

# EXTERNAL CIVIL RIGHTS MANUAL



- Equal Employment Opportunity
- On-the-Job Training
- **Title VI and Title VII**
- Disadvantaged Business Enterprise
- Contractor Compliance
- Labor Compliance

# EXTERNAL CIVIL RIGHTS MANUAL

**JANUARY 2013**

**(REV. MARCH 2013)**

Prepared by

**NORTH DAKOTA DEPARTMENT OF TRANSPORTATION  
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## INTRODUCTION

As a recipient of federal funds, the North Dakota Department of Transportation (NDDOT) is required to comply with the rules and regulations of the U.S. Department of Transportation, Federal Highway Administration (USDOT, FHWA) as they pertain to the federal-aid highway program.

NDDOT's internal and external civil rights programs are a function of the Civil Rights Division. The Civil Rights Division is located in the central office (Room 315) and is staffed by a Civil Rights Division Director (E. Diane Laub), three Civil Rights Program Administrators (Jackie Schmalz, **Denise Spanjer**, and Paula Messmer), and one Administrative Assistant (Amy Conklin). E. Diane Laub has responsibility for overall internal and external civil rights program management. Jackie Schmalz assists in the development, implementation, and monitoring of NDDOT's Contractor Compliance, Labor Compliance, and Title VII (Internal EEO) Programs. **Denise Spanjer** assists in the development, implementation, and monitoring of NDDOT's Disadvantaged Business Enterprise (DBE), On-the-Job Training (OJT), and DBE/OJT Supportive Services Programs. Paula Messmer assists in the development, implementation, and monitoring of NDDOT's Title VI and Nondiscrimination Program. Amy Conklin provides administrative office support.

Many of the internal and external civil rights monitoring responsibilities have been delegated to the districts. Primary civil rights responsibilities are delegated to the district engineers. They, in turn, delegate the internal EEO responsibilities and external contractor compliance and labor compliance monitoring to their staff.

This manual deals only with the external civil rights program and includes:

- I. General EEO Requirements
- II. On-the-Job Training
- III. Disadvantaged Business Enterprise
- IV. Contractor Compliance
- V. Labor Compliance
- VI. Miscellaneous (includes Title VI and Title VII)**
- VII. Contract Special Provisions

Each district is responsible for keeping the Civil Rights Division informed of any EEO, OJT, **Title VI, Title VII**, DBE, contractor compliance, and labor compliance activities, either positive or negative, in a timely manner. The Civil Rights Division Director and Civil Rights Program Administrators are available for technical assistance at any time by contacting the Civil Rights Division, North Dakota Department of Transportation, 608 East Boulevard Avenue, Bismarck, ND 58505-0700, phone and email:

701-328-2576 - E. Diane Laub	<a href="mailto:dlaub@nd.gov">dlaub@nd.gov</a>
701-328-2605 - Jackie Schmalz	<a href="mailto:jschmalz@nd.gov">jschmalz@nd.gov</a>
<b>701-328-3116 - Denise Spanjer</b>	<a href="mailto:dgspanjer@nd.gov">dgspanjer@nd.gov</a>
701-328-2978 - Paula Messmer	<a href="mailto:pmessmer@nd.gov">pmessmer@nd.gov</a>
701-328-2637 - Amy Conklin	<a href="mailto:aconklin@nd.gov">aconklin@nd.gov</a>
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Davis-Bacon wages would be due and weekly certified payrolls would be required.

(c) If a bona fide material supplier has demonstrated that he or she was open and making sales to the general public from a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., within the previous *twelve months* of the *day* the federal-aid highway construction project was *let to contract* (NOT awarded), DBRA generally DOES NOT apply no matter where the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is located. ~~However, according to USDOT:~~

~~• The ONLY exception involves truck drivers employed by material suppliers, or by trucking firms hired by material suppliers, who haul materials and supplies to and from the site of the work of a federal-aid highway construction project and perform more than an incidental amount of construction work while at the site of the work.~~

~~• For enforcement purposes, if any individual truck driver employed by a material supplier, or by a trucking firm hired by a material supplier, spends more than 20 percent of his or her time in a workweek on the site of the work of a federal-aid highway construction project, he or she is DBRA covered for ALL of the time he or she spends on the site of the work that workweek. He or she MUST be paid the appropriate Davis-Bacon wage, including applicable fringe benefits. Refer to paragraph B of Section V (page 119) for information concerning the application of DBRA to truck drivers.~~

