

**NORTH DAKOTA
DEPARTMENT OF TRANSPORTATION**

DAVIS-BACON

**WAGE AND PAYROLL
REQUIREMENTS
HANDBOOK**

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DAVIS-BACON WAGE AND PAYROLL REQUIREMENTS HANDBOOK

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This manual is intended to be a guideline for contractors in complying with Davis-Bacon and Related Act and other labor laws. While NDDOT Civil Rights Division makes every attempt to keep this manual up-to-date and complete, it is not meant to replace or preclude any law. If any conflict exists between this manual and federal or state law, the federal or state law should be followed.

TABLE OF CONTENTS

A.	SPECIAL PROVISIONS	1
B.	SITE OF WORK DEFINITION	2
C.	APPLICATION OF DBRA TO TRUCK DRIVERS	7
D.	PAYMENT OF PREDETERMINED MINIMUM WAGE	16
E.	COUNTING AND REPORTING TIME	18
F.	OVERTIME HOURS	21
G.	FRINGE BENEFIT PAYMENT	24
H.	PAYROLL DEDUCTIONS	28
I.	PAYROLL REQUIREMENTS	30
J.	CLASSIFICATIONS	34
1.	ASSISTANT OPERATOR	34
2.	APPRENTICE OPERATOR.....	34
3.	(BOBCAT) SKIDSTEER OPERATORS.....	34
4.	BORING MACHINE LOCATOR.....	34
5.	BRIDGE PAINTERS AND SANDBLASTERS	34
6.	CARPENTRY	35
7.	CONCRETE FINISHING	36
8.	CONCRETE SAW OPERATORS	42
9.	CORE SAMPLING	42
10.	CURE BRIDGE OPERATOR.....	43
11.	DOWEL BASKET AND DOWEL BAR PLACEMENT	43
12.	FLAGGERS.....	43
13.	IRONWORKER	44
14.	JOINT SEALING.....	44
15.	LINE CONSTRUCTION AND ELECTRICIANS.....	44
16.	MECHANICS, GREASERS, AND OILERS.....	46
17.	MICRO MACHINE AND SLURRY SEAL MACHINE OPERATORS	47
18.	PIPELAYERS	48
19.	RUMBLE STRIP MACHINE OPERATORS.....	49
20.	SIGN INSTALLATION	49
21.	TRUCK DRIVERS	49
22.	WATER SPRAYING EQUIPMENT	54
23.	WEED SPRAYERS	55
24.	WELDERS	55
K.	EXEMPTIONS FROM DBRA COVERAGE	55
L.	CONFORMANCE PROCESS	61
M.	CHILD LABOR LAWS	62

N.	UNCLAIMED PAYCHECKS	63
O.	EMPLOYEES HIRED THROUGH TEMPORARY EMPLOYMENT AGENCIES	63
P.	BULLETIN BOARDS.....	64
Q.	LABOR COMPLIANCE JOB-SITE INTERVIEWS	67
R.	NDDOT CIVIL RIGHTS DIVISION PERSONNEL	68
S.	FEDERAL AND STATE DEPARTMENT OF LABOR PERSONNEL	68
T.	REFERENCE SOURCES.....	69
	EXHIBIT 1: CONFORMANCE PROCESS	LXX
	EXHIBIT 2: <i>REQUIRED CONTRACT PROVISIONS, FEDERAL-AID CONSTRUCTION CONTRACTS (USDOT FORM FHWA 1273)</i> LXXV	
	EXHIBIT 3: LCPTRACKER LINKS AND INFORMATION	LXXVI

DAVIS-BACON WAGE AND PAYROLL REQUIREMENTS

The NDDOT, as an administering agency of federal-aid contracts, has responsibility for the enforcement of Davis-Bacon and Related Acts (DBRA) and the Contract Work Hours Service Act (CWHSSA) labor standards provisions included in its contracts. The United States Department of Labor (USDOL) has primary coordination and oversight responsibilities, including the authority to investigate labor standards compliance and to enforce federal laws, rules and regulations.

A. SPECIAL PROVISIONS

1. All “laborers and mechanics” (laborers, mechanics, operators, drivers and other non-management employees) working on the **site of work** of a federally-funded highway construction contract must be paid the prevailing wage rates and fringe benefits as set by the United States Department of Labor (USDOL). Davis-Bacon and Related Acts (DBRA) also require that certain labor standards provisions be specified in the contract and that the applicable wage rate decision be included in the contract. All federally-funded project contracts and subcontracts should contain the following special provisions:
 - a. FHWA Form 1273: (Rev. 5-1-12). This special provision outlines contractor requirements relating to wages, payrolls, and compliance statements and is available online at:
www.fhwa.dot.gov/programadmin/contracts/1273/1273.pdf
 - b. Labor Rates from U.S. Department of Labor. The prevailing wage rate decision specifies basic hourly rates and applicable fringe benefit payments for job classifications related to highway construction and is available online at (select a published date from the drop-down box):
www.dot.nd.gov/divisions/civilrights/laborcompliance.htm
 - c. CONTRACT SPECIAL PROVISION MANDATORY USE OF AUTOMATED CERTIFIED PAYROLL (09-06-2017).
This provision requires the use of LCPtracker, a paperless online system for entering and filing certified payrolls. Certified payrolls in paper form will no longer be accepted, and all contractors must file their payroll electronically, for all federal-aid projects bid on or after October 13, 2017. Copy of Provision available at:
<https://www.dot.nd.gov/divisions/civilrights/docs/revisedcertifiedpayrollsp10242015.pdf>.

2. Prime contractors are required to include these special provisions in all subcontracts and to further require their inclusion in any lower-tier subcontracts that may, in turn, be made. The prime contractor is responsible for compliance by any subcontractor or lower-tier subcontractor. The prime contractor is responsible for setting up subcontractors in LCPtracker, for ensuring that all subcontractors file payroll on the system and for approving and correcting payrolls as required.
3. If a non-federally-funded project is tied to a federally-funded project, the entire contract is considered federally funded and is subject to DBRA. Therefore, Davis-Bacon wages must be paid and weekly certified payrolls must be generated and submitted for all portions or segments of the contract.

B. SITE OF WORK DEFINITION

1. The federal regulations at 29 CFR Part 5.2(l) define the term site of the work as:
 - a. The **site of the work** is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, **provided** that such site is established specifically for the performance of the contract or project;
 - b. Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the **site of the work**, **provided** they are dedicated exclusively, or nearly so, to performance of the contract or project, **and provided** they are adjacent or virtually adjacent to the **site of the work** as defined in paragraph (l)(1) of this section;
 - c. Not included in the **site of the work** are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the **site of work** as stated in paragraph (l)(1) of this section, are not included in the **site of the work**. Such permanent, previously established facilities are not part of the **site of the work**, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of the contract.
2. The federal regulations at 29 CFR Part 5.2(j)(1)(iv) also define the terms **construction**, **prosecution**, completion, or **repair** to include:

- a. Transportation between the **site of the work** within the meaning of paragraph 5.2(l)(1) of this section and a facility which is dedicated to the construction of the building or work and deemed a part of the **site of the work** within the meaning of paragraph 5.2(l)(2) of this section; and
 - b. Transportation of portion(s) of the building or work between a site where a significant portion of such building or work is constructed, which is a part of the **site of the work** within the meaning of paragraph 5.2(l)(1) of this section, and the physical place or places where the building or work will remain.
3. To be considered site of work, the area must be both dedicated to the job site and adjacent or virtually adjacent to the location where the work is being constructed. While federal regulations do not define adjacent or virtually adjacent, the NDDOT has defined the terms as **any tool yard, fabrication plant, job headquarters, material or supply source (e.g., borrow pit, stockpile site, concrete or asphalt batch plant site), etc., whose boundary is located within one-half mile of the closest right of way boundary to the federal-aid highway construction project.** The distance is measured as one-half mile from the boundary to the tool yard, fabrication plant, job headquarters, material or supply source (e.g., borrow pit, stockpile site, concrete or asphalt batch plant site), etc., to the closest project boundary, **as the crow flies**, not to the middle of the project.

