

Employment Laws and Federal Government Contracting:

A Special Management Briefing for FTBA Contractors

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for Businesses*

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FTBA/FDOT Construction Conference



Florida Transportation
Builders' Association

Education Is The Best Form Of Preventive Maintenance SM

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- Labor and employment law firm, 1946
- Represent businesses only
- All laws impacting the workplace
 - Discrimination, retaliation, compensation, safety, immigration, benefits, government contracting
- National firm with 120 lawyers in 18 offices
- FTBA Affiliate Member since 2006

Phillip B. Russell

- **Clients: FTBA members and other construction industry clients**
- **I help clients stay out of trouble with the government, plaintiff's lawyers, and labor unions.**
 - **implement best policies and practices**
 - **train supervisors, managers, HR, and owners**
 - **advise and counsel clients on handling issues**
- **I actively support the FTBA by speaking, providing educational material, and supporting TransPAC.**
- **Stetson Law School 1995; Georgia Tech B.S. Mgt. '91, M.S. Econ. '92; family businesses growing up**

A Gladiator!



Today's Briefing

- **What is this all about?**
- **Obama's Pro-union Executive Orders**
- **American Recovery and Reinvestment Act of 2009**
- **Equal Employment Opportunity**
- **Affirmative Action Plans**
- **Davis-Bacon Act**
- **E-Verify**
- **Drug-free Workplace Act**

Who Said This?

“I don’t believe the labor movement is part of the problem. It’s part of the solution.”

President Barack Obama

Friday, February 6, 2009

When Signing his 4th Pro-Union Executive Order

Obama's Pro-union Executive Orders

- **Notice Posting Requirement**
- **Can't Use Federal Money to Stay Union-free by:**
 - preparing and distributing materials;
 - hiring and working with legal counsel or consultants;
 - holding meetings (including paying the attendees for time spent at meetings held for this purpose); and
 - planning or conducting activities by managers, supervisors or union representatives during work hours
- **Successor Projects – Must Recognize Existing Union**
- **Project Labor Agreements (PLA's)**
- **Why Issue These Orders?**
 - Foundation for using bailout money to promote unionization

American Recovery and Reinvestment Act of 2009 (ARRA)

- **Signed into law by President Obama on February 17, 2009.**
- **Appropriates substantial funding for construction, alteration and repair of federal buildings and for infrastructure projects, such as roads, bridges, public transit, water systems, and housing.**
- **DBA already requires use of prevailing wages for ARRA projects**
- **Also, generally, Federal agencies must ensure that recipients of assistance funded by ARRA appropriations require contractors and subcontractors to pay laborers and mechanics employed on ARRA-assisted construction at least the DBA prevailing wages**
- **ARRA also requires application of DBA prevailing wage requirements to projects financed with certain tax-favored bonds.**

Equal Employment Opportunity and AAP's

Don't Discriminate, Harass, or Retaliate

EMPLOYMENT AT WILL

- Employers are free to fire for a good reason, a bad reason, or no reason at all, *but* . . .
- You cannot take an adverse employment action based on:
 - PROTECTED STATUS
 - PROTECTED ACTIVITY

Protected Status

- **Race**
- **Color**
- **Sex**
- **National Origin**
- **Religion**
- **Pregnancy**
- Title VII of the Civil Rights Act
- 42 U.S.C. § 1981
- Executive Order 11246
- Age Discrimination in Employment Act
- Pregnancy Discrimination Act
- Equal Pay Act

Protected Activity

- **Objection or opposition to . . .**
 - some unlawful conduct

- **Participation in . . .**
 - an investigation into some alleged unlawful conduct

You fired me because of . . .

Who I am.

What I did.

Additional Employment Laws Specific To Federal Contractors

- **Executive Order 11246**
- **The Rehabilitation Act of 1973**
- **Vietnam Era Veterans Readjustment Assistance Act of 1974**
- **Drug Free Workplace Act**

Enforcement

- **U.S. Department of Labor**
 - **Office of Federal Contract Compliance Programs (OFCCP)**
- **Compliance Reviews**
 - **Desk Audit**
 - **On-site Reviews**
 - **Corporate Management Reviews**



Affirmative Action Requirement

- **Executive Order 11246**
- **Written Affirmative Action Plan**
- **Statistical Analysis of Workforce**
 - **Minorities**
 - **Women**
 - **Hiring, Promotions, Wages, Layoffs and Terminations**
- **Additional Recordkeeping of Employment Actions**

What Is Affirmative Action?

