APPENDIX I

The following Q&A's are from the column Amy Cavanaugh, CPC, QPA, QKA writes on BenefitsLink (see benefitslink.com)and are reprinted here with her permission. My thanks to Amy for sharing this.

http://benefitslink.com/modperl/qa.cgi?db = qa_davisbacon

Question 1: What is annualization?

Answer: Annualization is the concept of basing Davis-Bacon plan contributions to a qualified retirement plan based on an effective annual rate of contributions for all hours worked (on both Davis-Bacon and non-Davis-Bacon projects).

For example, assume that a contribution for an employee under a money purchase plan is calculated to be $2,000. Assume also that Davis-Bacon fringe compensation for this individual is $1,500, based on 500 hours of Davis-Bacon work. And assume the employee worked a total of 1,000 hours of service. In order for the contractor to meet its obligation with respect to the Davis-Bacon wages, only $1,000 of the $2,000 contribution can be funded with Davis-Bacon fringe benefit dollars. The other $1,000 would need to be contributed by the employer.

Certain state Davis-Bacon acts require annualization in all instances. The U.S. Department of Labor, in its Davis-Bacon Resource Book (11/2002), states that unless a defined contribution pension plan provides for immediate participation and immediate or esstentially immediate vesting schedules (100% vesting after 500 hours of service), the Davis-Bacon contribution must be annualized. It is the concept of annualization that gives rise to the fact that most Davis-Bacon plans provide for immediate eligibility and full vesting.

Under the federal Davis-Bacon Act, designing the Davis-Bacon feature with immediate eligibility and full vesting avoids the need to annualize.

Question 2: Why is there so little research material available on Davis-Bacon retirement plans?

Answer: Here's some background. The Davis-Bacon Act is governed by the Department of Labor through its wage and hour division, rather than the EBSA (the Employee Benefit Security Administration). The labor law provisions that address compliance with Davis-Bacon are concerned with timely and complete payment of the prevailing wage to covered workers. The DOL issued Davis-Bacon regulations with respect to the fringe benefit component, but those regulations are very general and have little or no specific guidance with respect to qualified retirement plans, except to set forth general rules with respect to timing of contributions and acceptable benefits.

A qualified plan that is funded in part or entirely with Davis-Bacon contributions must comply with the Davis-Bacon regulations and all of the terms of ERISA and the Internal Revenue Code. To the extent any corrective measures must be taken in order to comply with the qualification requirements set forth in the Code, it is important to make sure that the correction does not give rise to a Davis-Bacon violation. An example of this would be a Code section 415 violation or the making of excess aggregate contributions. In a non-Davis Bacon situation, such contributions could be reallocated as a forfeiture, but such a reallocation might cause the employer to be in violation of the Davis Bacon Act.

Important notice: Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. The laws, regulations and court decisions in this area change frequently. Answers are believed to be correct as of the posting dates shown. The completeness or accuracy of a particular answer may be affected by changes in the laws, regulations or court decisions that occur after the date on which that Q&A is posted.

Question 3: Does a Davis-Bacon Plan need an independent trustee?

Answer: No, it does not. Although the Davis-Bacon regulations state that Davis-Bacon fringe benefit contributions held in trust must have an independent trustee, the DOL's Wage and Hour people have clarified that ERISA sets forth sufficent safeguards to protect employee benefit pension plans from financial losses caused by

mismanagementand misuse of plan assets. Therefore, credit will not be disallowed, if the employer/trustee assumes the responsibilities imposed on fiduciaries under ERISA.

A fiduciary violation also would give rise to failure to pay covered workers proper wages, because the Davis-Bacon contribution to the plan is considered part of the covered worker's Davis-Bacon wages.

Question 4: Er, um, what's the Davis-Bacon Act, and why do I need to know about it as a plan administration consultant/TPA?

Answer: For those who slept through history class in high school (such as myself), the Davis-Bacon Act was depression- era federal legislation enacted to prevent unfair labor practices in nonunion situations.

Currently, the Act requires any contractor bidding on a government job in excess of $2,000 to pay workers at a "prevailing wage."

The purpose of the Act was to support labor unions by protecting workers from the economic disruption caused by out-of-town contractors coming into an area and securing federal construction contracts by underbidding local wage levels. During the depression, it was common for a businessman to gather crews of low-paid workers from rural areas (generally minority workers) and take these crews to metropolitan areas in order to underbid established local construction companies.

Prevailing wage compensation can be broken down into two components:

* the prevailing wage, and
* the prevailing wage fringe

Davis-Bacon prevailing wages must be paid unconditionally and not less often than once a week. A contractor may discharge his obligation for the payment of the basic hourly rates and the fringe benefits in the following ways:

* By paying not less than the basic hourly rate and making a contribution for the fringe benefits in the wage determination.
* By paying in cash directly for the basic hourly rate and making an additional cash payment in lieu of the required benefits.
* By a combination of the above methods.

Contributions to a qualified retirement plan are one of the acceptable fringe benefits. Because such contributions must comply with ERISA, the Internal Revenue and the Davis-Bacon Act, administration of these plans can get tricky.

Davis-Bacon wages are most common in construction situations, but a similar law-- the Service Contracts Act-- applies to service workers in government buildings.

Question 5: If Davis-Bacon wages are made as salary plus health benefits, how are these employees treated for coverage testing purposes (Internal Revenue Code section 410(b)) when testing an ERISA plan for non-Davis-Bacon employees?

Answer: Section 410(b) sets forth certain statutory exclusions with respect to coverage under a qualified retirement plan. Although union employees are excluded, there is no Davis-Bacon exclusions. While it is common to negotiate Davis-Bacon wages in a manner similar to collective bargaining employees, to the extent Davis-Bacon employees (or Davis-Bacon wages) were excluded from consideration under a qualified plan, coverage and nondiscrimination testing would need to mathematically support their exclusion.
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Question 6: Are Davis-Bacon contributions to a qualified plan required to be 100% vested at all times?

Answer: Not in a defined contribution plan, if contributions are annualized (see Question 1).
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Question 7: If a company is an S Corp with a Davis-Bacon plan, do the owners of the company have to be excluded from the plan? If not, is there any downside to allowing them to participate in the plan?

Answer: There is no exclusion from the prevailing wage rules with respect to business owners or their family members. This means that for periods of covered work, the owner must be paid the prevailing wage. (But they are not required to be paid the prevailing wage to the extent they are preforming administrative tasks.)

