

DAVIS-BACON ACT (DBA) UNFUNDED PLAN CHECKLIST

Unfunded or self-funded plan fringe benefits are costs to a contractor or subcontractor which may be reasonably anticipated in providing benefits of the type described in the DBA [40 U.S.C. § 3141(2)(B); 29 CFR § 5.23]¹, documented in an enforceable commitment to carry out a financially responsible plan or program. Such plans must be submitted to the Department of Labor National Office to determine whether the benefits and the plan are “bona fide.”

Under the implementing regulations at 29 CFR § 5.28, an unfunded/self-funded plan must comply with four key requirements:

1. The plan can be reasonably anticipated to provide benefits.

An unfunded/self-funded plan, whereby a contractor makes out-of-pocket payments to provide benefits, must be bona fide, or genuine, and it must be “reasonably anticipated” that it will withstand a test of actuarial soundness. An unfunded plan may retain or utilize an outside consultant to prepare an annual financial analysis to develop a reasonable estimate of monthly costs for the benefits to be provided by the plan. Unfunded plans cannot take Davis-Bacon credit for the employer’s administrative costs or employee contributions. Employer contributions to the plan must be made no less often than quarterly. Many unfunded/self-funded health insurance plans have a stop-loss insurance policy whereby a separate premium is paid to a third party carrier to insure against catastrophic claims.

2. The plan must represent a commitment that can be legally enforced.

A bona fide unfunded/self-funded plan or program must also be administered in compliance with, and be enforceable under, the Employee Retirement Income Security Act of 1974 (ERISA).

3. The plan must be carried out under a financially responsible plan or program.

Many bona fide plans or programs utilize third party firms to manage the payment of costs for the benefits provided and to ensure that company employees receive the proper benefits under the plan. Many plans will allow a fund manager, or third party, to pay benefit claims by withdrawing funds from a company operating account. These payments are not negotiable and may not revert in any manner to the employer.

4. The plan or program must be communicated in writing to employees. This communication is often a Summary Plan Description (SPD). It may also be in the form of a checklist of benefits or in an employee handbook.

¹ The DBA is available at: www.dol.gov/whd/regs/statutes/dbra.htm. The regulations are available at: www.wdol.gov/library.aspx.

Unfunded/self-funded plans submitted to the Department of Labor for review should include a letter and documentation that:

1. Identifies the benefit(s) to be provided;
2. Explains the funding/contribution formula;
3. Explains the financial analysis methodology used to estimate the costs of plan benefits and contributions to it;
4. Specifies the frequency of employer contributions to the plan;
5. Advises of whether employer contribution amounts are different for Davis-Bacon and non-prevailing wage work;
6. Identifies the administrator of the plan and the source of the funds the administrator uses to pay the benefits provided by the plan;
7. Advises of the ERISA status of the plan; and
8. Identifies how the plan is communicated to employees.

Plans should be submitted to:

Branch Chief
Branch of Government Contracts Enforcement
Wage and Hour Division, Room S-3006
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210