of $9,916 over the course of the project. Phase Tec prepared and submitted CPs which Circle C then passed along to the Army as part of its contract compliance and payment requests. The false CPs submitted rendered Circle C liable to the government under the FCA. The government claimed that its damages were $259,298.18, “which was the entire amount that the government paid for Phase Tec’s electrical work on the Kentucky warehouses. When trebled, that amount equals $777,894.54.” Id. at 617.

Facing a significant FCA penalty, Circle C appealed to the Sixth Circuit. The appellate court fundamentally disagreed with the government’s theory of damages, succinctly stating:

Actual damages are the difference in value between what the government bargained for and what the government received. Here, the government bargained for two things: the buildings, and payment of Davis–Bacon wages. It got the buildings but not quite all of the wages. The shortfall was $9,916. That amount is the government’s actual damages. Id. (citations omitted).

If the Sixth Circuit’s analysis of FCA/DBA damages holds in other Circuits, it is not unreasonable to foresee a decline in the use of the FCA by unions and employees as a way around the exclusive Department of Labor administrative remedies under the DBA. The simple reason being that relators (such as unions and employees) will likely see a greater payoff from DOL investigations and enforcement in the form of 100% of unpaid wages and fringe benefits rather than taking a small percentage of any tripled FCA damages using the Circle C approach. For instance, had the plaintiffs in Circle C gone to the Department of Labor, they theoretically would have been entitled to the full $9,916 in underpaid DBA wages and without any (or relatively little) expenditure of attorneys’ fees. However, based on Circle C, the same plaintiffs would only be entitled to $4,462.20 to $8924.40 in damages, after trebling the DBA underpayments and then allocating the appropriate percentage to the relator. See 31 U.S.C. § 3730(d)(1) (“If the Government proceeds with an action brought by a person under subsection (b), such person shall . . . receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim . . . plus reasonable attorneys' fees and costs.”); 3730(d)(2) (“If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds.”). In other words, the real payoff for plaintiffs in FCA/DBA cases was premised on being eligible for an award of a percentage of the total contract value, not simply the value of the alleged DBA violation.