~~NOTE: Contractors should be referred to Section C of the NDDOT Davis-Bacon Wage and Payroll Requirements Handbook available online at:~~

~~[www.dot.nd.gov/manuals/civilrights/davisbacon.pdf](http://www.dot.nd.gov/manuals/civilrights/davisbacon.pdf)~~

~~• The material supplier's status would NOT change to that of a subcontractor. Therefore, NO Prime Contractor's Request to Sublet (SFN 5682 - Rev. 07-2012) or subcontract agreement would be required. The prime contractor or subcontractor purchasing the materials or supplies MUST acknowledge joint employment and either put the individual truck driver(s) on its weekly certified payrolls or require the material supplier, or trucking firm hired by the material supplier, to generate and provide weekly certified payrolls. If a wage dispute ensues, the prime contractor will be held ultimately responsible for compliance with~~

~~DBRA. This means if the wages CANNOT be recouped from the material supplier, or trucking firm hired by the material supplier, the prime contractor will be held responsible for paying the wages.~~

- (7) Whenever any state, county, or city funded project is combined with or tied to a federally funded highway construction project as one contract, Davis-Bacon wages **MUST** be paid and weekly certified payrolls **MUST** be generated and submitted for all portions or segments of the contract. Consequently, the principles previously described apply to borrow pits, stockpile sites, concrete or asphalt batch plant sites, etc., used for the contract or project. For example:

A contract has three portions or segments, of which two are federally funded and one is strictly state funded. There is a two and one-half mile gap between the state funded portion or segment and the next closest federally funded portion or segment. Material is being hauled from a borrow pit located **less than one-half mile** from the closest right of way boundary to the state funded portion or segment.

- (a) Because two of the portions or segments are federally funded, the entire project is viewed as federally funded.
- (b) Since the borrow pit is located **less than one-half mile** from the closest right of way boundary to the state funded portion or segment,
- DBRA generally **DOES NOT** apply if the borrow pit **HAS BEEN** open and making sales to the general public within the previous **twelve months** of the **day** the project was **let to contract** (**NOT** awarded).
  - DBRA **DOES** apply if the borrow pit **HAS NOT BEEN** open and making sales to the general public within the previous **twelve months** of the **day** the project was **let to contract** (**NOT** awarded).
- (c) DBRA applies to anyone working **adjacent** (within one-half mile) to the boundaries of the project site, normally at a borrow pit, stockpile site, concrete or asphalt batch plant site, etc.
- (d) If material is hauled from that same borrow pit to any one of the other two portions or segments, which are **NOT adjacent** to the borrow pit, DBRA still applies because the portions or segments are looked at as a whole.

- (8) There are times when, at the end of a federal-aid highway construction project, NDDOT adds another mile or two to the project through the

issuance of a change order. If it was previously determined that the boundary to a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., was located **more than one-half mile** from the closest right of way boundary to the project but the added segment brings the boundary to the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., **within one-half mile** of the project boundary:

(a) Those employees working on the additional segment under the change order would be due Davis-Bacon wages, **including applicable fringe benefits**, and weekly certified payrolls would be required.

(b) Those employees hauling from and working at the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., under the change order would be due Davis-Bacon wages, **including applicable fringe benefits**, and weekly certified payrolls would be required by NDDOT **ONLY** if the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., **WAS NOT** open and making sales to the general public within the previous **twelve months** of the **day** the project was **let to contract (NOT awarded)**.

(c) **If the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., WAS open and making sales to the general public within the previous twelve months of the day the project was let to contract (NOT awarded):**

- **The truck drivers employed by the prime contractor, and/or any subcontractor, who haul the materials to and from the additional segment and spend more than a de minimis amount of time on the additional segment would be due Davis-Bacon wages, including applicable fringe benefits, for ALL of the spent on the additional segment that is more than de minimis.**

~~• Any individual truck driver employed by the material supplier, or by a trucking firm hired by the material supplier, who hauls the materials to and from the additional segment and spends more than 20 percent of his or her time in a workweek on the additional segment would be due Davis-Bacon wages, including applicable fringe benefits, for ALL of the time spent on the additional segment during that workweek.~~

(9) The district, city, county, or consultant project manager-engineer **MUST** use his or her best judgment to determine whether a location in question is considered a **site of the work** of a federal-aid highway construction project. If the district, city, county, or consultant project

project site to repair and clean such items, and in so doing performs more than an incidental amount of construction activity on the contract, the individual would be subject to DBRA. Similarly, an employee of an equipment rental dealer or tire repair company who performs on-site repair work on leased equipment is subject to DBRA if the employee performs more than an incidental amount of work on the site. For enforcement purposes, if such an employee spends more than 20% of his or her time in a workweek engaged in such activities on the site, he or she is DBRA covered for all time spent on the site during that workweek.