The downside of letting an owner who is paid the prevailing wage into a Davis-Bacon retirement plan would be that Davis-Bacon retirement plans are subject to coverage and nondiscrimination testing. A large contribution to an owner (or an owner's family member) might cause the plan to fail one or more of those tests.

Question 8: Can the prevailing wage deposits be used to satisfy the Safe Harbor employer match contribution?

Answer: Yes, it can, but if it is being used as a match then care must be taken to make whole those Davis-Bacon employees who are not deferring.

Also, it is important to remember that safe harbor matching contributions cannot be subject to any sort of in-service withdrawal.

Because the safe harbor match is 100% vested, there is no need to annualize the contribution.
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Question 9: Can Davis Bacon contributions be used to satisfy the ADP test (as if they were deferrals)?

Answer: Yes, if the Davis-Bacon amounts are given all of the characteristics of a QNEC-- which means that they must be fully vested and not available for any sort of withdrawal.
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Question 10: An employer sponsors a profit sharing plan that allocates contributions by employee class and uses crosstesting to satisfy 401(a)(4). A Davis-Bacon employee has requested that his prevailing wage contributions (which equal 15% of his pay) be allocated to the plan. How is such a contribution considered with respect to coverage, nondiscrimination and the gateway minimum?

Answer: Your question raises several issues; I will attempt to hit the major ones.

First, you say that "an employee has requested that his prevailing wage contribution be allocated to the plan." That sounds like a cash or deferred election, which will be subject to all of the rules of elective deferrals in order to avoid current taxation. It will be subject to the ADP test and is tested for coverage in the elective deferrals bucket. The employee also needs to pay Social Security (FICA) taxes on the amount of the deferrals.

Elective deferrals are not eligible to be considered for purposes of meeting top-heavy minimum contributions or the gateway allocation.

If the employer decided to discharge its prevailing wage obligation by contributing some or all of the prevailing wage fringe component into a qualified retirement plan, the amount could be classified as a QNEC, safe-harbor non-elective, matching or employer nonelective contribution. The way the employer's contribution is classified would determine how the contribution is treated for purposes of coverage and nondiscrimination testing. If the amount is not considered a matching contribution, the prevailing wage contribution would be tested for coverage as a non-elective contribution and would be eligible for consideration in satisfying the gateway minimum and for top-heavy required minimum contributions.

To the extent that a prevailing wage contribution is not used to offset other employer contributions, the contribution would be subject to benefits, rights and features testing for current and effective availability. Although this generally is not a problem (because most covered workers are NHCEs), from time to time a Highly Compensated Employee will perform covered work. (Pay special attention to the attribution rules; for example, a son of the owner might be performing covered work, receiving a high level of prevailing wage supplements).

Most Davis-Bacon plans do not fall under the 401(a)(4) safe harbors due to the way allocations are calculated. It might be necessary to perform the general test on a contribution basis.

Question 11: Can administrative fees be paid with prevailing wage contributions?

Answer: Certain fringe benefit plans provide that the administrative expenses of the plan may be paid out of the trust fund.

If the plan administrator or trustee are comprised of the owner and/or officers and employees of the firm, the contractor's own administrative expenses in providing fringe benefits are not creditable towards discharging Davis-Bacon prevailing wage obligations.

To make a long story short-- yes, most expenses can be absorbed by the accounts.

Question 12: With the new proposed 401(k) regulations threatening to hamper a client's ability to do bottom-up QNECs, what effect will they have on the treatment of prevailing wage contributions as a QNEC? Will these contributions need to meet all the proposed requirements in the proposed regs?

Answer: First, remember that the regulations are in proposed form; there will be modifications before they are finalized.

With respect to QNECs, it's true that the proposed regulations radically reduce the availability of bottom-up and flat dollar QNECs to resolve ADP and ACP testing failures. To the extent a QNEC is going to be used in ADP testing, the rate must not exceed 5 percent of pay or meet a representative contribution rate test. Under this test, no NHCE can receive a QNEC that is more than twice the representative contribution rate. The representative contribution rate is the lowest QNEC contribution rate for any NHCE in a group of at least half of all eligible NHCEs or, alternatively, all NHCEs employed on the last day of the plan year.

This brings to mind several scenarios. If you are using the QNEC as a safe harbor nonelective contribution, the rate would need to be only 3 percent. The balance could be treated as a non-elective contribution and perhaps still be fully vested. Whether or not the QNEC would fall into the representative contribution rate test would depend on the demographics of the covered workers.

Remember, there are no special rules for Davis-Bacon contributions. They need to be comply with all of the requirements of ERISA and the Code without running afoul of the federal wage and hour restrictions with respect to covered work.

Question 13: Are the contributions for a Davis Bacon benefit plan exempt from payroll taxes, including Social Security and Medicare?

Answer: At the time of the contribution, the Davis Bacon fringe supplement would be treated like any other contribution to a qualified plan. So it's tax-deferred for the employees but tax-deductible for the employer.

The only time Social Security/Medicare would apply is if a participant were offered the fringe benefit supplement as cash but elected to defer the contribution into the plan.

Question 14: Which law has priority when a contractor is working in a state where the state prevailing wage law may be more onerous or restrictive (such as California), than the federal Law (the Davis-Bacon Act)?

Answer: You ask a good question. I am in New York, where the famous Rondout case was just overturned on appeal.

I'll try to cover this topic in a very general sense. New York has a more restrictive prevailing wage law than the federal Davis-Bacon Act. When the New York state DOL attempted to withhold payments to Rondout Electric because the company had failed to properly pay workers' fringe benefits, the company filed suit alleging that New York state's attempt to preempt federal law was a violation of the National Labor Relations Act. The lawsuit relied on the doctrine of "machinists preemption," because arguably the New York state law interferes with the equality of bargaining power between labor and management on both private and public works projects. A district court granted Rondout's motion for summary judgement-- which appeared to support federal preemption.

But the case recently was appealed, where the appeals court reversed the district court. The appeals court found that although the Supremacy Clause of the federal constitution provides that federal laws are the supreme "law of the land," state law is to be preempted only if Congress has specifically intended to create a federal law that leaves no room for state action. So if the federal law conflicts with a state law, then the federal law would prevail.

The appeals court found further than the New York prevailing wage law does not "conflict" with federal law. Rather, it found the law to be within the permissible scope of state regulation.

Under the machinists preemption, states are prohibited from imposing additional restrictions on economic weapons of self-help such as strikes or lockouts. The appeals court did not find the state's prevailing wage law to be a restriction of that magnitude. It pointed out that the National Labor Relations Act does not prescribe labor laws, but rather provides a means to provide parties the opportunity to fairly come to an agreement on matters relating to terms and conditions of employment.