4. Material and Supply Sources

- a. DBRA generally does **not** apply to a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., when it is determined to not be included in the **site of the work** of a federal or federally-aided highway construction contract or project.
 - i. According to USDOL, **the only exception involves truck drivers** employed by prime contractors and subcontractors who haul materials and supplies to and from the **site of the work** of a federal-aid highway construction project and **spend more than a de minimis amount of time on the site of the work.** The truck drivers would be due Davis-Bacon wages, including applicable fringe benefits, for **all** of the time spent on the **site of the work** that is **more than de minimis**.
 - ii. **De minimis, as defined by USDOL, means only a few minutes at a time merely to pick up or drop off materials,** supplies, tools, etc. [See **Section C** for information concerning the application of DBRA to truck drivers.]
- b. If the boundary to a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is located **more than one-half mile** from the closest right of way boundary to a federal-aid

highway construction project, DBRA generally does not apply, except as noted in (a) above.

- c. If the boundary to a 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 a federal-aid highway construction project,
 - i. DBRA generally **does not apply** if the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., 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).
 - ii. DBRA **does apply** if the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., **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).
- d. It does not matter who owns the borrow pit, stockpile site, concrete or asphalt batch plant site, etc.; who is crushing; or who is producing the product. What matters is whether the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is dedicated to the federal-aid highway construction project **AND** is adjacent or virtually adjacent to the project.
- e. In addition, it does not matter if the borrow pit is a state-optioned pit. If the borrow pit is located **more than one-half mile** from the closest right of way boundary to the federal-aid highway construction project, DBRA generally **does not** apply, except as noted in (a) above.
- f. If rubble or other material is hauled from a federal-aid highway construction project to a location designated in the plans and specifications for the project, DBRA **does** apply and weekly certified payrolls are required. If no location is designated in the plans and specifications and the truck drivers are hauling the rubble or material from the project to a location determined to not be a **site of the work**, DBRA generally does not apply and weekly certified payrolls are generally **not** required by NDDOT.
- g. If DBRA does apply to a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., the employees who perform tasks directly related to producing the product are covered, including the truck drivers who haul the materials from the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., to the federal-aid highway construction project, regardless of on whose weekly certified payroll they appear.

5. Bona Fide Material Suppliers

- a. Pursuant to paragraph 15e16 of USDOL's Field Operations Handbook - Chapter 15 (10-25-10):

- i. The manufacture and delivery to the work site of supply items such as sand, gravel, and ready-mixed concrete, when accomplished by bona fide material suppliers operating facilities serving the public in general, are activities not covered by DBRA. This would be so even though the materials are delivered directly into a contractor's mixing facilities at the work site. Such bona fide material suppliers are not considered contractors under DBRA. Thus, their employees are not subject to DBRA labor standards.
 - ii. A particular facility set up at or near a construction site for the purpose of fulfilling the material requirements of a contract and thus subject to the DBRA initially, may undergo a change in its character to such an extent that it becomes the operation of a **supplier**. This would be so, for example, if it makes a sufficient quantity of sales from its producing facility to the general public. What constitutes a sufficient quantity of sales to the general public depends on the circumstances in each case, but must be more than mere token sales.
 - iii. If a material supplier, manufacturer, or carrier undertakes to perform a part of a construction contract as a subcontractor, its laborers and mechanics employed at the **site of the work** would be subject to DBRA in the same manner as those employed by any other contractor or subcontractor. Employees of a material supplier who are required to perform more than an **incidental** amount of construction work in any workweek at the **site of the work** would be covered by DBRA and due the applicable wage rate for the classification of work performed. This would include **warranty and/or repair work**. For example, if an employee of a supplier of precast concrete items is required to go to the 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.**
 - iv. 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 does not apply no matter where the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is located.
- d. 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 wage rates 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:
 - i. 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.
 - ii. 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.
- e. 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:
 - i. 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.
 - ii. 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).

- f. 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 time spent on the additional segment that is **more than de minimis**.
- g. If it is unclear whether a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is considered a site of the work of a federal-aid highway construction project, contact the NDDOT Civil Rights Division for a ruling.

C. APPLICATION OF DBRA TO TRUCK DRIVERS

1. The USDOL has issued a Final Rule that 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. 29 CFR 5.
2. Truck drivers who haul materials or supplies from one location on the **site of the work** to another location on the **site of the work** are “mechanics and laborers employed directly upon the **site of the work**,” and therefore, entitled to prevailing wages. Likewise, truck drivers who haul materials or supplies from a dedicated facility that is adjacent or virtually adjacent to the **site of the work** pursuant to amended section 5.2(l) are employed on the **site of the work** within the meaning of the Davis-Bacon Act and are entitled to prevailing wages for all of their time spent performing such activities.
 - a. It is also the Department’s position that truck drivers employed by construction contractors and subcontractors must be paid at least Davis-Bacon rates for any time spent on-site **which is more than de minimis**
 - b. The NDDOT has held the position for years that the Midway decision **does not preclude coverage for time spent on the site of the work no matter how brief.** However, as a practical matter, since generally the great bulk of time spent by material truck drivers is off-site and beyond the scope of Davis-Bacon coverage, while the time

spent on-site is relatively brief, the Department chooses to use a **rule of reason** and will not apply the Act's prevailing wage requirements with respect to the amount of time spent on-site, **unless it is more than "de minimis."** Pursuant to this policy, the **Department does not assert coverage for material delivery truck drivers who come onto the site of the work for only a few minutes at a time merely to drop off construction materials.**

3. USDOL publishes a Davis-Bacon Field Operations Handbook - Chapter 15, which supplements 29 CFR Parts 1, 3, 5, 6, and 7 pertaining to a group of statutes generally identified as the DBRA and CWHSSA.
 - a. The following is taken verbatim from USDOL's Field Operations Handbook - Chapter 15 (Revised 10-25-10):
 - i. 15e16 Material Suppliers
 - (a) The manufacture and delivery to the work site of supply items such as sand, gravel, and ready-mixed concrete, when accomplished by bona fide material suppliers operating facilities serving the public in general, are activities not covered by DBRA. This would be so even though the materials are delivered directly into a contractor's mixing facilities at the work site. Such bona fide material suppliers are not considered contractors under DBRA. Thus, their employees are not subject to DBRA labor standards. (See also FOH 15b04 and 15e22.)
 - (b) A particular facility set up at or near a construction site for the purpose of fulfilling the material requirements of a contract and thus subject to the DBRA initially, may undergo a change in its character to such an extent that it becomes the operation of a "supplier." This would be so, for example, if it makes a sufficient quantity of sales from its producing facility to the general public. What constitutes a "sufficient quantity" of sales to the general public depends on the circumstances in each case, but must be more than mere token sales.
 - (c) If a material supplier, manufacturer, or carrier undertakes to perform a part of a construction contract as a subcontractor, its laborers and mechanics employed at the **site of the work** would be subject to DBRA in the same manner as those employed by any

other contractor or subcontractor. **Employees of a material supplier who are required to perform more than an incidental amount of construction work in any workweek at the site of the work would be covered by DBRA and due the applicable wage rate for the classification of work performed.** This would include warranty and/or repair work. Unlike “de minimis,” which is not defined strictly, “incidental” is defined as 20% of an employee’s workweek or less, engaged in such DBRA activities on the site,

- (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. (See FOH 15b04(b) and 29 CFR 5.2(l).)

ii. 15e17 Owner-operators of trucks and other hauling equipment

As a matter of administrative policy, the provisions of DBRA/CWHSSA are **not applied to bona fide owner-operators of trucks who are independent contractors.** For purposes of these Acts, the certified payrolls including the names of such owner-operators need not show hours worked nor wages paid, but only the notation “Owner-operator.” This position does not pertain to owner-operators of other equipment such as bulldozers, scrapers, backhoes, cranes, drilling rigs, welding machines, and the like. Moreover, employees hired by owner-operators are subject to DBRA in the usual manner. Owner operators of trucks may be placed on the contractor’s certified payroll, with zero hours or rate of pay, and either the notation “owner operator” or the owner-operator box checked on LCPtracker.

