

Presenting a live 90-minute webinar with interactive Q&A

Navigating Thorny Employment Law Issues in the Construction Sector

Minimizing Employee Claims Over Joint Employer Status,
Independent Contractor Misclassification, Davis-Bacon Act Violations and More

THURSDAY, JANUARY 26, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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NAVIGATING THORNY NLRA AND WAGE AND HOUR ISSUES IN THE CONSTRUCTION SECTOR



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Current Employment Law Trends

1. Wage and Hour
2. Davis Bacon Act
3. Labor Law

Wage and Hour Law



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Four Main FLSA Requirements

1. A minimum wage (currently \$7.25 an hour).
2. Premium pay for overtime work (at a rate of 1.5 times the "regular rate" of pay for over 40 hours worked in a single workweek).
3. Certain recordkeeping, including accurate time records.
4. Limitations on the employment of minors under 18.

Two Wage Hour Issues That Regularly Appear in the Construction Industry

- The validity of “Per Diem” payments
- The exempt status of construction/project superintendents

“Per Diem” Payments – the General Rule

- Broadly speaking, most payments to a non-exempt employee must be included in the employee’s regular rate of pay for purpose of paying any overtime. However, certain payments may be excluded from the regular rate calculation.
- 29 U.S.C. § 207(e)(2) excludes “reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer’s interests and properly reimbursable by the employer.”

“Per Diem” Payments – Problem Areas

- Is the “per diem” payment really a reimbursement for an expense? Or is it “hidden wages”?
- Did the per diem primarily benefit the employer or employee?
- Meal and Lodging Expenses: according to the DOL Field Operations Handbook, meal and lodging are usually provided to the employee’s benefit and value of those payments would be deemed wages.
 - **Exception:** meal and lodging expenses incurred *while travelling*.

Per Diem Payments – Problem Areas

- Does the amount of the per diem payment depend on the number of hours worked by the employee? **Beware hourly-based per diem plans.**
- Look for payment plans where the combined “straight time” and “per diem” hourly rates combine to approximate a prevailing wage for a certain job position. I.e., carpenters typically make \$30/hr. but employer pays its carpenters \$15/hr. straight time pay and \$15/hr. “per diem” rate.
- Look for per diem plans where the employee receives a payment every day but never or rarely incurs any work-related expenses.

Per Diem Payments

News Brief

US LABOR DEPARTMENT SUES VICTORIA, TEXAS, OIL PIPE MAKER FOR BACK WAGES, DAMAGES FOR WORKERS

Firm uses 'per diem' scheme to evade overtime requirements

Date of Action: Dec. 3, 2015

Type of Action: Lawsuit filing

Name of Defendant: 3431 FM 1685, Victoria, Texas

Allegation: The U.S. Department of Labor (<http://www.dol.gov>) has filed a lawsuit against [redacted] after a Wage and Hour Division (<http://www.dol.gov/whd>) investigation found that the employer violated the Fair Labor Standards Act (<http://www.dol.gov/whd/flsa>) by failing to pay 43 employees approximately \$45,600 in overtime (http://www.dol.gov/whd/overtime_pay.htm) wages. Investigators from the division's Corpus Christi Area Office found that [redacted] improperly attributed part of workers' pay as a "per-diem" rate, typically used to reimburse workers for expenses they incur on behalf of their employer. In this case, the workers did not actually incur any costs for the employer or travel at work, so the per-diem (<http://blog.dol.gov/2015/01/14/cracking-down-on-pay-schemes-that-cheat-workers-out-of-millions-in-overtime-pay/>) payment was not legitimate.

Per Diem Payments

News Release

FEDERAL ENFORCEMENT EFFORT FINDS MORE THAN 3,000 GULF COAST WORKERS OWED NEARLY \$3.5 MILLION IN BACK WAGES BY STAFFING AGENCIES

US Labor Department determines agencies illegally paid wages as per diem reimbursement

NEW ORLEANS — Six Gulf Coast staffing agencies have agreed to pay thousands of workers nearly \$3.5 million in back wages after U.S. Department of Labor Wage and Hour Division (/whd/) investigators found part of their wages were mislabeled as "per diem" payments as reimbursement for expenses they never incurred.

What Are "Exemptions"?

- "Exempt": Not Subject To One Or More FLSA Requirements
- Some apply only to the overtime requirements, some apply to the minimum-wage and overtime requirements
- Default rule: Everybody is non-exempt, unless an exemption clearly applies.
- Exemptions are strictly interpreted. Must satisfy each and every requirement for a specific exemption.

