



Session III – Regulation Reality in 2018 – The Latest on DBE/MBE, Overtime, and Prevailing Wages

May 3, 2018

10:15 a.m. – 11:15 a.m.

Speakers

Sarah Cox, Dorsey & Whitney LLP

Rebecca Bernhard, Dorsey & Whitney LLP

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2018 Dorsey & Whitney Annual Construction Symposium

Session III – Regulation Reality in 2018 – The Latest on DBE/MBE, Overtime, and Prevailing Wage

Sarah Cox
Associate, Dorsey & Whitney LLP

Rebecca Bernhard
Partner, Dorsey & Whitney LLP



Who are we?



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Rebecca Bernhard, Partner

OFFICES

- Minneapolis
- Salt Lake City

PRACTICE

- Labor
- Employment
- Immigration
- Federal Contract Compliance & Audits
- Corporate transactions
- Negotiating with unions
- Post-acquisition & post-divestiture integration



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Sarah Cox, Associate

OFFICE

- Seattle

PRACTICE

- Construction & Design Litigation
- Construction & Design contract negotiation
- Alternative Dispute Resolution
- Mechanics lien perfection, negotiation, and foreclosure
- Federal contract claims resolution



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Overview of Presentation

- **DBE/MBE Qualification**
 - Background & Relevant Laws
 - Certification Requirements
 - OFCCP and EEOC
- **Overtime**
 - Background & Relevant Laws
 - Obama Administration Approach
 - Litigation
 - What This Means for You
- **Prevailing Wages**
 - Background & Relevant Laws
 - Obama Administration Rules
 - Trump Administration Approach
 - What This Means for You
- **Regulatory “Current Events”**
- **Questions**



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DBE/MBE Qualification



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Background & Relevant Laws

- **MBE:** Minority Business Enterprise
- **DBE:** Disadvantaged Business Enterprise
- Referred to in MN as “Disadvantaged Business Enterprise Program”
 - 26 CFR 26
 - Established to ensure women- and minority- owned businesses have an opportunity to participate in contracts financed by the U.S. Dept. of Transportation.
 - Applies only to transportation-related contracts that include **any amount of federal funds**.
 - Creates annual statewide goals for DBE performance on federally-funded contracts.
 - Administered by MN DOT Office of Civil Rights
 - Current goal is **11.7 percent** of the sum of federally-funded contracts to be performed and **7.13 percent** of the sum of all Federal Transportation Administration-funded contracts to be performed by DEBs for FY 2016-2018.



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Certification Requirements

- **DBE can be women, minority, disabled, or veteran-owned business.**
- Must be owned, capitalized, operated, and controlled by a member of an identified group.
- Requirements under the direct jurisdiction of the U.S. DOT.
- Must be **owned** and **controlled** by one or more socially and economically disadvantaged persons as defined by 49 CFR Parts 23 and 26.
- Businesses must show:
 - Minimum 51% ownership, control, expertise of one of the individuals listed above.
 - Control of daily management and operations of one of the individuals listed above.
- All applicants (each owner) must complete Statement of Disadvantage and a Personal Financial Statement affirming they are members of disadvantaged group and personal net worth, excluding primary residence or ownership equity in the company
- Business size can be measured in one of two ways or combination thereof:
 - Average gross receipts for three previous years.
 - Number of employees.



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- Must be **owned** and **controlled** by one or more socially and economically disadvantaged persons as defined by 49 CFR Parts 23 and 26.
- Businesses must show:
 - Minimum 51% ownership, control, expertise of one of individuals listed above.
 - Control of daily management and operations of one of the individuals listed above.
 - Net worth less than \$1.32 million.
- All applicants (each owner) must complete statement of Disadvantage and a Personal Financial Statement.
- Business size can be measured in one of two ways or combination thereof:
 - Average gross receipts for three previous years.
 - Number of employees.