iii. 15e22 Truck drivers

The application of Davis-Bacon to truck drivers is based on the definition of “construction, prosecution, completion, or repair” in 29 CFR 5.2(l) (see FOH 15b05). Three U.S. appellate court decisions in the 1990's helped to clarify these definitions and provide the guidance below. (65 FR 80268-80278, December 20, 2000):

- (a) Truck drivers are covered by Davis-Bacon in the following circumstances:
 - i. Drivers of a prime contractor or subcontractor for time spent working on the site of the work.
 - ii. Drivers of a prime contractor or subcontractor for time spent loading and/or unloading materials and supplies on the site of the work, if such time is not **de minimis**. See FOH 15e22 (b) (3).
 - iii. Truck drivers transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site.
 - iv. Truck drivers transporting portion(s) of the building or work between a site established specifically for the performance of the contract or project where a significant portion of such building or work is constructed and the physical place(s) where the building or work called for in the contract(s) will remain.

- (b) Truck drivers are not covered in the following instances:
 - i. Material delivery truck drivers while off the “site of the work.”
 - ii. Drivers of a contractor or subcontractor traveling between a Davis-Bacon job and a commercial supply facility while they are off the “site of the work.”
 - iii. Truck drivers whose time spent on the site of the work is **de minimis**, such as only a few minutes at a time merely to pick up or drop off materials or supplies.

4. Based on information contained in USDOL’s Field Operations Handbook - Chapter 15 and through consultation with USDOL’s Headquarters Office in Washington, D.C., and USDOL’s Regional Office in Dallas, Texas, NDDOT hereby issues the following additional guidance and clarification:

- a. With some exceptions, Davis-Bacon coverage includes all work, including trucking activities and operations, which take 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:
 - i. 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.
 - ii. Truck drivers employed by prime contractors and subcontractors for time spent loading and/or **un**loading materials and supplies on the site of the work, if such time is de minimis.
 - iii. Truck drivers employed by material suppliers, or by trucking firms hired by material suppliers.
 - iv. Bona fide owner-operators of trucks.
 - v. Traffic control suppliers (with some exceptions).
 - vi. See **Section K** 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 but is not limited to:
 - i. Checking in to get instructions for the day.
 - ii. Attending weekly EEO and safety toolbox meetings.
 - iii. 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).
 - iv. Cleaning any part of the equipment or trucks.
 - v. **ALL** time spent waiting:
 - a. For a flagger or pilot car driver to allow access onto the **site of the work** or to a specific area on the **site of the work**.

- b. To be weighed at a scale and to be otherwise processed in and out (e.g., turning in haul sheets, timecards, or other records).
 - c. To load and unload trucks.
- d. For Davis-Bacon purposes, an employee's time ends the moment the employee leaves the **site of the work**. This includes all times during the workday where a truck driver leaves the **site of the work** and travels to and from a site that has been determined to not be a **site of the work**.
- e. If an employee performs work in more than one job classification during a single payroll period and the classifications require different wage rates, the employee must be paid the highest rate for all hours worked unless the contractor's payroll records, or other affirmative proof, indicate which of the hours were included in the periods spent in each classification of work. The contractor may then pay not less than the rate specified in the Davis-Bacon wage rate decision incorporated into the contract for the job classification that describes each type of work performed.
- f. The **site of the work** means a federal-aid highway construction project and any tool yard, fabrication plant, job headquarters, material or supply source (e.g., borrow pit, stockpile site, concrete or asphalt batch plant site), etc., that is:
 - i. **Dedicated** to the federal-aid highway construction project **AND**
 - ii. **Adjacent or virtually adjacent** to the federal-aid highway construction project.
- g. Although as USDOL does not specifically define **adjacent or virtually adjacent**, NDDOT has defined **adjacent or virtually adjacent** as any tool yard, fabrication plant, job headquarters, material or supply source (e.g., borrow pit, stockpile site, concrete or asphalt batch plant site), etc., whose boundary is located **within one-half mile** of the closest right of way boundary to a federal-aid highway construction project. The distance is measured as one-half mile from the boundary to the tool yard, fabrication plant, job headquarters, material or supply source (e.g., borrow pit, stockpile site, concrete or asphalt batch plant site), etc., to the closest project boundary, **as the crow flies**, not to the middle of the project.
- h. **Dedicated** to the federal-aid highway construction project means 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).

NOTE: **Let to contract** means the bid opening date.

- i. For truck drivers employed by prime contractors and subcontractors, **de minimis** is defined by USDOL as only a few minutes at a time merely to pick up or drop off materials, supplies, tools, etc. According to USDOL:
 - i. The **de minimis** ruling is a result of the Midway case. The Midway truck drivers came on-site for only ten minutes at a time to drop off their deliveries and that the time spent **directly upon the site of the work** constituted only ten percent of their workday; but no one argued in the case that the truck drivers were covered only during that brief time. USDOL does not preclude coverage for time spent on the **site of the work** no matter how brief. However, as a practical matter, since generally the great bulk of the time spent by material truck drivers is off-site and beyond the scope of DBRA coverage while the time spent on-site is relatively brief, USDOL chooses to use a rule of reason and will not apply DBRA with respect to the amount of time spent on-site, unless it is **more than de minimis**.
 - ii. Situations involving **de minimis** rulings normally arise when:
 - (a) A borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is located **beyond the half-mile limit** but still close enough to cause the truck drivers less time in travel and more time on the **site of the work** waiting to be loaded and/or unloaded.
 - (b) A borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is located **within the half-mile limit** and 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), thus making it a commercial borrow pit, stockpile site, concrete or asphalt batch plant site, etc., and thus causing the truck drivers less time in travel and more time on the **site of the work** waiting to be loaded and/or unloaded.
 - iii. There is **NO** set percentage of time used to determine **de minimis**. USDOL will consider 5-10 percent to be **de minimis** but may not consider 18 percent or more to be **de minimis**. Decisions on anything close to 20 percent are made on a case-by-case basis.
 - iv. In determining whether a truck driver's time spent on the **site of the work** is **more than de minimis**, USDOL recommends basing the percent of time spent on the **site of the work** on all of the hours the truck driver works in any given workweek rather than the truck driver's daily hours. Thus, 8 hours out of a 40-hour workweek would be 20 percent.

- j. The prime contractor is ultimately responsible for compliance by it and any of its subcontractors. The burden of proof lies with the prime contractor and its subcontractors. The prime contractor and its subcontractors can either:
 - i. 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
 - ii. 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**.

NOTE: The prime contractor can either include the truck drivers on its weekly certified payrolls or require the subcontractor to generate and submit weekly certified payrolls for the time spent on-site that is **more than de minimis**.

- iii. A prime contractor's or subcontractor's failure to keep accurate records may cause the NDDOT to find for the complainant should a wage dispute ensue.
 - iv. If a wage dispute does ensue, the complainant will be required to provide documentation to substantiate his or her claim in order to proceed. If the complainant kept records of his or her time on-site and off-site, the prime contractor will be required to provide records for comparison. **If the prime contractor or subcontractor did not keep records and NDDOT finds for the complainant, the prime contractor will be held responsible for ensuring restitution is made.** The prime contractor may appeal the NDDOT's decision to the USDOL for resolution.
 - v. The prime contractor can minimize the likelihood of situations occurring where **de minimis** rulings are required by having truck drivers wait at locations considered not to be a **site of the work** until radioed in.
5. 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.

6. 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 which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics."

[29 CFR 5.2(m) states: "The term laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial."]

