

AREA PRACTICE

To determine the proper classification for work performed on a Davis-Bacon covered project, it may be necessary to examine **local area practice**.

- ◇ There are no nationwide standard classification definitions under the DBA. (This differs from the SCA, as SCA classifications are defined in the *SCA Directory of Classifications*.)

Note: The Dictionary of Occupational Titles, published by the Department's Employment and Training Administration, cannot be relied on for making Davis-Bacon determinations regarding proper employee classification.

- ◇ The Wage Appeals Board ruled in *Fry Brothers Corp.* (WAB Case No. 76-6, 6/14/77) that the proper classification of work performed by laborers and mechanics is that classification used by firms whose wage rates were found to be prevailing in the area and incorporated in the applicable Davis-Bacon wage determination.
- ◇ Questions as to the proper classification for the work performed by a laborer or mechanic are resolved in accordance with prevailing local area practice. An "area practice survey" may be conducted by the WHD or by the contracting agency to determine proper classification of workers.

For advice regarding proper classification of workers and for guidance on the need to conduct an area practice survey to determine proper classification of laborers and mechanics on DBRA covered projects, consultation with the WHD Regional Wage Specialist is appropriate. (See <http://www.dol.gov/esa/programs/dbra/regions.htm>.)

Basic Principles for Conducting Surveys to Determine Prevailing Local Area Practice

- ◇ In accord with *Fry Brothers Corp.*, information to be considered in the area practice survey is from firms whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination.
 - ◇◇ If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are non-union rates, the dispute will be resolved by examining the practice(s) of non-union contractors in classifying workers who have been performing the duties in question in the area.
 - ◇◇ If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are union rates, the

dispute will be resolved by examining the practice(s) of union contractors in classifying workers who have been performing the duties in question in the area.

- ◇◇ If a combination of union and non-union rates are listed in the wage determination for the classifications that may have performed the work in the area, the dispute will be resolved based on the combined information from:
 - ◇◇◇ union contractors for the classification(s) for which union rate(s) are listed,
 - ◇◇◇ and
 - ◇◇◇ non-union contractors for the classification(s) for which non-union rate(s) are listed.
- ◇ Proper classification of the laborers or mechanics performing the work in question will be resolved by examining the classification practice(s) of contractors who performed the work in question on:
 - ◇◇◇ similar construction projects (building construction, residential construction, highway construction, heavy construction),
 - ◇◇◇ in progress in the same area (normally the same county),
 - ◇◇◇ during the year preceding the wage determination lock-in date for the contract in question (as discussed below; *see* 29 C.F.R. § 1.6(c)).
 - ◇◇◇ In the case of contracts entered into pursuant to competitive bidding procedures (as contrasted with contracting by negotiation), the year prior to bid opening;
 - ◇◇◇ The year prior to contract award in the case of contracts entered into pursuant to contracting by negotiation (such as contracts arrived at through requests for proposals (RFPs) or similar contracting methods);
 - ◇◇◇ In the case of projects assisted under the National Housing Act, the year prior to beginning of construction or the date the mortgage was initially endorsed, whichever occurred first; or,
 - ◇◇◇ In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, the year prior to beginning of construction or the date the agreement to enter a housing assistance payments contract was executed, whichever was first.

- ◇ The extent of the information required for making area practice determinations will depend on the facts in each case. For example:
 - ◇◇ If, in gathering preliminary data, all of the parties agree as to the proper classification, the area practice is thus established (i.e., a **“limited”** area practice survey).
 - ◇◇ However, if all parties do not agree (i.e., jurisdictional dispute between two unions, or management does not agree with the union, or where non-union rate(s) in the wage determination may apply and the practice among non-union contractors in the area varies), it will be necessary to determine by a **“full”** area practice survey which classification actually performed the work in question.

Preliminary Steps for Conducting Surveys to Determine Prevailing Local Area Practice

1. Develop a clear description of the specific work for which a determination on proper classification is needed. (Examples: tying reinforcing rods for highway construction on a bridge, installation of process piping in a treatment plant, installing the metal roof on a building.)
2. Note the local area (generally the county) where the area practice issue is to be resolved, and the type of construction (building, residential, highway, or heavy) on which the work in question is to be performed.
3. Identify the area practice survey timeframe. (What is relevant is contractors' classification practices prior to award (or other applicable lock-in date) for the project on which the question of proper classification is to be resolved.)
4. Determine what classifications listed in the applicable contract wage determination (same county and type of construction) might perform the work duties in question.
5. Examine the “identifiers” for each such classification and determine whether the rate for each reflects a union negotiated or non-union wage rate.
 - ◇ Non-union rates in a Davis-Bacon wage determination are normally listed in a wage rate block that has an “SU” identifier, and appear in alphabetical order in the list of classifications in the wage determination. See the “Wage Determinations” section of this Resource Book for further information.
 - ◇ Union rates are listed under identifiers that refer to the union whose rates are reflected in a given wage rate block in the Davis-Bacon wage

determination. A list of identifiers used to designate various craft unions appears in the “Wage Determinations” section of this book; usually the local union number follows that designation.