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Overtime



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Background & Relevant Laws

- **Fair Labor Standards Act:** Unless exempt, employees covered by the FLSA must receive overtime pay for hours worked over 40 in a workweek at a rate not less than time and one-half their regular rates of pay.
- **Standard Salary Level:** \$23,660
- **Exemptions:**
 - Excludes “blue collar” workers and police officers, firefighters, paramedics, and other first responders
 - Must be compensated at salary or fee basis of at least \$455/week
 - Includes:
 - Executives
 - Administrative employees
 - Professionals
 - Computer employees
 - Outside sales
 - Highly compensated employees (over \$100,000)



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Obama Administration Rule Change

- **Obama-era Secretary of Labor Tom Perez (now DNC Chair) issued a new regulation on overtime pay and eligibility on July 6, 2015.**
- **Set to take effect December 1, 2016.**
- **The new rule:**
 - **Set the standard overtime salary level to the 40th percentile of full-time salaried workers in the lowest wage census region (the South).**
 - Translates to \$913/week or \$47,476 annual for a full-year worker.
 - **Set total annual compensation requirement for highly compensated employees to annual equivalent of 90th percentile of full-time salaried workers nationally (\$134,004).**
 - **Established mechanism for automatically updating the salary and compensation every three years to maintain levels at the 40th percentile and to continue to provide useful and effective tests for exemptions.**
 - **Amended the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the new standard salary level.**



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Litigation

- ***State of Nevada, et al. v. Department of Labor (2017)***
- **Plaintiffs:**
 - Group of States
 - U.S. Chamber of Commerce
 - Eastern District of Texas
- **Relief Requested:** Declaratory and injunctive relief halting implementation of new rule.
- **Court:**
 - November 2016: Injunction granted. Blocked new overtime regulation from taking effect.
 - August 2017: Summary judgment in Plaintiffs' favor granted. New rule struck down as unlawful, excessive exercise of DOL's delegated authority.



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Prevailing Wages



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Background & Relevant Laws

- **Relevant Statutes:**
 - Davis-Bacon and Related Acts
 - McNamara-O’Hara Service Contract Act
 - Contract Work Hours and Safety Standards Act
 - Copeland Anti-Kickback Act
 - Walsh-Healey Public Contracts Acts



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Davis-Bacon and Related Acts

- **Davis-Bacon and Related Acts (“DBRA”)**
 - Requires payment of minimum prevailing wages to laborers and mechanics on federal and federally-assisted construction projects in excess of \$2,000 for the **construction, alteration, or repair** (including painting and decorating) of public buildings or public works.
 - Contractors and subcontractors must pay their laborers and mechanics no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area.
 - Directs Dept. of Labor to determine such locally prevailing wage rates.



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Industry Impact?

- **National Association of Home Builders First Vice Chairman (now Chairman) Granger MacDonald (March 22, 2016).**

Image omitted



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Industry Impact?

The law's original intent, however, has been frustrated by burdensome regulations and prevents taxpayers from benefitting from competitive bidding. For NAHB members, the requirement to use Davis-Bacon wage rates can substantially increase the cost of constructing affordable housing. As this law is currently enforced, it is artificially driving up construction costs on apartment communities that include HUD financing. Further, the compliance burdens are creating barriers to entry for small mom-and-pop subcontractors to work on these projects.

Over the years my business has lost many subcontractors due to constraints over Davis-Bacon, including subcontractors we have worked with for over a decade. These smaller subcontractors, like our builder members, are ill-equipped to deal with the compliance burdens and reporting mandates. For example, Davis-Bacon requires the subcontractors, as well as the general contractors, to manage payrolls, make payments and report wage information on a *weekly* basis.

The onerous Davis-Bacon requirements are reducing the supply of subcontractors. NAHB estimates that subcontractors account for 65 percent of multifamily construction costs, but it is not only the paperwork burdens that are scaring some builders and subcontractors away from HUD projects where Davis-Bacon applies. Fines and liability associated with Davis-Bacon are a deterrent. NAHB has heard from builders who are held liable for violations of their subcontractors even though the subcontractor submitted certified payroll documentation. In fact, the DOL has held builders accountable for their subcontractor's fraud, such as falsifying certified payroll documents.



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Trump Administration Approach to Prevailing Wages

- **Late 2016 and 2017: Speculation that Trump infrastructure plan could repeal or suspend the Davis-Bacon Act.**
- **Excerpt from New York Times Interview (*image omitted*).**

Full interview available at: <https://www.nytimes.com/2017/04/05/us/politics/donald-trump-interview-new-york-times-transcript.html?smid=tw-nytimes&smtyp=cur&r=0>



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Trump Administration Approach (cont'd)

- **Two weeks came and went, no announcement.**
- **Meetings with union leaders indicated that DBRA would remain.**
- **Conservative media claimed the “DBRA” was “blatantly protectionist” and that he would be forced to repeal DBRA if he wanted to appease anti-spending supporters and members of the GOP.**



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2018 Infrastructure Plan

- On February 11, 2018, President Trump unveiled the 53-page infrastructure plan.
 - 53 pages.
 - Worth \$1.5 trillion.
 - **Maintained DBRA prevailing wage protections.**
- No indication that DOL will raise prevailing wages anytime soon.

