March 29, 2024

Jessica Looman, Administrator
U.S. Department of Labor
Wage and Hour Division
200 Constitution Avenue NW
Washington, DC 20210

Dear Administrator Looman,

We, the undersigned Attorneys General of Pennsylvania, Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Maryland, Michigan, Minnesota, New Jersey, Nevada, New York, Rhode Island, and Washington D.C. submit this letter to urge you to update the certified payroll information contractors are required to submit in connection with work they perform on projects covered by the Davis-Bacon and Related Acts ("DBRA"), 40 U.S.C. §§ 3141-48; 29 C.F.R. § 5.1. In particular, contractors should be required to provide more detailed disclosures regarding the utilization of fringe benefit funds and other deductions taken from workers' pay.

The undersigned enforce laws that protect workers' economic security, health, and welfare, either by directly investigating and prosecuting violations of prevailing wage laws or by defending enforcement actions by state departments of labor in administrative or judicial appeals. It is all too common for employers and contractors to submit certified payroll records that on their face appear to comply with prevailing wage requirements while concealing that workers were paid off the books at non-prevailing rates of pay or were required to pay back part of their paychecks to their employers. Mandating that weekly certified payroll records include more detailed information would help prevent schemes by contractors seeking to evade legally required prevailing wages. Our collective enforcement experiences affirm the critical role that certified payroll records play in uncovering and proving violations of prevailing wage laws.

For example, in one case prosecuted by the Pennsylvania Office of Attorney General, an employer forced journeyman electricians and plumbers to record a portion of their hours as laborers according to predetermined ratios. Through his scheme, the contractor stole over $64,000 from workers in the space of five years. Certified payroll records were crucial in that case; they established what representations the contractor made to public agencies, and provided evidence that he was forcing workers to record their time according to predetermined ratios.

In Massachusetts, the Attorney General cited a rail system construction and maintenance company for not paying the proper overtime and for submitting fraudulent certified payroll records. The Massachusetts Attorney General's review of the certified payroll records revealed the company claimed a type of fringe benefit that is not permitted under Massachusetts prevailing wage laws. The improperly claimed fringe amounts were paid to employees each week, but the amounts were not included in the calculation of overtime, resulting in an underpayment to employees of over $192,000.[1]

The New York State Department of Labor, which the New York Attorney General represents in enforcement litigation, often receives DBRA certification forms during its investigations, and has found them especially confusing in cases involving annualization requirements. As indicated in paragraph 1 below, the present form does not clearly state that contractors should list, for each specific benefit fund or plan, not only the payments for supplemental benefits for prevailing-wage-work hours, but also the annualized hourly credit for such payments. It would also be helpful if the Department of Labor could provide official guidance to employers that may find the form confusing, whether through a DBRA "toolkit" similar to those made available for other statutes, or a web page or video analogous to those available from private entities, which may or may not be accurate.

The undersigned have observed that violators of prevailing wage laws are using complex schemes in which they misappropriate fringe benefit funds or take unlawful deductions to reduce workers' pay. These schemes can cause substantial losses to workers but can be difficult to detect given the level of information currently included on certified payroll records. However, if the Department of Labor were to require more detailed disclosure regarding the utilization of fringe benefit funds, violations would become much more easily detectable. Specifically, the undersigned suggest the Department of Labor consider requiring:

1. Disclosure of hourly rate equivalents claimed for each type of benefit the employer provides. Rather than only requiring employers to list a total hourly rate equivalent for the total amount of all fringe benefits provided, employers should be required to provide an hourly rate equivalent for each benefit claimed. This change would allow enforcers to more easily determine whether an employer is claiming fringe benefit credit for non-creditable costs, or is not calculating hourly rate equivalents in a lawful manner (e.g. claiming the same amount for employees with individual vs. family medical insurance).
2. Information about the benefit plans provided. Employers should be required to disclose whether benefits provided are self-funded or unfunded plans and to identify the entity responsible for administering benefits provided. If enforcers suspect a violation may be occurring, for example, in connection with an unfunded plan, enforcers would be on notice of the fact that the plan is unfunded and will know to inquire as to whether the plan was approved by the Secretary as required under the 2023 DBRA regulations.

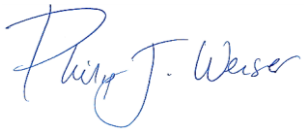
[1] New York-Based Rail System Company To Pay More Than $220,000 for Overtime and Payroll Violations on Public Works Projects (May 10, 2022), https://www.mass.gov/news/new-york-based-rail-system-company-to-pay-more-than-220000-for-overtime-and-payroll-violations-on-public-works-projects.

3. Itemization of deductions. Another less easily detectable type of DBRA violations that the undersigned have encountered are unlawful deductions from workers' pay by employers. Mandating employers to itemize deductions from workers' pay would help highlight for enforcers those suspicious and possibly fraudulent deductions.

The undersigned believe that these changes to the information contractors on DBRA projects must provide on certified payroll forms will better enable detection of violations. Further, if violators believe their schemes will be too easily detectable by the inclusion of such additional information on certified payroll records, these simple disclosure requirements suggested by the undersigned may have a deterrent effect.

Respectfully Submitted,

MICHELLE A. HENRY
Pennsylvania Attorney General



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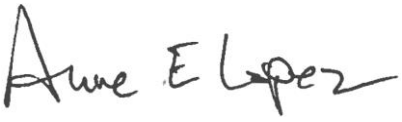

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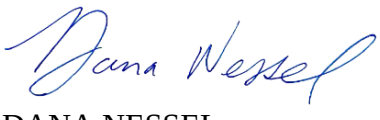

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