

DOL's Prevailing Wage Rule Changes Bring Needed Clarity

By **Daniel Wilson**

Law360 (March 17, 2022, 11:09 PM EDT) -- The U.S. Department of Labor's comprehensive proposed revisions to prevailing wage rules for federally funded construction projects, although seemingly aimed at benefiting workers, could bring clarity on the implementation of the rules that will also benefit contractors.

In a notice of proposed rulemaking set for formal publication on Friday, the DOL announced what it called the "most comprehensive" set of changes to the Davis-Bacon Act in decades. The law requires contractors and subcontractors on federally funded public works projects to pay at least the local prevailing wages.

Labor Secretary Marty Walsh said on March 11 that the planned overhaul, which comes as part of a broader pro-labor stance in the Biden administration, was intended to lead to higher wages for workers over time.

But not all proposed changes to the regulations will be beneficial only to workers, with the DOL also seeking to address a complaint voiced by those on both the labor and employer sides of the issue: a lack of clarity regarding how the prevailing wage law is implemented and enforced, said Nathan Reilly, of counsel with Morrison & Foerster LLP's investigations and white collar defense group.

"[There's a] thread line of what I think they're trying to do, which is to try to promote some degree more of consistency and transparency," Reilly said.

The headline change in the proposal is a reversion to the "30% rule," a method for calculating prevailing wages last used in 1983, allowing a prevailing wage to be set based on a wage that is paid to at least 30% of workers of a particular classification in a particular geographic area.

Currently, the prevailing wage is set based on the wage paid to 51% or more of workers in a particular classification, or a "weighted average" rate is used, dividing total hourly wages for all relevant workers by the total number of workers.

That average is a "mathematically contrived" method that doesn't truly reflect actual wages being paid on other projects, said Esmeralda Aguilar, a partner with Sherman Dunn PC who advises unions on labor and employment issues, focusing on prevailing wage laws.

"Restoring the historical definition of prevailing wage ... will mean that workers will now receive

prevailing wages that actually reflect the wages that are paid to workers in their community," she said.

That change is likely to be the biggest source of contention for construction contractors, due to concerns that they will face higher labor costs not only for their federal work but also on their nongovernment work due to a "spillover effect," said Howard Wolf-Rodda, a founding partner at Abrahams Wolf-Rodda LLC, whose practice focuses on the overlap of government contracts and wage and hour issues.

But outside that headline change, some other changes proposed by the DOL could be at least somewhat beneficial to contractors.

For example, since the last substantive update to the rules implementing the Davis-Bacon Act in the 1980s, the DOL has issued a host of related memoranda, guidance and updates to operational and resource handbooks, alongside many related decisions from administrative boards and courts. As a result, the department's stance toward administering and enforcing aspects of the statute can be murky.

The proposal tries to codify, consolidate and standardize those years of updates while removing outdated references, making it easier for all parties to find the information they need, according to Wolf-Rodda.

"That's useful, because I can't tell you how many conversations I've had with clients where I say, 'Well, if you look at [agency memoranda] number whatever, you'd find the answer to that,' and they're banging their heads," he said.

There is also a clause allowing the DOL to adopt state and local prevailing wage determinations in certain circumstances, part of a broader effort to require more frequent updates to determinations to make them more accurate, an issue that has been a source of concern both for contractors and workers.

That could help contractors who do work for both the federal government and local governments stay on top of their regulatory compliance efforts, said Morrison & Foerster's Reilly. But that could also create new problems if those state determinations aren't as reliable as other potential ways for determining prevailing wages, according to Wolf-Rodda.

Among other clauses aimed at creating more clarity, the proposal also states that it will always have the "operation of law" even if its clauses aren't explicitly included in a relevant contract, creating more certainty for agencies and contractors.

As part of that clause, contractors will also be able to seek reimbursement for increased costs if they later have to comply with a regulatory clause that an agency had left out of a contract.

Even proposed clauses that strengthen debarment rules for violations of the Davis-Bacon Act could ultimately serve to benefit some contractors, said Reilly, a former federal prosecutor. For companies who "want to play by the rules," that will reduce the chances that they will have to compete against rivals who don't properly comply with prevailing wage rules, he said.

"[Those contractors] want to understand that they're not being disadvantaged, that the enforcement mechanisms are not so weak that they're essentially getting beaten by people who are wantonly violating the terms," Reilly said.

The proposed rule will be open for comment for 60 days following its formal publication in the Federal

Register. There are likely to be many comments from contractors, industry and workers' groups and attorneys asking the DOL — or, in some cases, other agencies or Congress — to clarify, rein in, or expand on certain aspects of the rule when it is finalized.

One proposed change, for example, would allow for prevailing wage determinations to be made annually on construction contracts that stretch across multiple years, rather than being set once at the start of the project, bringing them more in line with the prevailing wage requirements for contracts covered by the Service Contract Act.

It is not clear what will happen when contractors' costs change as a result of incorporating those periodic redeterminations, because that is an issue outside the DOL's wheelhouse, according to Wolf-Rodda.

"My expectation would be that the [Federal Acquisition Regulatory] Council is going to have to address that in the FAR regulations, because that's clearly going to be an issue when rates change," he said. "In the Service Contract Act world, adjustments are a frequent source of disputes."

And from the perspective of construction workers, the "missing piece" is that the law also needs to be strengthened to allow them to go to court when they aren't paid at the proper prevailing wage rate, Sherman Dunn's Aguilar said.

"The DOL does all it can with the resources it has, the staff it has, to enforce this law and the scores of other laws it's charged with administering, but there's really nothing like being able to take one's grievance straight to court," she said. "There is no way DOL or any agency could ever get to every single complaint."

The most important goal that the DOL should try to meet is to make sure the processes in its upcoming final rule lead to the most accurate prevailing wage determinations, said Scott Hecker, senior counsel at Seyfarth Shaw LLP, a former DOL attorney.

"That's where it's certainly important for the department to listen to all stakeholders ... Compliance and education coming from the department to achieve the goal of clarity is going to be hugely important," he said. "And it should, hopefully, be a collaborative effort as opposed to an enhanced enforcement effort. Clients we've talked to really want clarity and time, they want to know what they're supposed to do, and they need to have the time in which to do it, because some of these things aren't easy to just turn the aircraft carrier and shift gears."

--Additional reporting by Daniela Porat. Editing by Kelly Duncan and Jay Jackson Jr.