Current Events

OFCCP & EEOC Merger?

- **OFCCP: Office of Federal Contract Compliance Program**
 - **Organization:** Branch of U.S. Dept. of Labor
 - **Purpose:** Responsible for ensuring that employers doing business with the Federal Government comply with the laws and regulations requiring nondiscrimination.
- **EEOC: Equal Employment Opportunity Commission**
 - **Organization:** Falls directly under executive; bipartisan commission comprised of five presidentially appointed members.
 - **Purpose:** Investigates discrimination complaints based on individual's race, children, national original, religion, sex, age, disability, sexual orientation, gender identity, genetic information, and retaliation for reporting, participation in, and/or opposing discriminatory practice.



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OFCCP & EEOC Merger?

- **Merger of OFCCP into EEOC included in President Trump's proposed budget for fiscal year 2018:**

“OFCCP and EEOC will work collaboratively to coordinate this transition to the EEOC by the end of FY 2018. This builds on the existing tradition of operation coordination between the two agencies. The transition of OFCCP and integration of these two agencies will reduce redundancies, promote efficiencies, improve services to citizens, and strengthen civil rights enforcement.”

– Proposed FY 2018 Budget Statement



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Tom Dowd Letter



Consolidating the two agencies would require legislative action to amend the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act to transfer enforcement authority from DOL to the EEOC. Rulemaking would be required to implement the amendments. Additionally, the analysis of relevant authorities includes a consideration of the different enforcement structures and approaches used by the two agencies. For instance, the EEOC's enforcement structure is judicial in nature while OFCCP utilizes the processes and procedures of DOL's Office of Administrative Law Judges and Administrative Review Board to carry out its enforcement responsibilities. Bridging these and other differences will likely prove time consuming and could delay the expected FY 2019 start for the proposed consolidation, which would result in a concomitant delay in the realization of intended benefits.

should be able to achieve desired reforms in the near term, without immediate recourse to legislative and regulatory action. OFCCP will continue to collaborate with the EEOC to further explore other opportunities to identify operational cost savings by eliminating existing redundancies.

Be assured that the Institute's thoughts and concerns about the consolidation proposal, as well as those of other stakeholders, are being considered by DOL and the Administration.

Sincerely,

THOMAS M. DOWD

cc: The Honorable Mick Mulvaney, Director
Office of Management and Budget

Source: U.S. Department of Labor 2017



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Senate Funding Bill Rejects Merger

Senate Appropriates Committee Report:

The Committee rejects the budget's proposal to begin plans to merge the OFCCP with the Equal Employment Opportunity Commission. The Committee strongly urges OFCCP to find efficiencies and cost savings, including the consolidation of offices, within its current budget structure. This should include a review of the current OFCCP office locations and infrastructure across the country and whether these offices align with current workload needs.

Source: <https://www.appropriations.senate.gov/imo/media/doc/FY2018%20Labor%20HHS%20Education%20Appropriations%20-%20Report%20115-150.pdf>



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White House Regulatory Rollback

- **White House announced July 19, 2017 that it intends to move forward with aggressive regulatory rollback.**
- **Neomi Rao, White House Office of Information and Regulatory Affairs.**

Image omitted



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Environmental Regulations

- **Since taking office, President Trump sought reversal of more than 60 environmental rules.**
- **Includes:**
 - **Overtaken flood building standards for federal infrastructure projects:**
 - Required federal agencies to protect new infrastructure projects by building to higher flood standards.
 - **Delayed compliance dates for federal building efficiency standards:**
 - Rules previously set efficiency standards for the design and construction of new federal buildings. Trump delayed compliance to Sept. 30 of last year, but unclear whether rules are now in effect.
 - **Review and potential revocation of permitting programs for certain power plants:**
 - Announced by Secretary of the EPA Scott Pruitt, who established panel to reconsider permitting process for building new facilities that might pollute air.



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New Labor Department Self-Reporting Initiative

- Six month trial program.
- Will allow employers who are not currently being investigated for wage violations to report potential violations to the DOL.
- Intended to incentivize employers to come forward by bypassing litigation.
- Sec. of Labor Jim Acosta: “By bypassing the litigation system, [the DOL] hopes that the dollars go back to the employees much more quickly.”
- Similar system by President George W. Bush.
- DOL has recovered more than \$1.2 billion in back wages for unpaid minimum wages and overtime in the last five years.
- Need help? We can help you take advantage of this program.



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Questions?



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