Exemption Problems: Construction/Project Superintendents

- Executive Exemption requires that the employee “customarily and regularly” directs the work of two or more other full-time employees.
- **Problem?**
- Oftentimes the Superintendent is the only Company employee at a job site. They supervise subcontractors, day laborers, etc.
- Numerous courts have held that this does not constitute supervision of “two or more employees.”

Exemption Problems: Construction/Project Superintendents

- Administrative Exemption requires the performance of “office or non-manual work” and work must include the “exercise of discretion and independent judgment about matters of significance.”
- **Problems?**
- What evidence will show that primary duty is not manual work?
- What evidence will show that Super exercises discretion?
- What is the Super likely to testify in the absence of solid documentary evidence?

Are They Really Exempt?

- Exemptions relate to individuals - Not to job descriptions, pay classifications, positions, job groups, conventional wisdom, etc.
- Detailed, accurate, current job information is essential
- Must be based upon actual work, real facts
- Opponents will dig-into what the employees actually do
- Job descriptions alone do not "make employees exempt"

Joint Employment Risks – Best Practices

- How much control is exercised over the employees of the secondary employer? Is the secondary employer compliant with employment laws?
- Do your employees perform many of the same tasks alongside secondary employees?
- If possible, avoid having your managers supervise/control the secondary employees.
- Avoid intermingling payroll records, workers' comp programs, HR and other support systems.
- Refrain from participating in labor relations activity of the secondary employer and direct all inquiries to the secondary employer.

Davis-Bacon Act



Basic Requirements

- **Contracts for construction, alteration or repair of public buildings or public works awarded by federal government or the District of Columbia for an amount in excess of \$2,000 must include language requiring each contractor and subcontractor:**
 - To pay all laborers and mechanics employed on site of the work the minimum “prevailing wage rate not less often than once a week”
 - To maintain and submit certified payroll records to the contracting agency reflecting payment of the required wages and fringe benefits to construction workers on the covered project.
- Similar requirements are imposed on federally funded or assisted contracts under statutes which adopt the DBA, including grants, loans, loan guarantees or insurance provided by federal agencies (e.g., HUD, DOE, DOT, DHHS).

Common Mistakes and Trouble Spots

- Failure to pay the prevailing wage rate
- Misclassification of workers
- Transportation workers
- Off-site work
- Working foremen
- Reimbursement of expenses incurred by employees working at remote locations
- Miscalculation of overtime
- Failure to “flow down” DBA contractual stipulations
- Liability for non-compliance by subcontractors

Satisfying The Prevailing Wage Rate

- Payment of the applicable prevailing wage rate to workmen for the classification of work performed by workmen for all hours worked on the site of a covered project
- Provision of fringe benefits or payment of cash equivalent to workmen for all hours worked on the site of a covered project
 - Bona fide fringe benefits
 - Self-funded plans
 - Quarterly payment requirement
- Combination of wages and bona fide fringe benefits that satisfy the predetermined prevailing wage rate

Misclassification of Workers

- Which classification applies?
- What if more than one classification may apply to work performed?
- What if the necessary classification of work is not included in the Wage Determination?
- Tracking hours worked for each classification of work performed
- Working foreman who works more than 20% of time with tools

Transportation Workers

- Owner-Operators
- Delivery, material and supply drivers
- Drivers employed by contractor/subcontractor
 - From where to where?
 - What is the driver doing?
 - *De minimis* on-site time

On-Site Versus Off-Site Work

- The DBA applies to work performed by “laborers and mechanics employed on the site of the covered work.”
 - The “physical location where the building, structure or other improvement is actually located and “will remain”; or
 - Any other physical location or facility established specifically for performance of contract or where a significant portion of work is done
 - Job headquarters, tool yards, batch plants, borrow pits, etc. may be part of the “site” if dedicated exclusively (or almost) to the contract work and located adjacent or virtually adjacent to the actual site.
 - However, a dedicated fab plant, batch plant, etc. established by a material supplier before opening of bids and not on actual location of project is not “on the site,” even if it is dedicated to project.

Work at Remote Locations

- If employees are assigned to work at a location outside daily commuting distances from home, the employer's payment of the cost of the board and lodging at the distant location and the weekend transportation costs are considered payment of travel expenses properly reimbursable by the employer and incurred for its benefit.
- Such payments are not considered bona fide fringe benefits within the meaning of the DBA, are not part of the employees' wages, and do not constitute board, lodging, or other facilities customarily furnished which are deductible from the predetermined prevailing wage rate.
- If the contactor or subcontractor does not reimburse employees for those expenses, it is the current enforcement position of the DOL that the employees may not be receiving the predetermined prevailing wage rate.