- More than non-discrimination requirements of Title VII and other laws applying to all employers
- Requires affirmative outreach :
 - To create diverse applicant pool
 - To improve access of all employees to promotion and other employment opportunities

What Affirmative Action Is Not

- **No requirement of “quotas;” only “goals”**
- **Does not affect employer ability to hire or promote best qualified applicant.**
- **Does not change employer ability to take employment action based on valid business reasons unrelated to race, sex, national origin, veteran’s status or disability.**

AAP Required Contents

- **Statement of commitment to Equal Employment Opportunity**
- **Statistical analysis of workforce**
 - **By job title**
 - **By salary**
 - **By department**
 - **By comparison to composition of available minorities and women in the community**

Supporting Documentation

- **Government requirements include:**
- **Report on applicants, hires, promotions, layoffs, terminations by minority status and sex**
 - **Statistical analysis of employment decisions**
 - **Report on compensation by minority status and sex**
 - **Maintaining records relating to decisions and reasonable accommodation for 2 years**

Rehabilitation Act

- **Covers employees with Disabilities**
- **Requires**
 - **Written AAP**
 - **Post-Offer/Pre-Employment Notification of Right to Self-Identify**
 - **Review of Job Descriptions**
 - **Non-Discrimination and Accommodation**

Veterans Protections

- **Covers**
 - Handicapped Veterans
 - Veterans of the Viet Nam War
 - Veterans of Listed Campaigns
- **Requires**
 - Affirmative Action
 - Internal and External Posting of Job Listings
 - Notification of Right to Self Identify
 - Notification of Rights to Applicants and Employees
 - Annual Reporting
 - Non-Discrimination/Harassment and Reasonable Accommodation.
 - Periodic Review of all Physical and Mental Job Qualification Standards

OFCCP Audits

- **Interviews of employees as to EEO, selection decisions, sexual harassment, pregnancy or other leave, and other indicia of potential discrimination**
- **Interviews of hiring managers as to selection process and application of affirmative action**
- **Audit of personnel files to review hiring, promotion, pay and other employment decisions**

OFCCP Enforcement: Discrimination

- **Individual complaints of discrimination or failure to accommodate based on disability**
- **Individual complaints of discrimination or failure to provide affirmative action and accommodation to a disabled veteran, Viet Nam veteran or veteran of a listed campaign.**

OFCCP Enforcement and Penalties

- Conciliation efforts
- Referral to office of the solicitor for administrative proceedings
- Injunction to comply with remedial measures
- Temporary or permanent debarment from federal contracts
- Back pay awards to applicants or employee found to be subject to discrimination in employment

Manager Role in OFCCP Audit

- **Before the audit**
 - Base employment decisions on qualifications and relevant criteria
 - Document employment decisions
 - Maintain relevant documents
- **During the audit**
 - Provide assistance to legal and HR to respond rapidly to audit requests
 - Prepare for any interviews by auditors

How To Avoid Audit Problems

- **Select the best qualified person when making hiring and promotional decisions**
- **Document the basis for the decision and maintain the documentation.**
- **Improve diversity by making outreach efforts to increase the diversity of the hiring and promotional pools, noticing all job openings, and providing opportunities to be considered including training**

Davis-Bacon Act

Payment of Prevailing Wages to Laborers and Mechanics on the Jobsite

DBA Requirements

- **Pay**
- **Reporting**
- **Posting**
- **Record-keeping**

DBA Pay Requirements

- Pay federal prevailing wage rates weekly to certain employees performing work on the project
 - Basic hourly wage rate, plus fringe rate!
 - Notices regarding DBA requirements are contained in construction bid documents
 - Federal Acquisition Regulations (FAR) require specific notices in bid documents and clauses in federal contracts