Rondout argued that the state's regulation of the annualization of fringe benefits paid for covered prevailing wage work unfairly impacts the bargaining process, and that the only way to avoid annualization would be to pay the fringe supplement in cash (which requires employers and employees to incur additional payroll taxes and other expenses, thereby diluting the true value of the wage). The appeals court rejected the argument, finding instead that annualization does not encourage or discourage employees in promotion of their interests. Hence annualization of the prevailing wage supplement did not fall within the scope of the machinists doctrine.

So, under New York's version of the Davis Bacon law, annualization remains a requirement on state-covered work.

It is important to remember that federal contracts are governed under the federal Davis-Bacon Act, which only requires annualization in the case of a plan with a vesting schedule.

Question 15: Can Davis-Bacon (employer) contributions made to a qualified retirement plan be subject to a 300-hour vesting schedule, and if so, can those non-vested forfeitures be used to reduce future Davis-bacon (employer) contributions made to the plan?

Answer: According to the DOL Wage and Hour people, a contractor may take credit for contributions that provide for immediate (or essentially immediate vesting). Immediate vesting is considered to mean 100 percent vesting after an employee works at least 500 hours.

Forfeitures cannot be used towards discharging future Davis-Bacon obligations. They can be reallocated as additional employer contributions. To do otherwise would be tantamount to taking double credit.

Question 16: Under what circumstances can the Davis-Bacon portion of a 401(k) profit sharing plan contribution be withdrawn by a participating employee?

Answer: The withdrawal rules with respect to Davis-Bacon fringe compensation contributed to a tax-qualified retirement plan are the same as for all other tax-qualified retirement plans. This means that the withdrawal rights are

contingent on the type of plan the amounts are contributed to, the type of contribution the amounts are classified as, and the other terms and conditions of the plan document.

For example, if the plan is a money purchase plan, no in-service withdrawals are permitted prior to the plan's normal retirement age. In the case of a 401(k) plan, to the extent that the plan is designed as a safe harbor plan and Davis-Bacon amounts are used to fund the safe-harbor contributions, in-service withdrawals are not permitted. This is also true if the contributions are classified as QNECs or QMACs.

If in-service withdrawals are permitted in the plan for the type of contribution that the Davis-Bacon amounts are being classified as, then withdrawals are permitted due to hardship, for use as plan loans or upon the attainment of some other plan-specified event.

Question 17: In a profit-sharing plan with discretionary employer contributions and Davis-Bacon contributions only, is it permissible for the Davis-Bacon employees to be excluded from the discretionary employer contribution allocation? If so, how does such a plan meet 401(a)(4) in the event the discretionary employer contributions are substantial relative to the meager D-B contributions?

Answer: Davis Bacon contributions are subject to the coverage and nondiscrimination tests that apply to all other qualified retirement plans.

It is perfectly acceptable to limit prevailing wage workers to their Davis-Bacon fringe amounts and pay no other contributions on their behalf, if the plan can pass the coverage and nondiscrimination tests under that benefit structure.

Section 401(a)(4) testing would be performed using the general test. If the plan cannot pass nondiscrimination using the general test for contributions, it will be neccessary to cross-test the allocation.

In short, the Davis-Bacon act requires a certain amount be paid to workers. There is no special treatment in the tax code for Davis-Bacon workers (unlike the special treatment for union workers, for example). Once the money is in the plan, you test and treat it as you would any employer nonelective contribution.

Question 18: We have a company where only some of the employees work Prevailing Wage Jobs. We have two profit sharing plans established for this company. Plan #1 includes all employees (including HCE's); contributions are made on a non discriminatory basis, but compensation is limited to non-prevailing wage employment. Plan #2 covers only employees with Prevailing Wage Income; the contribution is limited to the allowable contribution for fringe benefits. There are no HCEs in Plan #2. Do we have any problems with passing nondiscrimination and coverage tests?

Answer: Whether or not you pass coverage and nondiscrimination will be dependent on the actual numbers. You will need to test both plans for coverage and nondiscrimination and use a 414(s) definition of compensation.

There are no special rules for Davis-Bacon employees under the Internal Revenue Code. The definition of compensation you describe in your question does not fall within the 414(s) safe harbor definition of compensation, which means that these plans do not fall within the defined contribution nondiscrimination safe harbors.

It is likely that Plan One and Plan Two will need to be aggregated in order to pass coverage and nondiscrimination. Therefore, the fact that there are no HCEs is Plan #2 does not help you, unless Plan #1 covers enough employees to pass coverage and nondiscrimination on a stand-alone basis.

Question 19: What is the prevailing wage?

Answer: The Davis-Bacon Act is federal legislation that was enacted during the depression era (1931) to prevent unfair labor practices in nonunion situations. It was amended in 1935 to establish a system of setting wage rates in advance of the contract bidding. In 1964, it was amended to include fringe benefits as well as wages.

The purpose of the act was to support labor unions by protecting workers from the economic disruption caused by out-of-town contractors coming into an area and securing federal construction contracts by underbidding local wage levels. During the depression, it was common for a business to gather crews of low-paid workers from rural areas (often minority workers) and take these crews to metropolitan areas in order to underbid established local

construction companies. Currently the Davis-Bacon Act requires any contractor bidding on a government job in excess of $2,000 to pay workers at a “prevailing wage.”

Prevailing wage compensation can be broken down into two components: the prevailing wage and the prevailing wage fringe. Davis-Bacon prevailing wages must be paid unconditionally and not less often than once a week. A contractor can discharge his obligation for the payment of the basic hourly rates and the fringe benefits in the following ways:

* By paying not less than the basic hourly rate and making a contribution for the fringe benefits in the wage determination;

* By paying in cash directly for the basic hourly rate and making an additional cash payment in lieu of the required benefits; or

* By a combination of the above methods.

Question 20: A contractor satisfies the Davis-Bacon Act by providing the additional fringe in the paychecks of the prevailing wage group. The contractor has a cross-tested profit sharing plan. They want to create a separate class in the profit sharing plan called the "prevailing wage group". Providing the plan passes testing, is this permissible?

Answer: You hit the nail on the head with your final comment-- it's OK, rovided the plan passes testing. The prevailing wage group is certainly a valid business classification, so if the demographics are right it will pass the average benefits test.

There are no special rules with respect to Davis-Bacon eligibility. They are not an excluded class of employees.