(4) **(d) 29 CFR Part 5.2(l) specifically excludes from the definition of *site of the work* permanent fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial supplier or *materialman* that are established by a supplier of materials for the project before opening of bids and near to but not on the actual project site, even where such operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.**

b. **A bona fide material supplier MUST be able to demonstrate that he or she has *routinely been selling to the general public* from the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., and that the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., was opened for that use, **NOT** for the federal-aid highway construction project in question. In other words, if they are normally considered a supplier but they opened the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., just for the federal-aid highway construction project, **AND** the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is located **one-half mile or less** from the closest right of way boundary to the project, they would be considered a subcontractor and **NOT** a supplier. Consequently, Davis-Bacon wages would be due and weekly certified payrolls would be required.**

c. **If a bona fide material supplier has demonstrated that he or she was open and making sales to the general public from a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., within the previous *twelve months of the day* the federal-aid highway construction project was *let to contract* (**NOT** awarded), DBRA **generally DOES NOT** apply no matter where the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is located. ~~However, according to USDOL:~~**

~~(1) **The *ONLY* exception involves truck drivers employed by material suppliers, or by trucking firms hired by material suppliers, who haul materials and supplies to and from the site of the work of a federal-aid highway construction project and perform more than an incidental amount of construction work while at the site of the work.**~~

~~(2) **For enforcement purposes, if any *individual* truck driver employed by a material supplier, or by a trucking firm hired by a material supplier,**~~

~~spends more than 20 percent of his or her time in a workweek on the site of the work of a federal-aid highway construction project, he or she is DBRA covered for ALL of the time he or she spends on the site of the work that workweek. He or she MUST be paid the appropriate Davis-Bacon wage, including applicable fringe benefits. Refer to paragraph B of this section (page 119) for information concerning the application of DBRA to truck drivers.~~

~~NOTE: Contractors should be referred to Section C of the NDDOT Davis-Bacon Wage and Payroll Requirements Handbook available online at:~~

~~[www.dot.nd.gov/manuals/civilrights/davisbacon.pdf](http://www.dot.nd.gov/manuals/civilrights/davisbacon.pdf)~~

~~(3) The material supplier's status would NOT change to that of a subcontractor. Therefore, NO Prime Contractor's Request to Sublet (SFN 5682 - Rev. 07-2012) or subcontract agreement would be required. The prime contractor or subcontractor purchasing the materials or supplies MUST acknowledge joint employment and either put the individual truck driver(s) on its weekly certified payrolls or require the material supplier, or trucking firm hired by the material supplier, to generate and provide weekly certified payrolls. If a wage dispute ensues, the prime contractor will be held ultimately responsible for compliance with DBRA. This means if the wages CANNOT be recouped from the material supplier, or trucking firm hired by the material supplier, the prime contractor will be held responsible for paying the wages.~~

5. Whenever any state, county, or city funded project is combined with or tied to a federally funded highway construction project as one contract, Davis-Bacon wages **MUST** be paid and weekly certified payrolls **MUST** be generated and submitted for all portions or segments of the contract. Consequently, the principles previously described apply to borrow pits, stockpile sites, concrete or asphalt batch plant sites, etc., used for the contract or project. For example:

A contract has three portions or segments, of which two are federally funded and one is strictly state funded. There is a two and one-half mile gap between the state funded portion or segment and the next closest federally funded portion or segment. Material is being hauled from a borrow pit located **less than one-half mile** from the closest right of way boundary to the state funded portion or segment.