- b. The only exception is bona fide owner-operators of trucks (also referred to as independent truck owner-operators or ITOs). Bona fide owner-operators of trucks are **not** covered under DBRA. However, if the prime contractor or a subcontractor is using truck owner-operators for hauling on a federal-aid highway construction project, or the **site of the work, they must appear on either the prime contractor's or the subcontractor's weekly certified payrolls** in LCPtracker with employee's name, identify number and the "owner operator" box checked. This will prevent entry of hours or wage rates.

- c. When on the **site of the work** of a federal-aid highway construction project, the actual owner-operator **MUST drive the truck at all times**. If, for any reason, he or she does not drive the truck, even for a short period of time, the replacement driver must be paid the appropriate Davis-Bacon wage, including applicable fringe benefits, and **must** appear on weekly certified payrolls showing the hours worked and the wages paid.
- d. The prime contractor is responsible for ensuring compliance with the labor standards provisions of the contract. This includes obtaining subcontracts and weekly certified payrolls as required, as well as monitoring and verifying the status of all truck owner-operators working on a federal-aid highway construction project, or the **site of the work**, either directly for the prime contractor or for its subcontractors. **To determine bona fide owner-operator status, the prime contractor must request, verify, and provide the following information to the project manager-engineer** (NDDOT, city, county, or consultant) **BEFORE** the truck owner-operator begins work:
- (1) Owner-operator's name;
 - (2) Valid commercial driver's license;
 - (3) Vehicle registration in the owner-operator's name;
 - (4) Current vehicle license number;
 - (5) Truck number that will or is being used on scale tickets and haul sheets; and
 - (6) Copies of any signed lease or rental agreements for owner-operator trucks. **The lease or rental agreement must be between the driver and a reputable dealership** (e.g., Nelson Leasing, Inc., Allstate Peterbilt of Fargo, Inc., W.W. Wallwork, Inc., etc.); **NOT** the driver and the prime contractor or the driver and a subcontractor on the project.
- e. According to USDOL, **a lease or rental agreement does not constitute ownership**. However, NDDOT chooses to recognize lease or rental agreements with reputable dealerships **ONLY**. Those dealerships have no vested interest in when, where, for whom, or if the truck driver works.
- f. Determinations made by the North Dakota Department of Labor (DOL), or any other state agency, concerning independent contractor status for wage and hour, tax, worker's compensation, etc., purposes do not apply to DBRA covered contracts. The North Dakota DOL's determinations concerning independent contractor status are for state wage and hour purposes and are based on state law only. DBRA and USDOL rules and regulations are controlling in wage and hour matters concerning federal-aid highway construction projects.

D. PAYMENT OF PREDETERMINED MINIMUM WAGE

1. All covered employees working on the site of the work of a federally funded highway construction contract must be paid unconditionally and **not less often than once a week**.
2. The contractor must establish a fixed workweek (Sunday through Saturday for example) and a weekly payday (such as Friday, or the preceding day should such payday fall on a holiday). In LCPtracker, the work week is automatically set up after choosing an end date for the week.
3. Employees must be paid the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at the time of payment. [See **Section G** for information concerning fringe benefit payments.] In LCPtracker, these benefit payments are reporting each week, in total amounts.
4. Only payroll deductions authorized by law, or permitted under the regulations issued by the Secretary, USDOL, may be made from an employee's weekly paycheck. [See **Section H** for information concerning payroll deductions.] In LCPtracker, all deductions are reported under general categories, together with an "Other" deductions sections. All "Other" deductions must be explained in notes section.
5. The payment must be computed at wage rates not less than those contained in the Davis-Bacon wage rate decision incorporated into the contract, regardless of any contractual relationship that may be alleged to exist between the contractor, its subcontractors, and their employees.
6. Employees must be paid the appropriate Davis-Bacon wage and fringe benefits for the classification of work actually performed, without regard to skill, except those employees enrolled in approved apprenticeship and on-the-job training programs.
7. Apprentices and trainees must be paid at not less than the rate specified in the registered or approved program for the apprentice's or trainee's level of progress, expressed as a percentage of the journeyman level hourly rate specified in the applicable Davis-Bacon wage rate decision or may be paid as an Equipment Operator Group 6 Apprentice Operator, if allowed under the apprenticeship program. Apprentices and trainees must also be paid fringe benefits in accordance with the provisions of the apprenticeship or training program. [See **Section G** for information concerning fringe benefit payments.]
8. If an employee performs work in more than one job classification during a single payroll period and the classifications require different wage rates, the employee must be paid the highest rate for all hours worked unless the contractor's payroll records, or other affirmative proof, indicate which of the hours were included in the periods spent in each classification of work. The contractor may then pay not less than the rate specified in the Davis-Bacon wage rate decision

incorporated into the contract for the job classification that describes each type of work performed. Contractors must keep accurate records of such periods of work and ensure the employee is paid at the correct rate for periods of work performed in each job classification. [See **Section F** for information concerning the payment of overtime hours.]

9. If an employee's job classification is doubtful, contact the NDDOT Civil Rights Division for a ruling. [See **Section R** for addresses and phone numbers.]
10. If the job classification is known but is not included in the Davis-Bacon wage rate decision incorporated into the contract, the job classification and wage rate, including any fringe benefit amounts, must be conformed **after the contract has been awarded**. [See **Section L** for information concerning the conformance process.]

E. COUNTING AND REPORTING TIME

1. An employee's time starts for the day whenever he or she does any of the following in any sequence:
 - a. Checks in to get instructions for the day;
 - b. Loads, services, or does preventive maintenance on equipment;
 - c. Cleans any part of the equipment; and
 - d. Drives or rides in a company vehicle or drives a piece of equipment to the project site. This includes truck drivers who transport equipment, tools, materials, or supplies to and from the project site or the **site of the work** and to and from the home office site.
2. An employee's time ends for the day after any of these same duties are performed at the end of the day.
3. For the time spent performing the above duties, employees must be paid at least the federal minimum wage (currently \$7.25 per hour). Davis-Bacon wages are due when the employee reaches a federal-aid highway construction project, or the **site of the work**. For example:
 - a. An employee spends 1 hour each morning getting ready to go to and/or driving **to the site of the work** and 1 hour each day returning **from the site of the work**. While **at the site of the work**, he or she works 8 hours each day, Monday through Friday (10 hours each day for a total of 50 hours). The salary paid while **off the site of the work** is \$10.00 per hour while the salary paid **at the site of the work** is \$20 per hour. Overtime is paid at a rate of one and one-half times the applicable rate for all hours worked in excess of forty (40) hours per week.

- b. The above employee would have worked 40 hours at the applicable regular rate of pay from Monday through Thursday. The employee is entitled to 8 hours at \$10.00 per hour (2 hours each day times 4 days) and 32 hours at \$20.00 per hour (8 hours each day times 4 days).
 - c. For Friday, the employee would be entitled to 2 hours at \$15.00 per hour (\$10.00 x 1.5) and 8 hours at \$30.00 per hour (\$20.00 x 1.5).
 - d. See **Section F** for additional information concerning the payment of overtime hours.
- 4. Truck drivers who have reached a federal-aid highway construction project or the **site of the work** of a federal-aid highway construction project and are waiting to be loaded and/or unloaded must also be paid Davis-Bacon wages, including applicable fringe benefits, for their waiting time. [See **Section C** for information concerning the application of DBRA to truck drivers.]
- 5. Except as noted in **Section C**, truck drivers are generally not due Davis-Bacon wages when transporting equipment, tools, materials, or supplies to and from the home office site, or a project site not covered under DBRA, to and from a project site that is covered under DBRA. Truck drivers are generally due Davis-Bacon wages only when transporting equipment, tools, materials, or supplies from one project to another **when both projects are covered under DBRA.**
- 6. Rounding Time
 - a. Rounding time is permitted under DBRA. For example:
 - a. Seven minutes or less is dropped; 8 minutes through 22 minutes is 15 minutes; 23 minutes through 37 minutes is half an hour; etc. To be allowed, **rounding must be fair for both the employer and the employee.**
 - b. Under the system outlined above, an employee may gain a few minutes one day and lose a few minutes another day.
 - b. Rounding is allowed but is not required. Actual minutes may be used rather than rounding.
 - c. Rounding to a number greater than the nearest 15 minutes is not allowed. **In other words, rounding to the nearest half hour is not permitted.**
 - d. Contractors should keep in mind that rounding to the nearest 15 minutes causes the break between 7 and 8 minutes. Under this concept, some contractors do not allow employees to record the 15 minutes until the full 15 minutes have been worked. This is a **VIOLATION**.