Problems do arise if and when there is an HCE earning prevailing wage dollars (which is often the case with a child of the business owner).

Question 21: What is indirect compensation?

Answer: Examples of indirect compensation include:

* Short-term incentive pay

* Differential pay

* Merit pay

Question 22: It seems that more and more Davis-Bacon plans are 401(k) plans, when in the past they were money purchase plans. What changed?

Answer: Money purchase plans have become somewhat obsolete since the passage of EGTRRA.

Prior to EGTRRA, a money purchase plan allowed for deductible contributions of up to 25% of compensation while 401(k)s were limited to 15%. A change to the deduction rules now makes the limit for all defined contribution plans 25% of compensation. Further, elective deferrals aren't counted when applying the 25% limit. This means participants and employers can contribute more under a 401(k) program than under a money purchase plan.

Question 23: A construction company that performs Davis-Bacon work, has a Davis-Bacon Plan and a 401(k) profit sharing plan. Can the company exclude the Davis-Bacon workers from participating in the 401(k) profit sharing plan altogether? If not,) can the company exclude the Davis-Bacon wages from compensation considered in the 401(k) profit sharing plan? The office staff is unhappy that the Davis Bacon workers are getting benefits under both while they do not.

Answer: It is important to understand that Davis-Bacon workers are not afforded any special coverage or non-discrimination exceptions similar to those that apply to most union workers. Therefore, any coverage or

non-discrimination exception would have to pass both coverage and non-discrimination testing (under Internal Revenue Code sections 401(a)(4) and 410(b)).

When the Davis-Bacon dollars are allocated to a separate plan, it is common to design the non-Davis-Bacon plan to provide exclude Davis-Bacon wages. This would mean that the Davis-Bacon workers would share only in the non-Davis Bacon plan to the extent that they also work non-prevailing wage jobs. Allocations would be based only on non-Davis-Bacon wages. This means they would share, but there would not be any double crediting in the Davis-Bacon and non-Davis-Bacon plans.

It is important to note that for purposes of both plans, coverage and nondiscrimination must be performed considering both Davis-Bacon and non-Davis-Bacon wages. This is because all coverage and nondiscrimination testing must be performed using a Code section 414(s) definition of compensation.

In a situation where the employer maintains a Davis-Bacon and a non Davis-Bacon plan, generally coverage and non-discrimination must be performed in the aggregate.

Question 24: Service Contract Act regulations (29 CFR 4.175(d)) require periodic payments to a pension trust to be made quarterly or more frequently. How can an employer square this with the IRS's annual valuation and contribution rules? That is, how can the employer make quarterly contributions throughout a year when the necessary contribution won't be calculated until the end of the year?

Answer: There are two alternatives with respect to the timing of contributions. First, contributions can be made on a quarterly basis directly to the plan and then trued up at the end of the year. Alternatively, the quarterly contribution requirement will be satisfied if the money is held in an escrow account and then deposited to the plan prior to the due date of the tax return.

It is important to remember that the timing requirements under the Service Contracts Act and the Davis Bacon Act are payroll issues and both laws are concerned with segregating the payroll amounts from the employer's general assets.

Question 25: To isolate prevailing wage and non-prevailing wages, is it necessary to set up 2 different plans? What if one plan is a 401(k) cross-tested plan and the other is an integrated profit sharing plan? Or must both plans have the same options?

Answer: Prevailing wage contributions can be held in a plan that also holds benefits for non-prevailing wage employees. Whether the assets are held in one or two plans, there are no special coverage and nondiscrimination rules with respect to prevailing wage workers.

Generally most prevailing wage workers are non-highly compensated employees (NHCEs), but if an employee earns the prevailing wage and is a highly compensated employee (for example, the child of a buisness owner) and the prevailing wage contribution rate is higher than for other employees, this could present a 401(a)(4) discrimination issue.

With respect to the allocation formulas in the different plans, as long as each plan passes coverage under 410(b) on a standalone basis, the plans will not need to be aggregated for purposes of 401(a)(4). But if one plan needs the other to pass coverage, then the two plans will need to be aggregated for purposes of 401(a)(4), which would most likely require the allocations to be aggregated and cross-tested.

Question 26: In calculating the maximum deductible contribution for a profit sharing plan that has a 401(k) feature and allows prevailing wage contributions, do you include the compensation of the participants who are eligible for the prevailing wage contributions but not necessarily eligible for the profit sharing contribution?

Answer: The rules are the same as for any other defined contribution plan. The deduction limit is based on all eligible participants in the plan even if separate eligibility requirements apply to different segments of the plan. Therefore you include all compensation of all participants, including the Davis-Bacon workers (not just the Davis-Bacon wages).

There are no Davis-Bacon rules in the Internal Revenue Code. Any Davis-Bacon requirements in the terms of a qualified plan are for the purpose of meeting the requirements of the Davis-Bacon Act, not any special Code requirements.

Question 27: How soon after salary deduction occurs must an employer send an employee's contributions and the company's match to the plan's custodian or trustee?

Answer: Interesting question! 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 CFR 5.5(a)(1)(i).)

Annual contributions into a plan do not meet this requirement. Although 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.

With respect to employee contributions (salary deferrals made pusuant to 401(k)), the otherwise applicable DOL rules would apply, meaning that the elective deferrals would need to be remitted to the trust as soon as administratively feasible, but in not event later that the 15th day of the month following the month in which the deferrals were withheld.

Note that Davis-Bacon wages paid in the form of fringe benefits are not considered elective deferrals.

Question 28: I have inherited a plan that uses Davis-Bacon fringe benefits to fund the match. Could this be a deemed cash-or-deferred-arrangement (CODA), because the employees are effectively controlling whether they receive their fringe benefits as compensation or as an employer contribution?

Answer: While I can certainly see your point, I doubt the IRS would view such an arrangement as a deemed CODA.

Question 29: If I am part owner of the company that is doing a government job, am I exempt as an employee from payment to me of the prevailing wages otherwise required by the Davis-Bacon Act?

Answer: No. The Davis-Bacon Act applies to all mechanics and laborers employed on a job site; there is no exemption for owners of a company or family members who are mechanics or laborers. The Act does not apply to workers (including owners) whose duties are primarily administrative, executive or clerical. (With respect to a foreman, if the foreman devotes more than 20% of his or her time during a workweek to labor or mechanical duties, he or she will be considered a laborer or mechanic for the time so spent.)