- a. Because two of the portions or segments are federally funded, the entire project is viewed as federally funded.
- b. Since the borrow pit is located **less than one-half mile** from the closest right of way boundary to the state funded portion or segment,

~~(2) Any individual truck driver employed by the material supplier, or by a trucking firm hired by the material supplier, who hauls the materials to and from the additional segment and spends more than 20 percent of his or her time in a workweek on the additional segment would be due Davis-Bacon wages, including applicable fringe benefits, for ALL of the time spent on the additional segment during that workweek.~~

7. The district, city, county, or consultant project manager-engineer **MUST** use his or her best judgment to determine whether a location in question is considered a ***site of the work*** of a federal-aid highway construction project. If the district, city, county, or consultant project manager-engineer has questions or is unsure whether a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is covered, he or she **MUST** consult the **CIVIL RIGHTS DIVISION**.

## **B. Application of DBRA to Truck Drivers**

1. **The following excerpts are taken verbatim from USDOL's final rule amending 29 CFR Part 5 (65 FR 80268-80278, December 20, 2000):**
  - a. **The Department of Labor adopts as a final rule an amendment to the regulations, 29 CFR Part 5, which define the Davis-Bacon Act language *construction, prosecution, completion, or repair* at 29 CFR 5.2(j), and *site of the work* at 29 CFR 5.2(l). Specifically, this document revises the *site of the work* definition to include material or supply sources, tool yards, job headquarters, etc., in the *site of the work* only where they are dedicated to the covered construction project and are adjacent or virtually adjacent to the location where the building or work is being constructed. Also changed is the regulatory definition of *construction* to provide that the off-site transportation of materials, supplies, tools, etc., is not covered unless such transportation occurs between the construction work site and a dedicated facility located "adjacent or virtually adjacent" to the construction site.**
  - b. **This document also revises section 5.2(l)(1) to include within the *site of the work*, secondary sites, other than the project's final resting place, which have been established specifically for the performance of the Davis-Bacon covered contract and at which a significant portion of the public building or work called for by the contract is constructed. In conjunction with this change, section 5.2(j) has been amended to provide that transportation of portion(s) of the building or work between a secondary covered construction site and the site where the building or work will remain when it is completed is subject to Davis-Bacon requirements.**
  - c. **The Department's regulations provide a three-part definition of the *site of the work*.**
    - (1) **The first part at 29 CFR 5.2(l)(1) provides that "the *site of the work* is the physical place or places where the construction called for in the**

- a. **With some exceptions, Davis-Bacon coverage includes all work, including trucking activities and operations, that takes place within the confines of the federal-aid highway construction project as described in the bidding documents and subsequent contract. Davis-Bacon coverage also includes all such work performed at locations determined to be a *site of the work* of the federal-aid highway construction project. Both of these locations are hereinafter referred to as the *site of the work*.**
- b. **Exemptions from Davis-Bacon coverage include:**
- (1) **Those workers whose duties are primarily administrative, executive, professional, or clerical in nature, rather than manual. For example, supervisory personnel, field office employees, surveyors, gravel testers, quality control technicians, scale operators, etc.**
  - (2) **Truck drivers employed by prime contractors and subcontractors for time spent loading and/or unloading materials and supplies on the *site of the work*, if such time is *de minimis*.**
  - (3) ***Individual* truck drivers employed by material suppliers, or by trucking firms hired by material suppliers, for time spent loading and/or unloading materials and supplies on the *site of the work*, ~~if such time is 20 percent or less of his or her total workweek.~~**
  - (4) **Bona fide owner-operators of trucks.**
  - (5) **Traffic control suppliers (with some exceptions).**
  - (6) **Refer to paragraph F of this section (page 166) for information concerning exemptions from DBRA coverage.**
- c. **For Davis-Bacon purposes, an employee's time starts the moment the employee reaches the *site of the work*. This includes:**
- (1) **Checking in to get instructions for the day.**
  - (2) **Attending weekly EEO and safety toolbox meetings.**
  - (3) **Fueling and other maintenance, mechanical repair, or service work performed on equipment or trucks (whether it be by the operator, who **MUST** be paid the appropriate equipment operator rate and fringe benefits; the driver, who **MUST** be paid the appropriate truck driver rate and fringe benefits; or a mechanic, who **MUST** be paid the appropriate mechanic, greaser, or oiler rate and fringe benefits).**
  - (4) **Cleaning any part of the equipment and trucks.**
  - (5) **ALL time spent waiting:**

