

Billions In Federal Spending Guided By Prevailing Wage Rules

By Jon Steingart

Law360 (April 22, 2022, 5:23 PM EDT) -- The infrastructure bill President Joe Biden signed into law in the fall is set to unleash hundreds of billions of dollars on roads, bridges, trains and other construction projects.

Amid all that spending, the prevailing wages that contractors must pay will be a key factor. A prevailing wage is the amount that a majority of construction workers in a specific geographic area make, broken down by specific roles such as carpenter, truck driver and drywall installer. Under the Davis-Bacon Act, companies that work on projects supported by federal spending must pay employees prevailing wages.

Because prevailing wages reflect wages that people actually earn, they typically are several multiples larger than minimum wage. The Wage and Hour Division of the U.S. Department of Labor constantly surveys workers' earnings in various parts of the country and publishes prevailing wage determinations.

Here, Law360 explores the process and pitfalls of wage surveys.

Local Geographic Area Can Be Hard to Pin Down

Esmeralda Aguilar, a partner at Sherman Dunn PC who advises unions on prevailing wage issues, said the geographic rules the WHD follows for conducting surveys can sometimes lead to determinations that don't accord with the realities of construction labor markets.

The DOL ordinarily tries to determine prevailing wages on a county basis, she said. When a survey doesn't draw information from enough workers or companies to produce a strong data set, the analysis zooms out and examines a group of neighboring counties. But the DOL's approach, which it adopted in a 1982 rule, can define geographic areas in peculiar ways as it tries to avoid combining counties that aren't similar with one another, she said.

"The ... rule, essentially, put a bar on using urban county data for the purposes of determining rural county prevailing wage rates, and vice versa," Aguilar said. Urban counties will only be grouped with nearby urban counties, and rural counties only with other rural counties. That can result in prevailing wage determinations that are based on a geographic area that's hundreds of miles across and don't truly represent a local labor market, she said.

"You get these groupings that sometimes span from one part of the state all the way to the opposite end of the state," she said.

Urban and rural county labels come from the Office of Management Budget, which charts metropolitan statistical areas throughout the country. But they don't neatly reflect the nature of construction, where laborers frequently relocate for new work, Aguilar said.

"Labor markets in construction are unusual," she said. "They're quite broad because there's a lot more traveling in construction than in any other profession."

The DOL is planning to relax the bar on mixing rural and urban county data, which would allow aggregating survey results from neighboring jurisdictions. The proposal is part of a broad overhaul of the Davis-Bacon Act regulations that is open for public comment through May 17.

Unions Play Major Role in Prevailing Wage Rates

Lawrence Prosen, a Cozen O'Connor member who specializes in government contracts and construction, said wage surveys may undercount nonunion employers because they don't want to reveal compensation information that could put them at a strategic disadvantage. Responses to wage surveys are available from the DOL through open records requests.

"Nonunion shops or open shops oftentimes don't participate in the surveys," he said. "A lot of nonunion or open shop-type companies don't want to share their pricing because that gives the union the ability to see behind the curtains more easily."

Eric Su, a Crowell & Moring LLP partner who advises employers on prevailing wage compliance, said union-negotiated wage rates are overrepresented relative to nonunion workplaces in surveys.

Unions that represent workers at multiple companies can attempt to standardize the wages they negotiate, Su said, unlike separate employers that cannot coordinate the wages they pay. When the DOL probes local wages, it's more likely to enshrine those union-bargained rates in the prevailing wage determination because they are likely to appear with greater frequency in the survey responses, he said.

"In major cities, such as New York, Chicago and Boston, and California, you're seeing wage determinations largely refer to the local unions' wages," Su said.

Other factors bolster the robust role unions play in determining prevailing wages, Su said. For one thing, project labor agreements, which require contractors to hire union workers, put upward pressure on prevailing wage determinations by increasing the number of people who earn union-negotiated wages, he said.

Another factor is requirements for contractors to have apprenticeship programs, which tend to be run by unions, he said. He pointed out that the 2021 infrastructure law, like many federal construction projects, pushes contractors toward registered apprenticeships, which can develop career pathways and prepare individuals to enter a trade.

"In order to satisfy apprenticeship requirements for contractors, they would invariably have to establish some form of relationship with a local building trades union," Su said. "In most instances, there are no state-approved apprenticeship programs that are nonunion."

Wage Determinations Are Hard to Challenge

The Davis-Bacon Act gives the DOL a lot of discretion in how it develops prevailing wage determinations, making it hard to challenge the agency's findings.

But one path to challenge a wage determination is claiming that the DOL failed to follow its regulations for running a survey. Another is arguing that even if the agency observed them, the regulations themselves do not accord with the Davis-Bacon Act.

In Nevada, a group of trade associations is taking both approaches as it claims that the DOL flubbed a 2018 wage determination by using compensation data from one part of the state to fill in information it could not obtain from another region. The construction and trucking groups say the DOL should have obtained information by pulling public data from the state labor commissioner or extending the survey's deadline.

The immediate target of the suit is the 2018 wage determination. But Prosen said its ultimate goal could be to get a federal court to clarify the DOL's authority to develop prevailing wage determinations according to its own judgment.

"There's a lot of flexibility there, but it's not absolute," he said.

The case is Nevada Chapter of the Associated General Contractors of America Inc. v. Walsh, case number 3:21-cv-00430, in the U.S. District Court for the District of Nevada.

--Editing by Bruce Goldman.