DBA Reporting Requirements

- Submit weekly certified payroll records to the contract administrator (FDOT or CEI)
 - FDOT or CEI, depends on protocol in district
 - specified in pre-construction conference
- **WH-347 (handouts)**
 - Optional, but will satisfy reporting requirements
 - Must be completed within 7 days after regular pay date for the applicable pay period
 - See notes on WH-347 and Instructions14

DBA Posting Requirements

- **At the site of work, prominent and accessible place, easily seen by employees**
 - **WH-1321 “Employee Rights Under the Davis-Bacon Act” (handout)**
 - **prevailing wages, overtime, enforcement, apprentices, and how to complain / report**
 - **Wage Determination**

DBA Record-keeping Requirements

- Payroll and basic records for all covered employees during the course of the work and for three years thereafter:
 - Name, address, and Social Security number of each employee
 - Each employee's work classifications
 - Hourly rates of pay, including rates of contributions or costs anticipated for fringe benefits or their cash equivalents
 - Daily and weekly numbers of hours worked
 - Deductions made
 - Actual wages paid
 - Detailed information regarding various fringe benefit plans and programs, including records showing the plan or program has been communicated in writing to employees
 - Detailed information regarding approved apprenticeship or trainee programs
- FLSA record-keeping requirements also apply

DBA Coverage

- **Contract Coverage**
- **DBRA (Davis-Bacon Related Acts)**
- **ARRA (American Recovery and Reinvestment Act of 2009)**
- **Fair Labor Standards Act (MW and OT)**
- **“Laborers or Mechanics”**
- **“Site of the Work”**

DBA Coverage

- **Contract Coverage**
 - Covers contracts for construction, alteration, and/or repair, including painting or decorating
 - Of buildings or public works of the U.S.
 - For contracts in excess of \$2,000
 - Covers contractors and subcontractors
- **Other DBRA laws (many)**
 - Federal agencies assist construction projects through grants, loans, loan guarantees, and insurance
 - these Acts include by reference the requirements for payment of the prevailing wages in accordance with the Davis-Bacon Act
 - Examples: American Recovery and Reinvestment Act of 2009 and the Federal-Aid Highway Acts

DBA Coverage

- **American Recovery and Reinvestment Act of 2009 (ARRA)**
 - Signed into law by President Obama on February 17, 2009.
 - Appropriates substantial funding for construction, alteration and repair of federal buildings and for infrastructure projects, such as roads, bridges, public transit, water systems, and housing.
 - DBA already requires use of prevailing wages for ARRA projects
 - Also, generally, Federal agencies must ensure that recipients of assistance funded by ARRA appropriations require contractors and subcontractors to pay laborers and mechanics employed on ARRA-assisted construction at least the DBA prevailing wages
 - ARRA also requires application of DBA prevailing wage requirements to projects financed with certain tax-favored bonds.

DBA Coverage

- **Do the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) still apply?**
- **Yes, and The Contract Work Hours and Safety Standards Act (CWHSSA) applies to federal service contracts and federal and federally assisted construction contracts over \$100,000. It requires contractors and subcontractors on covered contracts to pay laborers and mechanics employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over 40 in a workweek.**

“Laborers or Mechanics”

- “Manual or physical in nature” including those who use tools or practice a trade, and includes electricians
- Includes Apprentices and Trainees at lower rates if part of DOL registered or state-recognized apprenticeship program
- Working foremen – DBA covered if not FLSA exempt and devote more than 20% of their time to laborer or mechanic duties
- Includes drivers, but not material delivery truck drivers who come onto the site of the work merely to drop off construction materials.
- Not “mental or managerial,” such as executive, administrative, or clerical; not if FLSA exempt as executive, administrative, or professional (e.g., salaried construction supervisors or superintendents).
- CAUTION: Do NOT misclassify as independent contractors!