~~j. For truck drivers employed by material suppliers, or by trucking firms hired by material suppliers, more than an incidental amount of construction work is defined by USDOL as more than 20 percent in any given workweek.~~

~~(1) The individual truck drivers would be due Davis-Bacon wages, including applicable fringe benefits, for ALL time spent on the site of the work during that workweek.~~

~~(2) However, the material supplier's status would NOT change to that of a subcontractor. Therefore, NO Prime Contractor's Request to Sublet (SFN 5682 - Rev. 07-2012) or subcontract agreement would be required. The prime contractor or subcontractor purchasing the materials or supplies MUST acknowledge joint employment and either put the individual truck driver(s) on its weekly certified payrolls or require the material supplier, or trucking firm hired by the material supplier, to generate and provide weekly certified payrolls. If a wage dispute ensues, the prime contractor will be held ultimately responsible for compliance with DBRA. This means if the wages CANNOT be recouped from the material supplier, or trucking firm hired by the material supplier, the prime contractor will be held responsible for paying the wages.~~

k. The prime contractor is ultimately responsible for compliance by it and any of its subcontractors ~~and material suppliers~~. The burden of proof lies with the prime contractor and its subcontractors ~~and material suppliers~~. The prime contractor and its subcontractors ~~and material suppliers~~ can either:

- (1) Pay the appropriate Davis-Bacon wage, including applicable fringe benefits, for all of the hours the truck drivers spend on the *site of the work*; or
- (2) Keep accurate records of the time so spent on the *site of the work* and pay the appropriate Davis-Bacon wage, including applicable fringe benefits, for **ALL** of the time spent on-site that is *more than de minimis (for prime contractors and subcontractors) or more than 20 percent in a workweek (for material suppliers)*.

**NOTE:** The prime contractor can either include the truck drivers on its weekly certified payrolls or require the subcontractor ~~or material supplier~~ to generate and submit weekly certified payrolls for the time spent on-site that is *more than de minimis (for prime contractors and subcontractors) or more than 20 percent (for material suppliers)*.

- (3) A prime contractor's ~~or subcontractor's, or material supplier's~~ failure to keep accurate records may cause NDDOT to side with the complainant should a wage dispute ensue.

- (4) If a wage dispute does ensue and it is determined that a subcontractor's truck drivers spent **more than a de minimis** amount of time on the **site of the work**, ~~or a material supplier's truck drivers spent more than 20 percent of the time on the site of the work in any given workweek~~ and it is found that the prime contractor did **NOT** incorporate the labor standards provisions and/or Davis-Bacon wage rate decision into the subcontract ~~or purchase~~ agreement, the prime contractor will be held liable for any back wages found due.
- (5) The prime contractor can minimize the likelihood of situations occurring where **de minimis and 20 percent** rulings are required by having truck drivers wait at locations considered **NOT** to be a **site of the work** until radioed in.
4. **Both USDOL's final rule amending 29 CFR Part 5 and their *Field Operations Handbook - Chapter 15* reference secondary sites other than the project's final resting place.**
- a. **These are sites that have been established specifically for the performance of the Davis-Bacon covered contract at which a significant portion of the public building or work called for in the contract is constructed.**
  - b. This is a new ruling resulting from the development of new construction technologies whereby major segments of a project can be constructed at locations some distance from where the permanent structure(s) will remain after construction is completed.
  - c. A case in point is the Braddock Locks and Dam project in Pennsylvania that involves the construction of two massive floating structures, each about the length of a football field, which would comprise the vast bulk of the new gated dam. The actual construction of these floating structures is at an upriver location on or near the water. They are then floated down the river to the point where they are submerged into the dam and gate piers.
  - d. USDOL will **NOT** specifically define the terms **significant portion** and believes it is unnecessary and unwise to do so. The size and nature of the project would dictate what constitutes a **significant portion**; and in those rare situations where projects are constructed in this manner, any questions would typically arise early in the procurement process so that advice could be obtained from USDOL in a timely manner.
  - e. **Nonetheless**, truck drivers transporting portions of a building or work to and from the project's final resting place **are covered by Davis-Bacon**.
5. **Truck Owner-Operators**
- a. **DBRA applies to laborers and mechanics, as defined at 29 CFR 5.2(m), and as stated in the Davis-Bacon Act: "regardless of any contractual relationship**