7. Breaks

- a. There is no federal law covering breaks.
- b. North Dakota state law provides, "On shifts exceeding five (5) hours and which consist of two (2) or more employees, there shall be a thirty (30) minute, uninterrupted **break made available to employees who desire such a break.**" Collective bargained provisions will prevail over provisions of the Wage Order.
- c. If employees want a break, state law says they must be given one. Also, employees must generally be paid for meal periods unless the following conditions exist:
 - a. The period is at least 30 minutes long;
 - b. The employee is completely relieved of duties; and
 - c. The employee can leave his or her work post, although he or she can be required to remain on the company premises.
- d. Rest periods and coffee breaks of 20 minutes or less are generally required to be counted as hours worked. Payment for break periods over 20 minutes depends on whether or not the employee is free to pursue his or her own activities.
- e. NDDOT does not enforce the state law on breaks. Any problems or questions should be addressed to the North Dakota Department of Labor (NDDOL). [See **Section S** for addresses and phone numbers.]
- f. Whereas breaks are not required, employees must be allowed to use the restroom in a reasonable fashion under OSHA (Occupational Safety and Health Administration) regulations. If an employer puts any restrictions on employee access to toilet facilities, the restriction must be reasonable, and may not cause extended delays. *OSHA Standard Interpretation, 1910.141*. In the case of a flagger, for example, if it is necessary for another employee to take over duties or to drive the flagger to a restroom, the flagger must be provided a relief worker and must be able to use the restroom without extended delays.

8. Timecards

- a. It is the employer's responsibility to provide a daily or weekly timecard to each employee and the employee's responsibility to complete the daily or weekly timecard and to submit it to their project supervisor on a timely basis. There is no mandatory timecard form.
- b. Federal regulations only require that contractors keep accurate records of periods of work and ensure that employees are paid at the correct wage rate for the periods of work performed in each job classification.
- c. When an employee's timecard contains an error, NDDOT strongly recommends any changes made to the timecard be initialed and dated by both the supervisor, or other company official, and the employee. Failure to do so may cause NDDOT to side with the employee should a wage dispute ensue.

F. OVERTIME HOURS

1. No overtime compensation requirements are included under DBRA. Overtime provisions for employees subject to DBRA depend on coverage under the Contract Work Hours and Safety Standards Act (CWHSSA) and/or the Fair Labor Standards Act (FLSA). Both CWHSSA and FLSA require prime contractors and subcontractors with DBRA covered contracts to pay laborers and mechanics (those who perform manual labor) employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over forty (40) in a workweek.
2. The **basic rate of pay** under CWHSSA is the straight time hourly rate and cannot be less than the basic hourly rate required in the Davis-Bacon wage rate decision incorporated into the contract. This means the wage rate actually paid an employee for non-overtime work, when it exceeds the applicable Davis-Bacon rate, is the basic rate of pay on which not less than time and one-half for overtime must be computed.
3. Under DBRA, amounts paid as fringe benefits, both contributions made to bona fide fringe benefit plans and cash payments made to employees, are excluded in computing overtime obligations under CWHSSA. [See **Section G** for information concerning fringe benefit payments.]
4. CWHSSA applies to laborers and mechanics (those who perform manual labor) for the time spent on DBRA covered contract work **ONLY** (i.e., total up all time each employee spent working on DBRA covered contracts and exclude all commercial, non-government work).

NOTE: Commercial, non-government work is subject to the Fair Labor Standards Act (FLSA). FLSA establishes the federal minimum wage of \$7.25 per hour and requires overtime of not less than time and one-half the **basic rate of pay** for all hours worked in excess of forty (40) in a workweek. NDDOT does not enforce FLSA. Any problems or questions should be addressed to either NDDOL or USDOL. [See **Section S** for addresses and phone numbers.]

5. In the case of an employee working for two or more employers, all hours worked under the same contract are to be counted for purposes of CWHSSA overtime even though the employers are disassociated or otherwise separate, such as a prime contractor and a subcontractor. This also applies to employees of a temporary employment agency. [See **Section O** for additional information concerning employees hired through temporary employment agencies.]
6. An employee working for the same contractor on two or more separately awarded contracts subject to DBRA and CWHSSA is entitled to have the hours worked on all such covered contracts combined and to receive overtime for all such hours worked in the workweek in excess of forty (40) as described in **paragraph 8** of this section. This also applies to employees

of a temporary employment agency. [See **Section O** for additional information concerning employees hired through temporary employment agencies.]

7. When an employee performs two or more types of work for which different hourly rates are applicable (i.e., different job classifications, DBRA work which is all covered by CWHSSA, or non-DBRA work which is covered by FLSA, etc.), the CWHSSA overtime premium is computed under FLSA principles. This means:

- a. The contractor can compute the overtime premium based on the **basic rate of pay** in effect when the overtime hours were worked; or the contractor can use the weighted average method to determine the overtime premium pay required under CWHSSA and/or FLSA. For example:

Assume an employee is hired to perform work on a DBRA covered contract in two job classifications: Painter and Electrician. The basic hourly rate for a Painter is \$10.00 plus \$3.00 in fringe benefits; and the basic hourly rate for an Electrician is \$12.00 plus \$2.50 in fringe benefits. The weekly certified payroll shows the employee performed painting and electrical duties as follows:

	S	M	T	W	T	F	S
Painter		8	8	8			
Electrician				8	8	4	

Step 1: Determine the straight time wages due, excluding fringe benefits

$$24 \times \$10 = \$240 \text{ (as Painter)}$$

$$\underline{20} \times \$12 = \underline{\$240} \text{ (as Electrician)}$$

$$44 \qquad \qquad \$480 \text{ (total straight time wages)}$$

Step 2: Calculate the regular rate

$$\$480 \div 44 = \$10.91$$

Step 3: Compute the overtime premium due

$$\$10.91 \times .50 = \$5.455 \times 4 = \$21.82$$

8. In the example above, the employee is working on one federal-aid highway construction project. As stated in **paragraph 5** of this section, if an employee is working for the same contractor on two or more separately awarded contracts subject to DBRA and CWHSSA, the employee is entitled to have the hours worked on all such covered contracts combined and to receive overtime for all such hours worked in the workweek in excess of forty (40). If the employee is

also performing two or more types of work for which different hourly rates are applicable, the contractor can again compute the overtime premium based on the **basic rate of pay** in effect when the overtime hours were worked or use the weighted average method to determine the overtime premium.

NOTE: Use of the weighted average method does not preclude contractors from having to keep accurate records of the actual hours worked in each job classification in order to pay not less than the basic hourly rate specified in the Davis-Bacon wage rate decision for the job classification that describes each type of work performed. If a contractor fails to do so, the employee **MUST** be paid the highest rate for all hours worked.