How to conduct a limited area practice survey to determine the proper classification of work

If the applicable wage determination reflects union rates for the all classifications involved:

6. Contact the unions that may have jurisdiction over the work in question to determine whether the union workers performed the work on similar projects in the county in the year prior to the wage determination lock-in date (contract award date, or other date, as described above) for the project at issue.
 - ◇ **Note the following criteria for usable data:**
 - a. **Similar projects** (same type of construction).
 - b. In the **same county** as the project in question.
 - c. Usable time frame is **one year prior to the wage determination lock-in date** for the contract in question, as established by 29 CFR 1.6(c).

If union contractors performed the work, each union should be asked how the individuals who performed the work in question were classified.

If no union workers performed any of the work in question in the county during the survey timeframe, Wage and Hour should be contacted for further guidance.

7. The information provided by the unions should be confirmed with collective bargaining representatives of management, *i.e.*, the contractor representatives.
 - ◇ These would include contractors' associations such as:
 - Local chapters of the Associated General Contractors of America (AGC)
 - The National Electrical Contractors Association (NECA)
 - Local contractor associations that bargain with the unions

(If, in response to the limited area practice survey, specific contractors who may have performed the work in question are identified, they may be contacted to confirm whether they have been performing the work in question in the area.)

If all parties agree as to the proper classification for the work in question, the area practice is established.

If a contracting agency encounters a situation where two unions are engaged in a jurisdictional dispute over a specific type of work and both have performed the work in question during the applicable time period, the contracting officer should contact Wage and Hour for further guidance.

If the applicable wage determination reflects non-union rates for all the classifications involved:

6. Contact open shop contractors (many are members of the Associated Builders and Contractors of America (ABC)) and ask whether they performed the work in question on similar projects underway in the county during the survey timeframe.
 - ◇ If so, these contractors should be asked how the employees who performed this work were classified.
 - ◇ If all contractors agree, or if a clear majority of the contractors agree, the area practice is established.
 - ◇ If no open shop contractor performed the work at issue in the county during the survey timeframe, contact Wage and Hour for further guidance.

If the applicable wage determination reflects a mix of union and non-union rates for the classifications involved:

6. Contact the unions, and contact union and open shop contractors (and/or their associations) to determine who performed the work at issue on similar projects during the survey timeframe.
 - ◇ If all parties agree, or if a clear majority of the parties agree on the classification, the area practice is established.
 - ◇ Wage and Hour should be contacted if no work of the type at issue was performed in the county during the applicable time frame discussed above.

For any type of wage determination (whether based on union rates, non-union rates, or a mixed schedule):

- ◇ If the parties contacted in the limited area practice survey **do not** agree (i.e., jurisdictional dispute between the unions, management does not agree with union, or disagreement between the open shop contractors), or if there is no clear majority in agreement, then it is necessary to conduct a **full area practice survey**. When a full area practice survey is needed, the contracting agency should contact the Wage and Hour Regional Wage Specialist for assistance, guidance and coordination in the conduct of the survey.

How to conduct a full area practice survey to determine the proper classification of work

6. Identify similar projects in the same geographical area as the project under investigation (usually the county) which were in progress during the period one year prior to the wage determination lock-in date of the contract involved in the dispute/investigation.
 - ◇ If no similar projects were built in the area during that time frame, contact Wage and Hour for advice in expanding the survey's geographic scope and/or its time frame.
7. Identify firms that performed the work in question on these projects and determine those from which data should be collected – according to whether the relevant classifications in question in the wage determination are either non-union rates, union rates, or both. (For example, only non-union wage rates in the wage determination are involved, information from union contractors is not relevant; if only union rates are involved, information from open shop contractors is not relevant.)
8. For each project, obtain data from the week in which the greatest number of employees performed the work in question, and record how many performed such work on each project and how such employees were classified and paid.
9. Compile all relevant information received and total the number of employees who performed the work in question in each classification reported.
 - ◇ **The classification which has the clear majority of employees performing the work in question is the proper classification.**
 - ◇ If the data does not show that at least 60% of the workers who performed the duties in question were classified in the same classification, contact Wage and Hour for further guidance.