



Memorandum

To: Chair Helen Head
From: Annie Noonan, Commissioner
Re: Prevailing Wage "Credit"
Date: 4/23/15

In response to questions posed to the Vermont Department of Labor, relating to the proposed sick leave bill and its interplay with the federal Davis Bacon Act (DBA) Prevailing Wage rate and "credit", we have reviewed applicable law and regulations, and offer the following information.

We have drawn upon various federal regulations, as well as publications from both the USDOL and states that have adopted the federal prevailing wage rate. In addition, the Vermont Agency of Transportation and the Vermont Attorney General's Office staff have participated in the analysis of this question.

A "Prevailing Wage" (PW) under the federal law means the total base hourly rate of pay and 'bona fide' fringe benefits customary or prevailing for the same work in the same trade or occupation in the area where the project is to be constructed. Fringe benefits must be "bona fide", such as health insurance, pension, life insurance, vacation, holiday pay, sick pay, dental insurance. 29 CFR 5.28 provides information about the types of payments that can be used to meet prevailing wage requirements under the Davis-Bacon Act.

There is no difficulty in determining whether a particular fringe benefit is "bona fide" where the benefits are common to the industry and are paid directly to the employees in cash or into a fund, plan or program. Where a particular fringe benefit or benefit plan is not of the conventional type described herein, it may require a determination by USDOL as to whether the fringe benefit or plan is "bona fide" in accordance with the requirements of the Davis Bacon Act. This is often true with respect to Unfunded Plans.

An "unfunded plan" refers to a fringe benefit plan or program which the contractor funds from the company's general assets (rather than by payments to a trustee or third party). Unfunded fringe benefits generally include holiday, vacation and sick day plans. A contractor's reasonably anticipated costs in providing bona fide fringe benefits under such a plan may be creditable towards meeting the Davis Bacon prevailing wage obligations if certain requirements are met:

1. It can be reasonably anticipated to provide benefits described in the Davis Bacon Act.
2. It represents a commitment to the employee that can be reasonably enforced.
3. It is carried out under a financially responsible plan or program.
4. The plan or program has been communicated in writing to the affected employees.

The first question we examined is the general prohibition by the DBA to allow a contractor to take "credit" for a benefit mandated by federal, state or local law. This is generally the case with contributions made for Social Security or Workers Compensation.

However, upon closer review, we found that an analysis had to be made regarding “funded” or “unfunded” plans. For example, in the case of the mandated employer health care assessment, despite the fact that this is a mandated program, the employer’s monies go into a fund that meets the four (4) criteria listed above, and as such, the Vermont Agency of Transportation and the Vermont Attorney General agree that the contractors can take “credit” for those costs against the prevailing wage rate, following the required DBA-PW formulas. VTRANS has allowed contractors that “credit”.

In this analysis, we note that many vacation and sick leave plans in the construction industry are generally “Unfunded Plans” within the meaning of 29 CFR § 5.28. If the employer is required to provide 3 days of sick leave, such as proposed under the bill, “credit” against the Prevailing Wage rate can still be taken provided that the four (4) criteria cited above are met, and that the employer pays out the dollar value of the unused sick leave, which can be done either annually or upon separation of the employee. The reason for this requirement is, simply stated, that the employer has taken a “credit” against the hourly rate that the employee would be entitled to under DBA-PW, and, as such, the employee is guaranteed either the benefit or the money. (For example, an employee is entitled to \$15.00 per hour under DBA-PW, but the employer calculates the benefit to equal \$1.00 per hour, and pays the employee \$14.00 per hour, the employee is entitled to either the benefit or the money). In essence, however, the employee is only entitled to the amount ‘deducted’ if they do not use the benefit (in this case, the sick leave hours), or the payout for 24 hours at the amount/rate deducted. If an employee should terminate prior to becoming eligible under a vacation or sick leave plan, and amounts have been paid into an account on such employee’s behalf for which the contractor has taken credit towards meeting its prevailing wage obligations, then the employee must be paid those amounts from the account upon termination.