9. Additionally, CWHSSA has no **site of the work** limitations as does DBRA. For example, if an employee performs part of the contract work under a construction contract at the job site and then continues contract work at a shop or other facility located at a remote distance, all the hours at both locations, including travel time between them, would be considered subject to CWHSSA. Different wage rates, however, might be paid since the Davis-Bacon prevailing wage requirements would apply only to activities performed on the **site of the work**.
10. Contractors should also keep in mind that NDDOT, city, county, and consultant staff check all weekly certified payrolls for completeness and accuracy. If an employee is working on two or more separately awarded contracts and the contracts fall under the jurisdiction of different NDDOT districts, cities, counties, or consultants, NDDOT **STRONGLY RECOMMENDS** contractors compute the overtime premium based on the **basic rate of pay** in effect when the overtime hours were worked. If the weighted average method is used, contractors should provide a clear explanation (including all calculations made) in an attachment to each separate payroll. In LCPtracker, this explanation should be placed in "comments" section on certification page.
11. When an employee performs two or more types of work for which different hourly rates are applicable and the employee works on DBRA covered contracts and commercial, non-government work in a single workweek, USDOL requires that the hours be segregated. This means they must be broken down as to the actual hours worked on the DBRA covered contracts and the actual hours worked on the commercial, non-government work using two separate weekly payrolls. The contractor cannot combine the DBRA hours and the non-DBRA hours and use the weighted average method to determine the overtime premium.
12. See Section E for information concerning the counting and reporting of time. See also paragraphs 15g00 through 15k11 of the USDOL Field Operations Handbook - Chapter 15 for additional information regarding overtime requirements. See Section T for information on how to access Chapter 15.

G. FRINGE BENEFIT PAYMENT

1. When hourly fringe benefits are listed on the Davis-Bacon wage rate decision, they may be paid in the following manner:
 - a. Making payments in the amount of the required fringe benefits to an established program, funded or unfunded. Funded programs are those programs in which the payments are irrevocably made to a trustee or a third person, i.e., the program is established separately from the contractor's own organization, such as Blue Cross/Blue Shield. Unfunded programs are those in which the fringe benefit payments are made directly to a program provided from the general assets of the contractor's organization, such as vacation programs.
 - b. Making payments to the employee in the amount of the required fringe benefits.
 - c. A combination of the above methods.
2. For example, assume the Davis-Bacon wage rate decision provides that an employee is entitled to a basic hourly wage of \$15.00 per hour plus \$2.50 per hour for health and welfare and \$2.50 per hour for a pension or retirement program. The employer may do any one of the following:
 - a. Pay not less than \$15.00 per hour to the employee, plus make payments to established health and welfare and pension programs in amounts which total not less than \$5.00 per hour for either health/welfare, or for pension, or for both.
 - b. Pay not less than \$15.00 per hour to the employee, plus pay an additional \$5.00 per hour to the employee for fringe benefits (the employee would receive a straight-time rate of \$20.00 per hour).
 - c. Pay not less than \$15.00 per hour to the employee, plus an additional payment of \$2.50 per hour to the employee, plus a contribution of \$2.50 per hour to either health/welfare or pension programs. In this example, the employer is combining the methods discussed above. This method could be used in those cases where an employer provides some but not all of the fringe benefits set forth in the Davis-Bacon wage rate decision.
3. If the payments made by the employer to health and welfare, or pension programs, or to both programs, is greater than the combined total of \$5.00 per hour, the excess may be applied toward the \$15.00 basic hourly wage rate, i.e., the employer could satisfy the obligations by paying an hourly wage rate of \$14.00, plus \$6.00 per hour in fringe benefits. However, overtime compensation must be computed on the \$15.00 basic hourly wage rate contained in the Davis-Bacon wage rate decision regardless of any collective bargaining agreement (see 29 CFR Part 5.32*). For example:

$$\begin{aligned} &\text{Hours 1-40 (at published rates)} \\ &\$15.00 + \$5.00 = \$\mathbf{20.00} \times \text{hours} \end{aligned}$$

Hours over 40 (at published rates)

$\$15.00 + \$7.50 (\$15.00 \div 2) + \$5.00 = \$27.50$ x hours

Hours 1-40 (excess fringes applied to basic hourly rate)

$\$14.00 + \$6.00 = \$20.00$ x hours

Hours over 40 (excess fringes applied to basic hourly rate)

$\$14.00 + \$7.50 (\$15.00 \div 2) + \$6.00 = \$27.50$ x hours

*29 CFR Part 5.32 states:

*“(a) The Act excludes amounts paid by a contractor for fringe benefits in the computation of overtime under the Fair Labor Standards Act, the Contract Work Hours and Safety Standards Act, and the Walsh-Healey Public Contracts Act **whenever the overtime provisions of any of these statutes apply concurrently with the Davis-Bacon Act** or its related prevailing wage statutes. It is clear from the legislative history that **in no event can the regular or basic rate upon which premium pay for overtime is calculated** under the aforementioned federal statutes **be less than the amount determined by the Secretary of Labor as the basic hourly rate** (i.e., cash rate) under Section 1(b)(1) of the Davis-Bacon Act. **Contributions by employees are not excluded from the regular or basic rate upon which overtime is computed** under these statutes; that is, **an employee’s regular or basic straight-time rate is computed on his earnings before any deductions are made for the employee’s contributions to fringe benefits**. The contractor’s contributions or cost for fringe benefits **may be excluded** in computing such rate **so long as the exclusions do not reduce the regular or basic rate below the basic hourly rate contained in the wage determination**.*

(b) The legislative report notes that the phrase contributions irrevocably made by a contractor to a trustee or to a third person pursuant to a fund, plan, or program was added to the bill in Committee. This language in essence conforms to the overtime provisions of Section 7(d) (4) of the Fair Labor Standards Act, as amended. The intent of the Committee was to prevent any avoidance of overtime requirements under existing law.

(c)(1) The Act permits a contractor to pay a cash equivalent of any fringe benefits found prevailing by the Secretary of Labor. Such a cash equivalent would also be excludable in computing the regular or basic rate under the federal overtime laws mentioned in paragraph (a). For example, W Construction pays their laborers or mechanics \$3.50 in cash under a wage determination of the Secretary of Labor which requires a basic hourly rate of \$3.00 and a fringe benefit contribution of 50 cents. The contractor pays the 50 cents in cash because the contractor has made no payments and incurred no costs for fringe benefits. Overtime compensation in this case would be computed on a regular or basic rate of \$3.00 an hour. However, in some cases, a question of fact may be presented in ascertaining whether or not a cash payment made to laborers or mechanics is actually in lieu of a fringe benefit or is simply part of their straight time cash wage. In

the latter situation, the cash payment is not excludable in computing overtime compensation. Consider the examples set forth in paragraphs (c) (2) and (c) (3) of this section.

(c)(2) X Construction has for some time been paying \$3.25 an hour to a mechanic as his basic cash wage plus 50 cents an hour as a contribution to a welfare and pension plan. The Secretary of Labor determines that a basic hourly rate of \$3.00 an hour and a fringe benefit contribution of 50 cents are prevailing. The basic hourly rate or regular rate for overtime purposes would be \$3.25, the rate actually paid as a basic cash wage for the employee of X Construction rather than the \$3.00 rate determined as prevailing by the Secretary of Labor.

(c)(3) Under the same prevailing wage determination discussed in paragraph (c)(2) of this section, Y Construction who has been paying \$3.00 an hour as his basic cash wage on which he has been computing overtime compensation reduces the cash wage to \$2.75 an hour but computes his costs of benefits under Section 1(b)(2)(B) as \$1.00 an hour. In this example, the regular or basic hour rate would continue to be \$3.00 an hour.”

4. Contributions to fringe benefit plans, funds, or programs made by a prime contractor or subcontractor must be made on a regular basis (not less often than quarterly).
5. A contractor may take credit for contributions for any bona fide fringe benefits regardless of whether the particular benefit is listed in the Davis-Bacon wage rate decision.
6. The cost of transportation and board and lodging is considered as payment of travel expenses **properly reimbursable by the employer and incurred for its benefit**. Such payments **are not considered bona fide fringe benefits** within the meaning of DBRA, are not **part of the employee's wages**, and **do not constitute board, lodging, or other facilities customarily furnished, which are deductible from the predetermined wage pursuant to Reg 3.5(j)**.

NOTE: 3.5(j) is in reference to Section 3(m) of the Fair Labor Standards Act. According to USDOL, **board, lodging, or other facilities customarily furnished, which are deductible from the predetermined wage** are rare and do not apply to the highway construction industry.