Question 30: We are doing an ADP test for a 401(k) plan that has prevailing wage contributions. The plan uses the prevailing wage contributions in the ADP test. The plan is failing ADP and the 1 HCE is having to receive a refund of all of his deferrals plus a small portion of the prevailing wage contributions. If we calculate a QNEC for this client, can the prevailing wage contributions be used as an offset to the QNEC?

Answer: Yes, if the plan document provides for an offset approach (remember that all allocations in a profit-sharing plan must be definitely determinable) and if the prevailing wage amounts are subject to all of the restrictions placed on QNEC contributions (i.e., full vesting and limited withdrawals).

Question 31: What are all of the fringe benefits that can be calculated into the non-cash fringe portion of certified wages?

Answer: In order for a contractor to discharge its prevailing-wage obligation, any fringe benefits provided to covered workers must be bona fide. To be considered a bona fide fringe benefit for purposes of the Davis-Bacon Act, a fringe benefit plan, fund or program must constitute a legally enforceable obligation that meets the following criteria:

1. The provisions of the plan, fund, or program adopted by the contractor must be specified in writing and must be communicated in writing to the affected employees.

2. Contributions must be made pursuant to the terms of such plan, fund, or program.

3. Any contributions made by employees must be voluntary.

4. The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, or supplemental unemployment benefits.

5. The plan must contain a definite formula for determining the amount to be contributed by the contractor and a definite formula for determining the benefits for each of the employees participating in the plan.

6. The contractor's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust, or other funded arrangement.

7. The trustee must assume the usual fiduciary responsibilities imposed on trustees by applicable law.

8. The trust or fund must be set up in such a way that the contractor will not be able to recapture any of the contributions paid in or in any way divert the funds to its own use or benefit.

9. No benefit required by any other federal law or by any state or local law, such as unemployment compensation, workers' compensation, or Social Security, is a fringe benefit for purposes of the Act.

Davis-Bacon Act 1(b)(2)(B); Reg 29, CFR 5.23, Subpart B]

As its name implies, the prevailing-wage fringe supplement is intended to pay for bona fide employee fringe and welfare benefits. These include the following:

1. Health insurance;

2. Retirement benefits;

3. Non-mandated disability programs;

4. Supplemental unemployment or severance pay;

5. Life, sickness, or accident insurance;

6. Holiday, vacation, or sick pay; and

7. Training programs.

In order for a contractor to discharge its obligation with respect to the fringe supplement, the rate of contribution must have a reasonable relationship to the actual cost of the benefits. Although the fringe component can be banked on behalf of the employee to pay for health insurance in the future during times of layoff or unemployment or paid as wages, it is not intended to be used to fund benefits during periods of noncovered work. If the fringe supplement is paid to the worker as compensation, it becomes subject to FICA and other payroll taxes. [Rev Rul 75-241, 1975-1 CB 316; Reg 29, CFR 5.23, Subpart B]

Question 32: I am adding a Davis-Bacon contribution to an existing safe harbor 401(k) plan. The plan makes a 3% nonelective contribution to employees quarterly based upon their plan "compensation," which is a 415(c) definition of compensation. The total Davis-Bacon wages ACTUALLY PAID IN CASH (but not those made as a Davis-Bacon contribution to the plan) would be included in this definition, right? The Davis-Bacon contribution will be 3% of the total Davis Bacon wage (basic wage and fringe wage portions). Then the safe harbor contribution will be offset by any Davis-Bacon contributions, so that there is no redundancy. What I am struggling with is whether the plan "compensation" will include the Davis-Bacon wages element, less the amount (3%) directly contributed to the plan. Also, should I be excluding HCEs from the Davis-Bacon contribution? Would I be better off just to exclude the Davis-Bacon wages completely from the plan "compensation" definition and therefore eliminate the need for the offset? Seems like I would then have a nonsafe harbor definition of compensation that would have to be tested. What is the preferred method to include Davis-Bacon contributions in an existing safe harbor 3% nonelective 401(k) plan?

Answer: The fringe benefit piece of the Davis-Bacon prevailing wage is not considered compensation provided it is paid towards bona fide benefits. Because contributions are made quarterly, you satisfy the timing requirements set forth in the Davis-Bacon regulations.

Davis-Bacon covers HCEs, so if you exclude them from the allocation they will need to be made whole outside of the plan.

Finally, because the Internal Revenue Code requires a section 414 safe harbor definition of compensation for the 401(a)(4) safe harbors, excluding Davis-Bacon wages from the plan's definition of compensation would require that either the compensation test or the general nondiscrimination test be performed.

Question 33: If an employer currently has a money purchase plan at 17% of all pay (Davis-Bacon and non-Davis-Bacon wages), is this considered annualizing as described in Q&A 1? You indicate that an employer annualizing contributions may use a vesting schedule, but Q&A 15 indicates that the employer can take credit only for contributions that are immediately vested. My home office guru is telling me that this means that if the contributions are subject to a vesting schedule (as allowable for a plan that is annualizing), the employer cannot take credit for the contributions. Can you clarify?

Answer: Credit cannot be taken for Davis-Bacon contributions made to a qualified plan that are subject to a vesting schedule, unless the contribution is annualized. This means that if the Davis-Bacon fringe piece earmarked for a plan is equal to 5 percent of compensation, the total contribution at the end of the year must be at least equal to 5 percent of total compensation (not just Davis-Bacon compensation). Most employers avoid this complexity by providng full vesting.

In your example, you appear to be annualizing because the contribution is based on Davis-Bacon and non-Davis-Bacon compensation. But if the prevailing wage fringe compensation exceeds 17 percent of compensation you might be running afoul of the annualization requirement if Davis Bacon prevailing fringe supplements are being used to fund non-Davis-Bacon plan contributions.

Question 34: I met with a prospective client (who has a 20% money purchase pension plan) about setting up an ESOP as an ownership succession tool. Could the ESOP contributions count as part of the Davis-Bacon prevailing wage? Would the ESOP have to have a money purchase pension plan within the ESOP in order to comply?

Answer: Yes, an ESOP funded with Davis-Bacon prevailing wage dollars. It could be established as a money purchase or a profit sharing plan. The normal rules with respect to Davis-Bacon and with respect to ESOPs would apply.

Question 35: I have only seen prevailing wage retirement plans with defined contribution formulas, such as money purchase or 401k. Is it possible to satisfy the Davis-Bacon requirements through a defined benefit plan? If so, are there special requirements for expressing the benefit formula relative to the fringe hourly rate?

Answer: Yes, it is possible to have a defined benefit Davis-Bacon.

