

## FRINGE BENEFITS

### **Definition** 29 C.F.R. § 5.2(p).

- ◇ Under the Davis-Bacon Act, the terms “wages,” “scale of wages,” “wage rates,” and “prevailing wages” include:
  - ◇◇ The basic hourly rate of pay,
  - ◇◇ Any contribution irrevocably made by a contractor or subcontractor to a trustee or third party pursuant to a bona fide fringe benefit fund, plan or program, and
  - ◇◇ The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated to the employees in writing.
- ◇ The statutory language of the Davis Bacon Act regarding fringe benefits is found at 40 U.S.C. § 3141, and is reiterated at 29 C.F.R. § 5.23.

### **In practice**

- ◇ The Davis-Bacon “prevailing wage” is made up of two interchangeable components – a basic hourly rate and fringe benefits that have been found prevailing in an area and published in a Davis-Bacon wage determination. Along with the basic hourly rate listed on the wage determination, a fringe benefit will be listed for any classification for which fringe benefits were found prevailing. The total, including any fringe benefits listed, comprises the Davis-Bacon “prevailing wage” requirement.
  - ◇◇ This obligation may be met by any combination of cash wages and creditable “bona fide” fringe benefits provided by the employer:
    - ◇◇◇ The total, including any fringe benefits listed for the classification, may be paid entirely as cash wages;
    - ◇◇◇ Payments made or costs incurred by the contractor for “bona fide” fringe benefits may be creditable towards fulfilling the requirement; or
    - ◇◇◇ A combination of cash wages paid and “bona fide” fringe benefits may be used together to meet the total required prevailing wage.
  - ◇◇ Fringe benefits for DBRA must be paid for all hours worked – both straight time and overtime hours.

- ◇◇ Under DBRA, each classification stands alone and each laborer and mechanic is due the full prevailing wage, including fringe benefits, if listed for the classification, for all hours worked.

Example:

A Davis-Bacon wage determination requires:

Basic hourly rate	\$10.00
Fringe benefit	<u>1.00</u>
Total prevailing rate	\$11.00

The contractor can comply by paying:

1. \$11.00 in cash wages;
2. \$10.00 plus \$1.00 in pension contributions or other “bona fide” fringe benefits; or
3. \$9.00 plus \$2.00 in pension contributions or any combination of “bona fide” fringe benefits. (In this case, to compute the minimum overtime rate under CWHSSA, half the basic rate listed, i.e. \$5.00 must be added to the full \$11.00 straight time “prevailing wage.” Thus, under CWHSSA, the **overtime rate would be \$16.**)

Note: Under DBA/DBRA monetary wages paid in excess of the basic hourly rate may be used as an offset or credit to satisfy fringe benefit obligations, and vice versa.

**Application to all hours worked**

- ◇ Under Davis-Bacon, fringe benefits must be paid for **all** hours worked, including overtime hours. However, the fringe benefit amounts listed in the applicable wage determination may be excluded from the half-time premium due as overtime compensation.

For example:

An employee worked 44 hours as an electrician. The wage determination rate was \$12.00 (basic hourly rate) plus \$2.50 in fringe benefits. The electrician would be due:

$$\begin{aligned}
 44 \text{ hours} \times \$14.50 &= \$638.00 - (\text{straight time pay}) \\
 4 \text{ hours} \times \frac{1}{2} \text{ of } \$12.00 &= \underline{24.00} - (\text{overtime pay}) \\
 &= \$662.00
 \end{aligned}$$

**Crediting fringe benefit contributions to meet DBA/DBRA requirements**

- ◇ The Davis-Bacon Act (and 29 C.F.R. § 5.23), list fringe benefits to be considered.

Examples:

Life insurance

Health insurance

Pension

Vacation

Holidays

Sick leave

- ◇ The use of a truck is not a fringe benefit; a Thanksgiving turkey or Christmas bonus is not a fringe benefit. (See *Cody-Zeigler, Inc.*, WAB Case No. 89-19, April 30, 1991.)

- ◇ No credit may be taken for any benefit required by federal, state or local law, such as:

Workers compensation

Unemployment compensation

Social security contributions

Funded fringe benefit plans

- ◇ The contractor's fringe benefit contributions made irrevocably to a trustee or third party pursuant to a fund, plan or program, can be credited toward meeting the prevailing wage requirement, without prior DOL approval. For example:

- ◇◇ Contractor pays for health insurance monthly premiums.

- ◇◇ Contractor makes quarterly contributions to retirement plan trust.

- ◇ The amount of contributions for fringe benefits must be paid **irrevocably** to the trustee or third party.

- ◇ Contributions to fringe benefit plans must be made regularly, not less often than **quarterly**. (This requirement is specified in the standard Davis-Bacon contract clauses at 29 C.F.R. § 5.5(a)(1)(i).)

