

Strings Attached: Enhanced Enforcement of Federal Prevailing Wage Laws Against Recipients of Federal Stimulus Funds

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Companies signing up to receive federal funds under the recently enacted stimulus package may wind up with more than they bargained for; namely increased Department of Labor scrutiny.

The Federal Stimulus law, the American Recovery and Reinvestment Act ("ARRA" or "Stimulus Law"), contains a little-noticed provision that requires all recipients of funds or federally assisted bonds under that law to pay "prevailing" wages and benefits to employees on federally funded projects. The prevailing wage, determined by the U.S. Department of Labor ("DOL"), usually means pay will be based on the standard wage paid to union members for that type of work ("union scale"). Many employers will be surprised to learn that, due to the massive size and scope of the Stimulus Law, they are now subject to these federal prevailing wage requirements if they accept federal funds, or federally assisted bonds, for such projects as varied as weatherizing buildings, building new power plants, or paving roadways.

The DOL recently received a substantial increase in resources for enforcement of two union-friendly "prevailing wage" laws, the Davis-Bacon Act (the "DBA" or "Davis-Bacon") and the Service Contract Act (the "SCA"), both of which share a common purpose: to ensure the payment of "prevailing wages" (i.e., most commonly union scale wages), on construction projects (governed by the DBA) and on service contracts funded with federal money (governed by the SCA). The new resources devoted to enforcement, combined with the widespread distribution of funds under the Stimulus Law, means that some clients may soon find themselves subject to compliance reviews under these laws for the first time.

In addition, recipients of stimulus funds that pass through state agencies may also be subject to state-level prevailing wage requirements. Some states – such as California – have prevailing wage laws with requirements beyond those specified in federal statutes and which may require the payment of wages higher than those specified by DOL.

DOL has launched a series of Prevailing Wage Conferences to be held across the country during the next year to educate federal contracting personnel, and the broader community, about DOL's newly enhanced enforcement activities under Davis-Bacon and the SCA. The Conferences are focused on DOL initiatives related to ARRA. The first of these conferences was held in Washington this summer. We attended this conference and report below on its highlights.

The Stimulus Law Requires Compliance with Prevailing Wage Laws

The ARRA contains provisions that tie stimulus funding with the DBA and SCA. Federal agencies directly contracting for construction work using ARRA funds must ensure that bid solicitations and resulting contracts contain DBA labor standards and wage determinations. Also under the ARRA, federal agencies are required to ensure that recipients of assistance funded by ARRA appropriations require contractors and subcontractors to pay laborers and mechanics who are employed on ARRA-assisted construction projects at least the DBA prevailing wages. Also, ARRA appropriations will fund federal service contracts subject to the SCA.

Division A of ARRA appropriates substantial funding for:

- Construction, alteration, and repair of federal buildings;
- Infrastructure projects such as roads, bridges, public transit, water systems, and housing; and
- Various activities that federal agencies may contract out for service employees to perform, which would be covered by the SCA.

Davis-Bacon requirements apply to both federal construction contracts funded by ARRA and most ARRA-assisted construction projects.

For example, a private entity that accepts ARRA funding for weatherization (i.e., installation of solar panels) under the Department of Energy's program may be subject to the prevailing wage requirements of the Davis-Bacon Act.

Division B of ARRA requires application of DBA prevailing wage requirements to projects financed with certain tax-favored bonds issued after ARRA enactment (February 17, 2009).

- New clean renewable energy bonds
- Qualified energy conservation bonds
- Qualified zone academy bonds
- Qualified school construction bonds
- Recovery zone economic development bonds

The end result of ARRA is that most work funded by ARRA will be subject to the Davis-Bacon Act and/or the Service Contract Act. The Wage and Hour Division has established a special ARRA website where All Agency Memorandum No. 207 (which sets forth the DOL's policies on ARRA compliance), important links, and other relevant information on ARRA is posted and updated: www.dol.gov/esa/whd/recovery.

DOL Enforcement Initiatives

DOL speakers at the Conference in Washington provided some insight into where DOL is headed in the coming months.

Special Wage & Hour Division Enforcement Efforts Under the American Recovery and Reinvestment Act

- According to Clarence Strain in the Government Enforcement and Policy office of the wage and hour division of DOL, 32 Wage and Hour investigators have been promoted to “special investigators” and will now focus on investigating the recipients of ARRA money. These 32 seasoned investigators will also train an additional 200 newly hired investigators who will also look at ARRA issues.
- The Wage & Hour Division of DOL will launch an aggressive enforcement program on October 1. (The presenter, Mr. Strain, did not clarify as to whether companies can expect investigations to begin as of October 1, or whether companies in violation will receive notice as of October 1. It is unclear whether investigations are starting October 1 or violations are being flagged starting on October 1.) Last year only three government contractors were debarred for violations; going forward DOL’s goal is to “get as many as they can.”
- DOL field investigators emphasized that they can, and will, interview employees on site and during working hours, and are likely to become more aggressive if they perceive resistance by employers or contractors.

Enhanced OFCCP Enforcement Efforts Under the American Recovery and Reinvestment Act

- DOL’s Office of Federal Contract Compliance Programs (“OFCCP”), the affirmative action enforcement agency, will also be hiring additional investigators to look at contractors receiving ARRA funds. Although OFCCP representatives were not as forthcoming as the Wage & Hour Division, it appears that there may be aggressive enforcement of OFCCP obligations against companies that receive ARRA money.
- OFCCP representatives (Diego Gonzales, a Compliance Officer in the Policy Division, and Caroline Robinson, who works in the Enforcement and Appeals section) stated that there will be two different “lists” on which a government contractor can appear: (1) Federal Contractor Selection System (“FCSS”) list; and (2) ARRA FCSS list. A government contractor can be on both lists. Normally, a contractor found to be in compliance on the FCSS list will not be subject to another compliance review for two years. However, if that contractor gets ARRA money, another compliance review will be permitted six months after receipt of the ARRA funds.

Uncertainties Abound

It was notable that DOL officers do not fully understand how ARRA will impact their current compliance systems. An OFCCP Branch Chief gave a presentation on the G-FIVE Initiative, which provides a three-year period without OFFCP inspections for those recognized for hiring veterans. When asked how this program is impacted by ARRA’s six-month compliance schedule, he indicated he was unaware of ARRA’s requirements.

Employer Action Steps

Employers who have received ARRA money, are seeking ARRA money, or are even eligible for ARRA money, are encouraged to:

- Attend one of the ongoing DOL conferences and seek advice of experienced counsel to ensure that you are fully aware of all the strings that come with this money. DOL will be continuing to host free conferences throughout the country.
- Examine pre-existing state-level requirements in addition to the new federal requirements.
- Review existing pay practices and make corrections before they become problems.
- Establish protocols and educate all managers and HR personnel.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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