“Site of the Work”

- **Building or site where the work will remain**
- **Job headquarters, tool headquarters, etc. only if dedicated exclusively to the project and are adjacent to the project**
- **Not home offices or other facilities whose existence does not depend on the federal project**

Wage Determinations

- Issued by the U.S. DOL
- No requirement of when and how often surveys are conducted or wage determinations are issued
- General or Project-Specific
- Issued for different types of construction – Building, Heavy, Highway, and Residential
- Covers county or counties
- Available at www.wdol.gov and searchable

“Highway Construction”

- “Highway construction is generally the construction, alteration, or repair of roads, streets, highways, runways, taxiways, alleys, parking areas, and other similar projects that are not incidental to ‘building,’ ‘residential,’ or ‘heavy’ construction.”

FAR 22.404-2(3)

“Heavy Construction”

- “Heavy construction includes those projects that are not properly classified as either ‘building,’ ‘residential,’ or ‘highway,’ and is of a catch-all nature. Such heavy projects may sometimes be distinguished on the basis of their individual characteristics, and separate schedules issued (e.g., ‘dredging,’ ‘water and sewer line,’ ‘dams,’ ‘flood control,’ etc.).”

Wage Determinations

- **General Wage Determinations**
 - cover a specific geographic area
 - contain no expiration date
 - remain valid until modified, superseded, or canceled by the DOL
 - once incorporated into a contract, a GWD usually remains effective for the life of the contract, unless extended
 - most common and focus of this seminar

“Prevailing Wage”

- (a)(1) The prevailing wage shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the prevailing wage shall be the average of the wages paid, weighted by the total employed in the classification.

29 C.F.R. § 1.2(a)(1).

Wage Determinations

- Local Example #1 (FL080316)
 - Highway Construction, Hillsborough County
 - Published 10/9/2009
 - Operator: Bulldozer
 - Wage Rate \$14.00; Fringe Rate \$1.85
 - Total Prevailing Wage Rate \$15.85
 - Operator: Paver
 - Wage Rate \$11.61; Fringe Rate \$0.00
 - Total Prevailing Wage Rate \$11.61

DBA Survey Process

- **U.S. DOL's Prevailing Wage Resource Book 2009 (handout)**
 - **When started, DOL notifies national and local interested parties and requests their participation**
 - **Contractors and subcontractors are identified initially from F.W. Dodge reports**
 - **Follow-up on non-responses**
 - **WD10 Survey forms (handout)**

29 C.F.R. 1.3

- **The Administrator will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area....**

Wage Determinations

- **How to Challenge**
 - Request for review to DOL's Regional Office
 - After denied, can request DOL Administrator review the WD
 - After denied, can file a petition with the Administrative Review Board (ARB)
 - ARB's decision is final; no judicial review
 - IEC Chapter and contractor members are "interested parties"

Computing Wages and Fringes

Wages and Fringes

- Prevailing wage includes both basic wage rate and fringes (see examples)
- Contractor can include only the following:
 - amounts paid in cash (not really “cash”)
 - contributions made irrevocably to a trustee or third party under any bona fide plan or program to provide for medical, pension, life insurance, disability, and similar programs

Wages and Fringes

- **“Prevailing wage” is made of 2 interchangeable components:**
 - basic hourly wage rate
 - fringe benefits
- **Contractor may pay**
 - (1) All in wages
 - (2) Partial in wages

Example

- **Prevailing Wage = \$15.85 (Operator: Bulldozer)**
 \$14.00 (hourly wage rate)
 \$1.85 (fringe rate)
- **Contractor can pay:**
 \$14.85 in cash wages;
 \$14.00 in cash wages, plus \$1.85 in fringes
 \$12.00 in cash wages, plus \$3.85 in fringes
- **CWHSSA requires calculation of overtime rate based on prevailing wage, even if cash wages are lower. So, here, OT rate is \$21.00 minimum.**

Example

- Fringes must be paid for all hours worked, including overtime hours.
- However, fringe benefit amounts listed in the WD may be excluded from the half-time premium due as OT compensation.
- Example: An employee worked 43 hours as an Operator: Bulldozer (\$14.00/\$1.85). The employee would be due:
43 hours x \$15.85 = \$681.55 (straight time pay)
3 hours x ½ of \$14.00 = \$21.00 (overtime pay)
= \$702.55

What Fringe Benefits Are Included?