- ◇◇ Annual contributions into a plan do not meet this requirement. While profit sharing plans are bona fide within the meaning of the Act, profits are not determined until the end of the year. Therefore, the DOL requires contractors to escrow money at least quarterly on the basis of what the profit is expected to be.
- ◇ The contractor must make payments or incur costs in the amount specified by the applicable wage decision **with respect to each individual laborer or mechanic**. Thus, the amount contributed for each employee must be determined separately, and credit taken accordingly towards the prevailing wage requirement for each individual. (It is not permissible to take credit based on the average premium paid or average contribution made per employee.)
- ◇ Credit may not be taken for fringe benefit contributions made on behalf of employees who are not eligible to participate in the plan (e.g., those excluded due to age or part-time employment).
  - ◇◇ Some plans provide that contributions and allocations under the plan will only be made on behalf of participants who are employed on the last day of the plan year. No credit is permitted for such participants for whom no contribution is made or for contributions made for employees whose accounts receive no allocation solely because they are not employed on the last day of the plan year.
  - ◇◇ On the other hand, it is not required that all employees participating in a fringe benefit plan be entitled to receive benefits from the plan at all times. For example, an employee who is eligible to participate in an insurance plan may be prohibited from receiving benefits from the plan during a 30-day waiting period. Contributions made on behalf of these employees would be creditable against the contractor's fringe benefit obligations.
- ◇ A pension plan that meets the Employment Retirement Income Security Act (ERISA) requirements may be considered “bona fide” for DBA/DBRA purposes.
- ◇ Some pension plans contain “vesting” requirements. Where an employer contributes to the plan, employees may be required to complete a certain length of service before they have a nonforfeitable right to benefits based on the employer’s contributions to the plan. Thus, an employee who leaves employment before completing the specified length of service may forfeit all or part of the accrued benefit.
  - ◇◇ Such forfeitures are permitted, provided the plan is a bona fide plan that meets applicable requirements under ERISA, including minimum vesting requirements.
  - ◇◇ Forfeited Davis-Bacon contributions may not revert to the employer, but should be distributed among the remaining plan participants.

Unfunded plans

- ◇ A fringe benefit plan or program under which the cost a contractor may reasonably anticipate in providing benefits that will be paid from the general assets of the contractor (rather than funded by payments to a trustee or third party) is generally referred to as an **unfunded plan**. These generally include:
  - ◇◇ Holiday plans
  - ◇◇ Vacation plans
  - ◇◇ Sick pay plans
- ◇ No type of fringe benefit is eligible for consideration as an unfunded plan unless it meets the following criteria:
  1. It can be reasonably anticipated to provide benefits described in the Davis-Bacon Act;
  2. It represents a commitment that can be legally enforced;
  3. It is carried out under a financially responsible plan or program; and
  4. The plan or program has been communicated in writing to the laborers and mechanics affected.
- ◇ To insure that such plans are not used to avoid compliance with the Act, the DOL directs the contractor to set aside, in an account, no less often than quarterly, sufficient assets to meet the future obligation of the plan.

Annualization:

- ◇ Davis-Bacon credit for contributions made to fringe benefit plans are allowed based on the effective annual rate of contributions for all hours worked during the year by an employee.
- ◇ Examples:
  - ◇◇ For a defined benefit pension plan, or for a defined contribution pension plan which does not provide for immediate or essentially immediate vesting, if a contractor wishes to receive \$2.00 per hour credit for a pension contribution, the contractor must contribute at this same rate for all hours worked during the year. If this is not done, the credit for Davis-Bacon purposes would have to be revised accordingly.
  - ◇◇ If the firm's contribution for the pension benefit was computed to be \$2,000 a year for a particular employee, the employee worked 1,500 hours of the

year on a Davis-Bacon covered project and 500 hours of the year on other jobs not covered by the Davis-Bacon provisions, only \$1,500 or \$1.00 per hour would be creditable towards meeting the firm's obligation to pay the prevailing wage on the Davis-Bacon project. (Annual contribution – \$2,000, divided by total hours worked – 1,500+500 = 2000; i.e. \$2,000/2000hours = \$1.00 per hour.)

- ◇ For contributions made to defined contribution pension plans which provide for immediate participation and immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), and certain approved supplemental unemployment benefit plans, a contractor may take Davis-Bacon credit at the hourly rate specified by the plan. Under such plans, contributions are irrevocably made by the contractor, most, if not all, of the workers will become fully vested in the plan, and the higher contributions made during Davis-Bacon work result in an increase in the value of the individual employee's account. The amount of contributions to such plans should be in conformance with any limitations imposed by the Internal Revenue Code.
- ◇ Example: An employee works as an electrician where the wage determination rate is \$12.00 (basic hourly rate) plus \$2.50 in fringe benefits.
  - ◇◇ Where the employer provides the electrician with medical insurance in the amount of \$200 per month (\$2,400 per year), the employer would divide the total annual cost of the benefit by 2,080 hours (40 hours x 52 weeks) to arrive at the allowable fringe benefit credit.

(\$200 x 12 months) divided by 2080 hours = \$1.15 per hour.
  - ◇◇ If the employee in this example receives no other “bona fide” fringe benefits, then for each hour worked on a covered contract the individual is due \$12.00 (basic hourly rate) plus \$1.35 paid as cash (the difference between the \$2.50 per hour fringe benefit required under the applicable wage determination and the credit allowed for the provision of medical insurance.) Thus,

Basic hourly rate	\$12.00
Medical insurance benefit	1.15
<u>Additional cash due</u>	<u>1.35</u>
Total due per hour	\$14.50 (\$12.00+\$2.50)