There are no special requirements with respect to the benefit formula. You just need to make sure that you can create a paper trail to prove that you are meeting the fringe benefit hourly requirement.

Question 36: I have a client with collectively bargained employees who fall within the Service Contract Act. They receive a set dollar amount each hour for "health and welfare benefits," but they have the option of deferring those dollars into a 401(k) plan (up to 75% of compensation per payroll period). If they are deferred into the 401(k) plan, however, the employer uses part of those dollars to pay for the fully vested 401(k) plan match (100%, up to 3% of compensation). Thus, the deferral is not 100% of H&W but really 100% of H&W after the match is put into the plan. Is this permissible?

The plan document (a prototype) is silent on this. Obviously I must amend the plan to take it out of prototpye status. What other issues am I missing?

Answer: The Service Contract Act is similar to the Davis-Bacon Act. It is a prevailing wage program for workers in public buildings.

As in a Davis-Bacon employment situation, employees receive a set dollar amount each hour for "health and welfare benefits" (H&W); I believe it's $2.60 an hour currently. It seems permissible for the employer to fund the 401(k) plan match with the H&W amount. Because the employer "backs into" that amount, FICA should not be due on the amount of the match.

I don't think it's a problem that the plan document is silent on this treatment, but it would be better to include language that explains it.

Your client also should make sure it keeps proper records to certify payroll.

Attachment I - The Davis-Bacon Act of 1931: The Labor Explanation

In 1931, laws were enacted both in Washington and in Wisconsin to guarantee fair competition on federal and state construction projects. Over the years these laws, the Davis-Bacon Act and the state Prevailing Wage law, have become recognized by workers both inside and outside the construction industry, as important milestones in the history of organized labor.

It is fitting that workers, particularly those in construction, understand the important role prevailing wage laws have played over the years in protecting workers on public works projects. It is equally important to remember the conditions and circumstances under which these laws got on the books.

Today, many people believe the Davis-Bacon Act was a product of the great depression. While it is true the Davis-Bacon Act was passed two years after the stock market crash of 1929, the fact is the Act had little to do with the so-called “pump-priming” policies of that era.

By the time the Davis-Bacon Act became law, seven states had already enacted prevailing wage statutes — most notably, Kansas, which passed the first state prevailing wage law in 1891.

New York also had a prevailing wage statute on the books before the turn of the century, nearly 30 years before the first version of the Act was introduce in Congress in 1926 — in the midst of the roaring twenties.

By the middle of the 1920s, the United States government was already greatly involved in heavy construction projects ranging from flood control and dam building to expanding and housing the institutions of government.

Federal and state governments were preparing to become even more active and sought to protect themselves from falling victim to “fly-by-night” “cut throat” contractors who performed “shoddy” work with “exploited”, “low-skilled” and “imported” workforce.

Interestingly enough, those were not the words of labor, but were the words of the bill’s primary sponsors, Congressman Robert Bacon and Pennsylvania Senator James Davis, who viewed their bill not so much as a means to protect workers, but more as a way of providing some market stability in what was, and still is, an inherently unstable construction industry.

Then as now, construction is a time and materials industry. Low bid requirements on public projects allowed contractors from outside an area to bid and win work based on substandard wages and helped create the situation where contractors literally “imported” low-wage workers from around the country rather than use the local labor force.

Abuses were wide spread in the years preceding the Acts passage. Bacon, a former Banker, explained the need for the law when he detailed for his colleagues during debate on the bill how a construction firm from Alabama transported thousands of unskilled workers to a public project in New York.

“They were herded onto this job, they were housed in shacks, they were paid a very low wage, and ... it seems to me that the federal government should not engage in construction work in any state and undermine the labor conditions and the labor wages paid in that state.”

Davis, the former Secretary of Labor under Presidents Harding, Coolidge and Hoover, went on to argue that “the least the Federal Government can do is comply with the local standards of wages and labor prevailing in the locality where the building construction is to take place.”

By establishing a local wage standard that contractors had to pay workers on public projects, the authors intended to provide a level playing field on which contractors could compete for work based on wages that “prevailed” in the area, rather than rewarding the practice of slashing worker’s wages in order to win work.

Laborers of the period, because so many were recent immigrants, because they performed “unskilled” work, and because they were easily replaced, were particularly vulnerable to these practices. Recognizing the direct impact of the Act of protecting Laborers, the General Executive Board of the Laborers International Union voted to endorse the Davis-Bacon Act in 1931.

Attachment II - The Davis-Bacon Act of 1931: The Alternative Explanation

Condensed from a Cato Institute briefing paper: http://www.cato.org/pubs/briefs/bp-017.html

Introduction

Passed at the beginning of the Depression at the instigation of the labor union movement, Davis-Bacon was designed explicitly to keep black construction workers from working on Depression-era public works projects. The act continues today to restrict the opportunities of black workers on federal and federally subsidized projects by favoring disproportionately white, unionized and skilled workers over disproportionately black, non-unionized and unskilled workers.

Davis-Bacon has survived the civil rights revolution, every attempt to repeal it, and most attempts to reform it, because it is a legislative jewel in organized labor's crown. Civil rights groups--with the political clout to challenge the act--should be natural enemies of Davis-Bacon. But over the years they have agreed to swallow their principles and support the law in exchange for political and economic support from the AFL-CIO.

This paper discusses the discriminatory origins of Davis-Bacon, the discriminatory effects of the act from the 1930s until today, and recent attempts to make Davis-Bacon less onerous.

Discriminatory Intent

By the 1930s, most major unions in America that represented skilled construction workers completely excluded blacks from their ranks. A few others relegated blacks to segregated locals. Despite the general exclusion of blacks from craft unions and discrimination in vocational education and occupational licensure, in the South in 1930 the construction industry provided blacks with more jobs than any industry except agriculture and domestic service. Because the effects of union and educational discrimination were hardly felt in unskilled construction work, blacks performed most of that work in the South. Blacks also did much skilled construction work there, composing 17 percent of southern carpenters, for example.

At the same time, many black construction workers were migrating north. By 1930 they composed a proportion of the northern urban construction work force that approximated the black proportion of the total northern urban population. As in the South, blacks held a disproportionate share of unskilled construction jobs, while discriminatory union and licensing policies resulted in a more limited presence for blacks in skilled construction work. As one historian points out: "By 1930 Black workers had obtained a foothold in the northern construction work force, but the low proportion of skilled construction workers who were Black suggests that the foothold was a tenuous one." Davis-Bacon was soon to help destroy that foothold in both the South and North.