- **Funded Plans**
 - Health Insurance
 - Life Insurance
 - Pension
- **ALSO, Unfunded Plans...**
 - Vacation
 - Holidays
 - Sick Leave

What is NOT included?

- **Any benefit required by federal, state, or local law**
 - **Workers' compensation**
 - **Unemployment compensation**
 - **Social security contributions**
- **Incidentals**
 - **Use of a truck; Thanksgiving turkey; or a Holiday Bonus**

Funded Benefit Plans

- **Contributions made irrevocably to a trustee or third party pursuant to a fund, plan, or program**
 - **No DOL approval required**
 - **Contributions must be made regularly, not less often than quarterly**
 - **Annual contributions do not meet this requirement. For annual profit sharing plans, contractor must escrow money at least quarterly based on expected profit.**
 - **Contributions must be actually made for each individual (no averages across many employees)**
 - **Cannot take credit for contributions made on behalf of employees who are not eligible to participate in the plan (e.g., part-time employees)**
 - **ERISA compliant plans are generally bona fide funded plans, even if “vesting” requirements**

Unfunded Fringe Plans

- **Holiday, vacation, sick pay**
- **Must meet the following criteria:**
 - (1) **reasonable anticipation to provide the described benefit;**
 - (2) **legally enforceable agreement;**
 - (3) **carried out under a financially responsible plan or program;**
and
 - (4) **plan or program has been communicated in writing to the laborers or mechanics.**
- **Contractor may be required to set aside funds in an escrow to cover the cost of the unfunded fringe plans**

Examples

- DBA credit for contributions made to fringe benefit plans are allowed based on the effective annual rate of contributions for all hours worked during the year by an employee.
- Example – If a contractor's contribution to a pension plan was computed to be \$2,000 a year for an employee who worked 1,500 hours on a DBA project and 500 hours on other non-DBA projects, only \$1,500 or \$1.00 per hour would be creditable towards the contractor's DBA obligation (Annual contribution \$2,000 divided by total hours worked 2,000 = \$1.00 per hour.)

Examples

- Example: An employee works as an Operator: Bulldozer ($\$14.00 / \$1.85 = \$15.85$)
- Where the contractor provides the employee with medical insurance in the amount of \$200 per month (\$2,400 per year), the contractor would divide the total annual cost of the benefit by 2,080 hours (40 hrs x 52 weeks) to arrive at the allowable fringe benefit credit
- $(\$200 \times 12 \text{ months}) / 2,080 \text{ hours} = \$1.15 / \text{hr}$
- This is less than the required prevailing wage!

Examples

- If the same employee receives no other bona fide fringes, then for each hour worked on a covered contract he is due an additional \$0.70 (the difference between the \$1.85 fringe rate and the \$1.15 credit allowed for the medical insurance)
- The contractors must pay additional cash in lieu of fringe or increase the hourly wage rate

Apprentices / Trainees

- **Bona fide apprenticeship or trainee program registered with the U.S. DOL**
- **Not listed on the Wage Determinations, but apprenticeship / trainee program can set % for basic hourly rate**
- **Fringe benefits are paid according to the program; or, if silent, the full fringe amount included in the Wage Decision**
- **Apprentices / trainees are limited in number by ratio set by the program**

Penalties / Sanctions

- **Willful violations**
 - Contract payments may be withheld
 - Contract termination or debarment for 3 years
- **Falsification of certified payroll records**
 - Civil or criminal prosecution, the penalty for which may be fines and/or imprisonment

Common Compliance Mistakes

- Failing to adequately document compliance
- Failing to classify employees correctly
- Failing to post proper notices
- Failing to include all required employees on the certified payroll report
- Failing to use unfunded benefit plans (i.e., vacation, holidays, sick days) for fringe credit
- Failing to classify working foremen properly

E-Verify

- **President Bush signed Executive Order requiring most federal contractors to use E-Verify for all new hires and employees performing work on government contracts.**
- **Obama Administration delayed implementation of regulations, but went into effect September 8, 2009.**

Who must comply?