7. It is the **contractor's choice** whether the fringe benefits are paid into an approved plan, fund, or program; directly to the employee; or a combination of partial payment directly to the employee and partial payment to a plan, fund, or program.

NOTE: According to USDOL, the contractor is under no obligation to obtain the employee's concurrence before contributing to the fringe benefit plan, fund, or program on his or her behalf. However, the plan must be communicated, in writing, to the employee (i.e., the employee must be provided information on how to participate in or receive benefits from the plan, fund, or program).

8. Eligibility Standards for Participation in Fringe Benefit Plans, Funds, or Programs

- a. Eligibility standards are permissible in an otherwise bona fide fringe benefit plan, fund, or program under DBRA. However, an employer **must** make payments or incur costs in the applicable specified amounts with respect to each individual employee performing DBRA covered contract work. Employees who are excluded from a plan, fund, or program for whatever reason and for whom the employer makes no contribution **must be paid in cash**. For example, many hospitalization plans require a waiting period of 30 days before an employee can participate in the plan. Since the employer normally makes no contribution for the employee during the waiting period, the employee must be paid the fringe benefit in cash or furnished other bona fide fringe benefit equal in monetary value. If the plan requires contributions to be made during the eligibility waiting period, credit may be taken for such contributions.
- b. Since it is not required that all employees participating in a bona fide fringe benefit plan, fund, or program be entitled to receive benefits from that plan, fund, or program at all times; however, credit may not be taken for contributions for employees who by definition are not eligible to participate, such as employees who are excluded because of age or part-time employment.
- c. Similarly, employers frequently make contributions to union fringe benefit funds for employees who are not members of the union. If the employee cannot participate in or receive benefits from the union fund, **the employee must be paid the fringe benefits in cash**, even though the employer, by the terms of his or her union contract, may be required to contribute to the union fringe benefit fund on behalf of such employees.

9. To convert the annual cost of a particular fringe benefit to an hourly cash equivalent, the following formula may be used:

Divide the annual cost of the fringe benefit by the total number of working hours to which the cost is attributable (52 weeks per year times 40 hours per week equals 2,080 hours). For example, if the annual cost to the employer for a pension program is \$5,000 per employee, divide 5,000 by 2,080. This equals a cash equivalent of \$2.40 per hour.

10. See paragraphs 15f11 through 15f19 of the USDOL Field Operations Handbook - Chapter 15 for additional information regarding fringe benefit requirements. [See **Section T** for information on how to access Chapter 15.]
11. Fringe benefits are required to be paid on all regular and overtime hours worked. However, the required fringe benefit amount, as listed in the Davis-Bacon wage rate decision, is not calculated at time and one-half when figuring the overtime rate. For example, if an employee's basic hourly rate is \$15.00 per hour plus \$5.00 per hour in fringe benefits, and the employee works 50 hours in one week, the employee would be entitled to 50 hours at \$20.00 per hour (basic hourly rate plus fringe benefit amount) and 10 hours at \$7.50 per hour (one-half of the basic hourly rate of \$15.00).

12. Fringe benefits for electricians and line construction workers are different from power equipment operators and truck drivers. For example, as of January 10, 2014, the prevailing rate for a lineman is **\$34.15 plus \$5.00 and 29.5% or \$45.10 per hour** ($\$34.15 \times .295 = \$10.07 + \$34.15 + \$5.00 = \49.22). [See **Section I, paragraphs 3, b and c, and Section J, paragraph 13**, for additional information concerning electrician and line construction classifications.]

NOTE: According to USDOL, where a fringe benefit includes a percentage, compliance will be achieved by computation of the percentage stated times the basic wage rate.

13. Apprentices and trainees must be paid fringe benefits in accordance with the provisions of the apprenticeship or training program. If the apprenticeship or training program does not specify or mention fringe benefits, apprentices and trainees must be paid the full amount of fringe benefits listed in the Davis-Bacon wage rate decision for the applicable classification. If the Administrator for the Wage and Hour Division determines that a different practice prevails for the applicable apprenticeship classification, fringe benefits must be paid in accordance with that determination. If that is the case, trainees must receive the same fringe benefits as apprentices.
14. NDDOT's on-the-job training program specifies that on-the-job trainees be paid full fringe benefits where applicable.

H. PAYROLL DEDUCTIONS

1. **ONLY** deductions authorized by law may be made from an employee's weekly paycheck. Authorized payroll deductions include:
- Federal and state withholding income taxes and federal social security taxes.
 - Sums previously paid to the employee as a bona fide prepayment of wages when such prepayment is made without discount or interest and in such a manner as to give the employee complete freedom of disposition of the advanced funds. NDDOT **STRONGLY RECOMMENDS** that any advanced payment of wages be documented, signed, and dated by the employer and the employee. Failure to do so may cause NDDOT to side with the employee should a wage dispute ensue.
 - Amounts required by court process to be paid to another, unless the deduction is in favor of the employer, or any affiliated person, or when collusion or collaboration exists.
 - Contributions made on behalf of the employee to funds established by the employer, or representatives of its employees, or both, for the purpose of providing, either from principal or income, or both, medical or hospital care; pensions or annuities on retirement; death benefits; compensation for injuries, illnesses, accidents, sickness, or disability, or for insurance to provide any of the foregoing; or unemployment benefits,

vacation pay, savings accounts, or similar payments for the benefit of the employees, their families, and dependents providing, however, that the following standards are met:

- i. The deduction is not otherwise prohibited by law.
- ii. The deduction is either voluntarily consented to by the employee, in writing, and in advance of the period in which the work is to be done and such consent is **not**:
 - (a) A condition either for the obtaining of or for the continuation of employment;
 - (b) Provided for in a bona fide collective bargaining agreement between the employer and representatives of its employees;
 - (c) **NO** profit or other benefit is otherwise obtained, directly or indirectly, by the employer, or any affiliated person, in the form of commission, dividend, or otherwise; or
 - (d) The deduction shall serve the convenience and interest of the employee.
- e. Contributions made on behalf of the employee toward the purchase of United States Defense Stamps and Bonds when voluntarily authorized by the employee.
- f. Deductions requested by the employee to enable him or her to repay loans to, or to purchase shares in, credit unions organized and operated in accordance with federal and state credit union statutes.
- g. Deductions voluntarily authorized by the employee for the making of contributions to governmental or quasi-governmental agencies, such as the American Red Cross.
- h. Deductions voluntarily authorized by the employee for the making of contributions to Community Chests, United Givers Funds, and similar charitable organizations.
- i. Deductions to pay regular union initiation fees and membership dues, not including fines or special assessments; provided, however, a collective bargaining agreement between the employer and representatives of its employees provides for such deductions and the deductions are not otherwise prohibited by law.
- j. Deductions for not more than the **reasonable cost** of board, lodging, or other facilities meeting the requirements of Section 3(m) of the Fair Labor Standards Act of 1938, as amended, and 29 Code of Federal Regulations Part 531. When such deductions are made, the additional records required under 29 Code of Federal Regulations Part 516.25(a) must be kept.

NOTE: USDOL has indicated these instances are rare and do not apply to the highway construction industry.
- k. Deductions for the cost of safety equipment of nominal value purchased by the employee as his or her own property and personal protection in his or her work, such as safety shoes, safety glasses, safety gloves, and hard hats:

- i. If such equipment is not required by law to be furnished by the employer;
 - ii. If such deduction is not violative of FLSA or prohibited by other law;
 - iii. If the cost on which the deduction is based does not exceed the actual cost to the employer where the equipment is purchased from him or her and does not include any direct or indirect monetary return to the employer where the equipment is purchased from a third person; and
 - iv. If the deduction is either:
 - (a) advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of employment or its continuance; or
 - (b) Provided for in a bona fide collective bargaining agreement between the employer and representatives of its employees.
- I. Deductions for which the employer has applied and received permission to make from the Secretary, USDOL, Washington, DC.
2. Deductions specifically prohibited include:
- (a) Deductions from an employee's wages to pay for damage caused by the employee to company equipment, such as trucks, or for the theft of company property.
 - (b) Deductions for the cost of lost or destroyed clothing and other items issued to the employees for use in performing their jobs.
 - (c) Deductions for purchasing, renting, and laundering protective clothing, coveralls, etc., where the use of such clothing is required either by the employer or the nature of the job.
3. In addition, the practice of docking an employee a stated period of time or money (other than for the actual time lost) for being late for work, failing to punch a time clock, or other violation of an employment rule is considered a kickback, rebate, or unlawful deduction.