The story of Davis-Bacon begins, one might say, in 1927 when a contractor from Alabama won a bid to build a Veterans' Bureau hospital in Long Island, New York. He brought a crew of black construction workers from Alabama to work on the project. Appalled that blacks from the South were working on a federal project in his district, Representative Robert Bacon of Long Island submitted H.R. 17069, "A Bill to Require Contractors and Subcontractors Engaged on Public Works of the United States to Comply with State Laws Relating to Hours of Labor and Wages of Employees on State Public Works," the antecedent of the Davis- Bacon Act.

The discriminatory implications of Bacon's bill were recognized immediately. On the floor of the House of Representatives, Congressman Upshaw said: "You will not think that a southern man is more than human if he smiles over the fact of your reaction to that real problem you are confronted with in any community with a superabundance or large aggregation of negro labor."

Over the next four years Bacon introduced thirteen more bills to establish regulation of labor on federal public works projects. Finally, a bill submitted by Bacon and Senator James J. Davis, with the support of the American Federation of Labor, passed in 1931. The law provided that all federal construction contractors with contracts in excess of $5,000 or more must pay their workers the "prevailing wage," which in practice meant the wages of unionized labor.

The measure passed because Congressmen saw the bill as protection for local, unionized white workers' salaries in the fierce labor market of the Depression. In particular, white union workers were angry that black workers who were barred from unions were migrating to the North in search of jobs in the building trades and undercutting "white" wages.

The comments of various congressmen reveal the racial animus that motivated the sponsors and supporters of the bill. In 1930, Representative John J. Cochran of Missouri stated that he had "received numerous complaints in recent months about southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South." Representative Clayton Allgood, supporting Davis-Bacon on the floor of the House, complained of "cheap colored labor" that "is in competition with white labor throughout the country."

Other congressmen were more circumspect in their references to black labor. They railed against "cheap labor," "cheap, imported labor," men "lured from distant places to work on this new hospital," "transient labor," and "unattached migratory workmen." While the congressmen were not referring exclusively to black labor, it is quite clear that despite their "thinly veiled" references, they had black workers primarily in mind. Similar sentiments were expressed in the Senate.

Discriminatory Effects Depression Era

Davis-Bacon became law on March 31, 1931, just as the federal government was embarking on an ambitious public works program that would soon account for half of all money spent on construction work in the country. Because of Davis-Bacon, as explained below, almost all federal construction jobs flowing from this spending spree went to whites.

Soon after Davis-Bacon became law, unions began to complain that the law as written was not successfully protecting their members' jobs. Congress responded in 1935 by amending the Act, reducing the minimum contract amount covered to $2,000 and providing for predetermination of prevailing wage rates by the Department of Labor. With that, the Department of Labor promulgated regulations for Davis-Bacon that remained largely unchanged until 1983.

Under those regulations, wages on federal construction projects had to follow union scale in any area that was at least 30 percent unionized. Given the manner in which the Labor Department enforced them, the regulations guaranteed that almost all wages would be set according to union wages. In fact, contractors often limited their hiring to the more highly skilled union workers since there was no economic benefit to hiring non- union labor. Indeed, because they had to pay the same wages regardless of who they hired, contractors working on large-scale federal construction found it most efficient simply to recruit construction workers directly through (whites-only) AFL union locals. Because the craft unions had few or no black members, federal contractors rarely hired blacks for skilled positions.

But if Davis-Bacon's effects on skilled blacks were substantial, its effects on unskilled blacks were devastating. According to Census Bureau statistics, as of 1940 blacks composed 19 percent of the 435,000 unskilled "construction laborers" in the United States and 45 percent of the 87,060 in the South. The Department of Labor's regulations failed to recognize categories of unskilled workers other than union apprentices, even in the rare instances when such categories were sanctioned by local craft union rules. They required that if a contractor wanted to hire an unskilled worker who was not a union apprentice, the worker had to be paid the same as a skilled worker. Since unions rarely allowed blacks into their apprenticeship programs, the result was the almost complete exclusion of unskilled black workers from Davis-Bacon projects. Not only did this limit the employment opportunities of unskilled blacks but it prevented them from acquiring skills as well, for with discrimination in union and public school vocational training programs, the only way blacks could become skilled workers was for them to accept unskilled employment and learn on the job. But that employment was now effectively foreclosed to them

World War II

In 1941 the federal government extended Davis-Bacon to cover military construction contracts. At the start of World War II, federal agencies began signing "stabilization agreements"--that is, agreements preserving the status quo with unions. In the construction industry, those agreements granted a closed shop to the affiliated unions of the Building Construction Trades' Department of the AFL. Because those unions were closed to blacks, the stabilization pacts often resulted in the disqualification of black skilled and semi-skilled construction workers from federal projects.

The federal government was sometimes able to pressure unions to relent and allow blacks into their unions, or at least to form new segregated locals. Far more often, however, blacks were excluded from major construction projects, and in some cities were banned from defense construction work altogether by the unions.

In response to complaints of discrimination in public works projects during World War II, the federal government established the Fair Employment Practices Committee (FEPC). At its worst, the FEPC was completely ineffective. At its best, it froze an unfavorable status quo. In any event, it was not renewed in the post-war period.

Post World War II

By the late 1950s, exclusionary construction unions dominated the market in skilled construction labor, particularly for large-scale projects. As a result, the percentage of skilled black construction workers declined precipitously. The remnant of skilled black construction workers was almost entirely excluded from federal projects because of Davis-Bacon's bias for unionized labor. As for unskilled black workers, they too were generally unable to get jobs on Davis-Bacon projects since they were barred from union apprenticeship programs approved by the Department of Labor for Davis-Bacon purposes.

Presidents Eisenhower and Kennedy attempted to alleviate discrimination on public works projects through executive action, but their efforts were generally unavailing because of union intransigence, strengthened by Davis-Bacon. As late as the Kennedy administration, blacks were still barred from the unions of the electrical workers, operating engineers, plumbers, plasterers, and sheet metal workers, among others.

Even efforts by the Johnson administration to ensure compliance with the 1964 Civil Rights Act did not shield blacks from the discriminatory effects of Davis-Bacon. Craft unions held work stoppages to prevent the employment of blacks on such publicly funded construction projects as the Cleveland Municipal Mall (1966), the U.S. Mint in Philadelphia (1968), and the building site of the New York City Terminal Market (1964). A 1968 Equal Employment Opportunity Commission study showed that "the pattern of minority employment is better for each minority group among employers who do not contract work for the government [and are therefore not subject to Davis-Bacon] than it is among prime contractors who have agreed to nondiscrimination clauses in their contracts with the federal government [who are subject to Davis-Bacon]."