- **Regulations apply to contracts awarded after September 8, 2009.**
 - Prime contracts over \$100,000 and 120 days or more for performance
 - Subcontracts over \$3,000 (if prime contract includes clause)
- **Prime contractors required to include E-Verify clause in subcontracts.**



Exemption from Rule

- **Contracts that include only commercially available off-the-shelf (COTS) items and related services**
 - **COTS = commercial item sold in substantial quantities in the commercial marketplace and is offered to the gov't in the same form that it is available in the commercial marketplace, or with minor modifications.**
 - **Includes most food and agricultural products, including those shipped as bulk cargo (grains, oils, and produce).**

Which Employees Must Be Verified

- Covered contractors must use E-Verify for:
 - all new hires and
 - all employees “assigned to the contract.”
- “Employee assigned to federal contract” = any employee hired after Nov. 6, 1986, who is directly performing work in the U.S. under a contract that includes the clause committing the contractor to use E-Verify. Amount of time spent on contract work does not matter.
- Does NOT include employees normally performing support work, such as indirect or overhead functions, and who do not perform any substantial duties under the contract.
- Note that this applies to employees assigned to THE contract, not A contract.
- Must verify all “new hires” regardless of whether they are assigned to the contract.
- Only applies to employees working in United States, including Guam, Puerto Rico, and U.S. Virgin Islands.

May Verify

- **Contractors have the option of verifying entire workforce (new hires and all employees, even if not assigned to federal contract), but they:**
 - **Must notify DHS through “Maintain Company” page, and**
 - **Must initiate a query for each employee in the workforce within 180 days of updating profile.**

Timing for Compliance

- **Clock starts when covered contract or subcontract is entered that contains E-Verify clause.**
 - **Enrollment**: Contractors then have 30 days to enroll in E-Verify after contract award.
 - **Phase In**: Contractors have 90 days after enrollment to begin verifying employees working on project and to begin verifying new hires.
 - **Final Step**: After 90-day phase in, you must verify new hires within 3 business days of employment.
- **You may verify new hires after offer accepted (but before employment starts), but may not verify applicants. Note difference between “hire date” and “start date.”**

Current E-Verify Users

- If already enrolled in E-Verify, you must update “Maintain Company” profile after contract award. Once you designate company as federal contractor user, all E-Verify users at company will need to take a federal contractor tutorial that explains the new policies and features.
- You must continue to verify all new hires within 3 business days; 90-day phase-in does not change this requirement.
- Do not “re-verify” employees who have already been verified.

Notice Requirements

- Employer must post that it is an E-Verify participant in an area visible to prospective hires and all employees to be verified
- Employer cannot use E-Verify to pre-screen job applicants.
- Employer must post DOJ Anti-Discrimination Notice regarding unfair employment practices in area visible to prospective hires



Penalties for Non-Compliance

- **Suspension or debarment from federal contracts**
- **If DHS or SSA suspends MOU, contractor may be suspended or debarred from federal contracts**

Drug Free Workplace Act of 1988

- Publication and notification of policy statements with specified consequences
- Establishment of a drug awareness program
- Notification to employees of certification and reporting of drug related conviction requirements
- Employer notification of procurement agency of drug convictions
- Disciplinary action or rehabilitation after conviction
- Good faith efforts by management to maintain a drug-free workplace

Labor & Employment Law Workshop

Thursday, April 1, 2010
Marriott Waterside

Compliance and Prevention Services

- Supervisor and Manager Training
 - Employment Law 101 every Third Thursday
 - Customized on-site training
- Advice and Counseling on Tricky Situations
 - Hotline Service at Flat Annual Rate (**HANDOUT**)
- Audit Policies, Practices
 - Flat Rate Projects (Handbook, Policies, Payroll)
 - AAP's and Mock OFCCP Audits

How Do I Stay Informed?

- Newsletters, Bulletins
 - Sign-up Sheet (**HANDOUT**)
- My Direct Contact Information
 - prussell@constangy.com
 - (813) 222-1354 (dd) // (813) 966-6598 (cell)