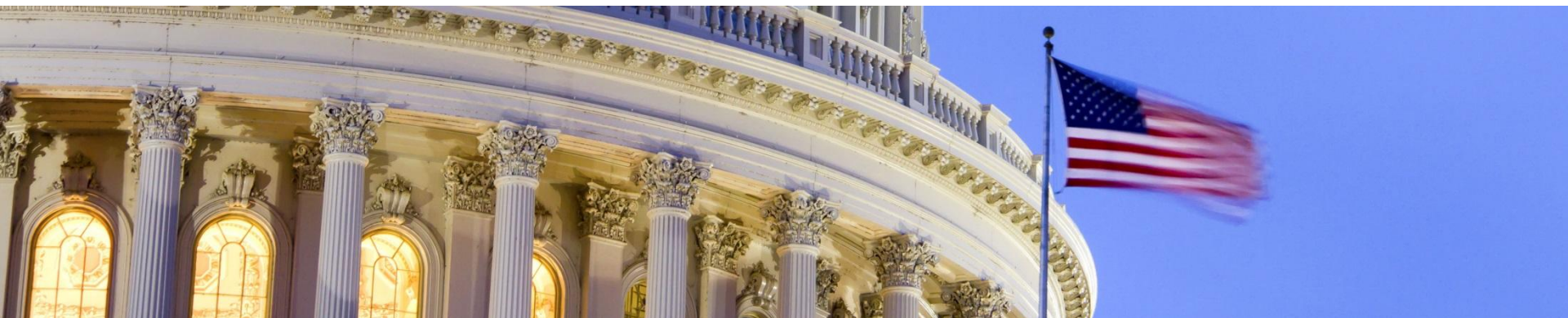
Overtime

- Hours worked?
- More than one rate in effect in the same workweek?
- Rate in effect vs. weighted average method
- Basic Hourly Rate
- Effect of payment of cash in lieu of fringe benefits

Best Practices: Davis Bacon Act

- Pay the correct prevailing wage rate for the work performed
- Ensure workmen are properly classified
- Don't get greedy when it comes to fringe benefit credits
- Prepare and maintain accurate weekly certified payroll records
- Monitor, audit and confirm that subcontractors are paying prevailing wages

Labor Law



Labor Law Issues Unique to Construction

- Joint Employer Status
- Sourcing Labor
 - Disputes Between and Among Trades
 - Hiring Hall Issues

Joint Employer Generally

- Activist NLRB reverses long-settled joint employer rules in *Browning-Ferris*
- Appeal is pending before the D.C. Circuit
- *McDonald's* trial underway alleging McDonald's is a joint employer of its franchisees' employees

Joint Employer Generally

Joint employment found when two entities “share or codetermine” matters governing “essential terms and conditions of employment”

- Old: alleged joint employer must exert direct and immediate control over hiring, firing, discipline, supervision and direction
- New: indirect or a reserved right to control, whether or not exercised, may be sufficient

Joint Employer: Target Arrangements

- Traditional staffing agency relationships/temp workers
- Parent/subsidiary relationships
- Contractor/subcontractor
- Predecessor/successor
- Independent contractors (drivers, salespersons)
- Consultants/specialists (IT consulting; project management)
- Franchisor/franchisee
- Supply chain?

Impact on labor relations strategy?

Sourcing Labor: Disputes Between Trades

- Collective bargaining by employer groups and adoption of agreements results in overlap...
- What happens when two or more trades have “exclusive jurisdiction” over overlapping work?
- Unions may not threaten or coerce employers into assigning work to one trade or another. (Section 10(k) “resolves” disputes.)

Sourcing Labor: Disputes Between Trades

- Section 8(f) allows collective bargaining without majority representation.
- Does this mean withdrawal of recognition is allowed?
- Can the work just be performed by subcontractors?

Sourcing Labor: Hiring Hall Issues

- Who does the hall send when you call?
 - Hiring hall agreements do not have to be reduced to writing, and the union is not necessarily required to keep the criteria for referral in writing or to keep written records of the order of past referrals.
 - Are there any limitations?
- The staffing impact of strained relations with a trade can be substantial.

Best Practices: Labor Law

- Balance labor strategies with economic efficiencies to avoid joint employer status.
- Invest in an outcome - labor disputes should be resolved with a clear strategic path.
- Composite crew arrangements(?)
- Letters of assent(?)