To encourage the use of skilled minority workers in federal construction projects, the Nixon administration's Department of Labor launched its "Philadelphia Plan," followed by other city affirmative action "plans." Despite its resort to quotas, however, the Department of Labor continued otherwise to stunt black employment on federal projects by recognizing unskilled workers as appropriate Davis-Bacon workers only when they participated in a bona fide apprenticeship program registered with a certified state apprenticeship agency or with the Federal Bureau of Apprenticeship and Training. This harmed blacks because unions continued to discriminate in their apprenticeship programs. Meanwhile, the number of registered apprenticeships available was dwarfed by the number of blacks who could have acquired gainful employment as unskilled "helpers" on federal projects.

Nevertheless, a 1978 Congressional Research Service (CRS) report alleged that "repealing or weakening . . . Davis-Bacon would adversely affect apprenticeship programs in the construction industry and hurt minority groups." According to the CRS report, unionized employers would be forced to cut costs by reducing training outlays, and 20.7 percent of trainees in union-sponsored programs in 1976 were members of minority groups, compared to less than 10 percent in non-union-sponsored programs.

The CRS report, which was based on statistics provided by unions, has been refuted by various later studies. A report issued by the Comptroller General of the United States in 1979, for example, stated that "Davis-Bacon wage requirements discourage nonunion contractors from bidding on federal construction work, thus harming minority and young workers who are more likely to work in the nonunionized sector of the construction industry."

A 1980 report of the American Enterprise Institute agreed that Davis-Bacon was harmful to minority workers because so few positions were available on Davis-Bacon covered work under the categories of helper, learner, or trainee. The report pointed out that very few union journeymen were minority-group members, and it was in nonjourneyman categories that most would begin their construction careers. The report added that union apprenticeship programs, even if they did not discriminate, severely limited the number of people who might enroll, and imposed arbitrary educational requirements, thus freezing out the most disadvantaged workers. Abolishing Davis-Bacon, the report concluded, would allow more participation by non-union firms in construction, thus advancing the employment opportunities of minority workers.

Former NAACP general counsel Herbert Hill noted that even when the number of black union apprentices increased because of government pressure, many of those apprentices never graduated to journeyman status. Hill concluded that as of 1982 "the pattern of racial exclusion in the building trades . . . remained intact." As another economist observed, the low percentage of skilled black construction workers "is due primarily to Davis- Bacon."

The most recent study of Davis-Bacon notes that "one would much more likely find minorities among the helpers and trainees of non-union firms than in the registered apprenticeship programs." Recent statistics also show that minorities are a larger percentage of the non-union construction labor force than of the union labor force. Open-shop firms not only hire more minorities but hire them for better positions. As the study concludes, "Open shop firms employ . . . a higher proportion of minority workers as craftsmen."

Ralph C. Thomas III, executive director of the National Association of Minority Contractors (which represents over 60,000 minority contractors, more than 90 percent of which are non- union), believes that the key to solving the problem of underrepresentation of minorities in the building trades is on-the-job training in non-union, minority-owned construction firms. According to Thomas, however, Davis-Bacon prevents minority contractors from successfully training workers. A minority contractor who successfully bids for a Davis-Bacon covered contract has "no choice but to hire skilled tradesmen, the majority of which are of the majority. This defeats a major purpose in the encouragement of minority enterprise development-- the creating of jobs for minorities. . . . Davis-Bacon . . . closes the door on such activity in an industry most capable of employing the largest numbers of minorities."

Recent Reforms

In 1982 the Department of Labor changed certain Davis-Bacon regulations, making it somewhat easier for open shop firms to compete for contracts covered by Davis-Bacon. The department redefined "prevailing wages" from the old 30 percent rule to a new 50 percent rule. That change, combined with the fact that far fewer construction workers are unionized today than was the case several decades ago, means that Davis-Bacon wage rates will be set according to union rates only in highly unionized cities.

Unfortunately, those are often cities with large minority populations. Thus non-unionized minority workers and contractors in those cities will continue to be frozen out of Davis-Bacon projects. Moreover, the 1982 reform also fails to reduce the burdensome paperwork requirements that keep many small, often minority-owned, companies from bidding on Davis-Bacon projects.

In 1982 the Department of Labor also changed its Davis-Bacon regulations to allow the use of unskilled "helpers" on Davis-Bacon projects in any area where helpers were used at all, partly in an effort to help minorities and women gain more opportunities in federal construction projects. The construction unions challenged the new regulation on the ground that it violated the department's mandate to establish prevailing wages. The courts agreed, and the department was forced to rewrite the regulation.

The new rule, which went into effect only on February 4, 1991, defines a helper as "a semiskilled worker who works under the direction of, and assists journeymen." When fully implemented, this rule, while not removing all of the discriminatory effects of Davis-Bacon, will be a boon to black construction workers, who are still best represented in the construction industry in the unskilled categories; as of 1987, blacks were only three-quarters as likely as whites to be skilled construction workers, but almost one-and-one-half times as likely as whites to be unskilled workers. Thus far, however, Congress has prohibited the secretary of labor from using any funds to implement the rule. The construction unions, moreover, will almost certainly try to persuade the Clinton administration's Labor Department to repeal the helper regulation.

Conclusion

An estimated $60 billion in annual construction and maintenance work is covered by Davis-Bacon, and even more is covered by state and municipal prevailing wage legislation. Yet despite the pernicious effects of Davis-Bacon on blacks, and its blatantly discriminatory origins, civil rights activists have generally ignored or quietly supported the law. Only one of the many histories of black workers mentions the law, and then only once, and not by name. No lawsuits have been filed by civil rights groups against the law; in fact, the NAACP, among other mainstream civil rights organizations, actually supports the law because of the group's close political alliance with organized labor. Grass-roots community activists, in contrast, generally oppose Davis-Bacon and its state and local equivalents because they reduce employment opportunities and make government efforts to help the poor far more expensive.

Given the incentives that have enabled Davis-Bacon to endure, it will be negated most easily only by strong leadership from the top. Failing that, Davis-Bacon can be repealed legislatively, or, more likely, successfully challenged in court. When that occurs, minority contractors will find it easier to get federal contracts without divisive quotas, black workers will find it easier to get construction jobs, and the federal government will be able to accomplish more with a smaller burden on the taxpayer. Most important, however, one of the remaining racist stains on American law will be removed