I. PAYROLL REQUIREMENTS

1. Weekly certified payrolls and basic records relating thereto must be maintained by the prime contractor and each subcontractor during the course of the work of a federally funded highway construction contract for all employees working at the **site of the work**.
2. For jobs bid in October, 13, 2017 and thereafter, the Department

will require use of LCPtracker, an online-based labor compliance system. Jobs bid prior to that time will continue to use LCPtracker on a voluntary basis, with contractors allowed to file either paper or electronic payroll.

3. **Weekly certified payrolls are not required by NDDOT for employees working on state funded only contracts** and are generally not required for employees working at locations considered not to be a **site of the work** of a federally funded highway construction contract.

4. There is no mandatorily prescribed format for contractor payrolls. However, all contractors must uniformly complete weekly certified payrolls using the job classifications found in the Davis-Bacon wage rate decision incorporated into the contract. For example:

a. When electrical work is performed on or within a commercial building **ONLY**, such as a rest area, the job classification **Electrician** must be used. **Any other electrical work on a federal-aid highway construction project in North Dakota is covered by line construction.** Electrician rates are listed in the Davis-Bacon wage rate decision by county. Consequently, the county in which the project is located must also be included after the job classification **Electrician**.

b. Line construction workers must be listed as either **Lineman, Cable Splicer, Line Equipment Operator, or Groundman**. Use of the term **Journeyworker** standing alone is unacceptable. [See **Section G, paragraphs 12-14** for additional information concerning electrician and line construction classifications.]

c. Power equipment operators must be listed as **Power Equipment Operator** and either **Group 1, 2, 3, 4, 5, or 6**. Listing the type of equipment operated after the group number is optional but not required.

d. Truck drivers must be listed as either **Single-axle Truck, Tandem- or Tri-axle Truck, Tandem- or Tri-axle Semi, Lowboy, Off Road Heavy Duty End Dump, or Euclid**. [See Section J, paragraph 19 for additional information concerning truck driver classifications.]

5. In addition, all weekly certified payrolls **must** contain:

a. The employee's full name and an individual identifying number (e.g., the last four digits of the employee's social security number);

NOTE: Addresses and social security numbers must be maintained by the prime contractor or subcontractor and provided, upon request, to NDDOT, USDOL, FHWA, or the prime contractor (when a subcontractor), for purposes of an investigation or audit of compliance with prevailing wage requirements.

Complete Social Security Numbers should never be placed on paper payrolls. On LCPtracker, social security numbers must be entered as

“XXX-XX-last 4 digits.” Employers are encouraged to list a telephone number, but this is not required.

- b. The employee's correct job classification or classifications;
- c. The employee's hourly wage rate or rates (regular and overtime) and, where applicable, fringe benefits totals paid into plans or an hourly rate if paid in cash, or both, where fringe is “mixed”;
- d. The daily and weekly hours worked in each job classification, including actual overtime hours worked;
- e. Total earnings;
- f. Itemized deductions made (per employee); and
- g. Actual or net wages paid.

6. The contractor must ensure that all employees are included on the weekly certified payroll and that the employees are properly classified and properly paid.

7. Each weekly payroll submitted must be accompanied by a completed Statement of Compliance (USDOL Form WH-348) signed by the contractor, or his or her agent who pays or supervises the payment of the persons employed under the contract, if filed on paper. If filed on LCPtracker, the contractor must set up and use an electronic signature, which is the equivalent of a pen and ink signature. Whichever method is used, the Statement of Compliance certifies that:

- a. The weekly payroll contains the information required to be maintained and that such information is **correct and complete**;
- b. The persons employed on the contract during the payroll period have been **paid the full weekly wages** earned without rebate, either directly or indirectly, and that no deductions have been made, either directly or indirectly, from the full wages earned other than the permissible deductions set forth in the regulations; and
- c. Each employee has been **paid not less than the applicable wage rate and fringe benefits, or cash equivalent**, for the classification of work performed as specified in the applicable Davis-Bacon wage rate decision incorporated into the contract.

8. **An electronic version of Payroll Form (WH-347)** can also be accessed through the following Internet link:

<https://www.dol.gov/whd/forms/wh347.pdf> although this Form may no longer

be used for projects bid on or after October 13, 2017:

9. NDDOT requires that all contractors working on federal-aid highway construction contracts in North Dakota use the Statement of Compliance. This will either be WH 348 (where paper filing is allowed) or the electronic version available through LCPtracker.

10. For all jobs bid on or after October 13, 2017, certified payrolls must be submitted electronically through LCPtracker. If an employer uses a payroll system, an interface is available which will allow employers to upload records from their payroll system to LCPtracker. Please call (701) 328-2605 or go to lcptracker.com to explore this option for your company.

11. Prime contractors are responsible for the submission of weekly certified payrolls by all subcontractors. This includes ensuring timely submittal and reviewing the weekly certified payrolls for completeness and accuracy **BEFORE** submitting. When there are problems, the prime contractor should be working with the subcontractor to resolve the issues. This is not the responsibility of the project manager-engineer (NDDOT, city, county, or consultant). Payrolls and compliance statements are due within **seven (7) calendar days** after the regular payment date of the payroll period. For jobs bid after October 1, 2017, these payrolls must be submitted through LCPtracker, with the prime contractor approving the payrolls through the Prime Approver account. Until a prime contractor reviews and electronically approves the payrolls of itself and its subcontractors on this account, they are not viewable by the Project Engineer. Once approved, the payrolls will be audited and accepted or rejected by the Project Engineer. It is vital that the prime contractor review payroll on the Prime Approver account each week, and approve this payroll. Failure to do this will give the impression to project staff that payroll has not been received.

12. NDDOT's DBE supportive services consultant is available to assist contractors and/or project managers-engineers (NDDOT, city, county, or consultant) who are having difficulty in obtaining weekly certified payrolls from DBE firms. The DBE supportive services consultant will work with the DBE firm to ensure weekly certified payrolls are completed correctly and submitted timely.

13. On a cyclical basis, USDOL conducts a wage survey to determine the prevailing wages being paid in the state on federally funded highway construction projects. For this reason, NDDOT districts and city, county, and consultant engineers will be asked to request and retain an additional copy of all weekly certified payrolls issued for such projects. At the end of the construction season, the weekly certified payrolls are forwarded to the NDDOT Civil

Rights Division for submission to USDOL in Dallas, Texas. Contractors will be notified by the project manager-engineer (NDDOT, city, county, or consultant) when an additional copy of the weekly certified payrolls is required.

14. All payroll records must be maintained and preserved by the contractor for a period of **three (3) years** following the completion and final acceptance of the project. In addition, the payroll records must be made available, at the request of FHWA; the Secretary, USDOL; and NDDOT, at any time during that period.

J. CLASSIFICATIONS

1. Assistant Operator

A worker providing assistance to a Group 1-6 Equipment Operator, who is not actually operating the equipment, is a Group 6 Assistant Operator.

2. Apprentice Operator

To be paid as a Group 6 Apprentice Operator, a worker must be in an approved USDOL Apprentice program, or must be a trainee in the NDDOT OJT program. Apprentices or trainees may be paid under the Group 6 rate, or as otherwise required under the NDDOT program or under the approved USDOL program.

3. (Bobcat) Skidsteer Operators

The operator of a skidsteer will be included in the Power Equipment Operator Group 5, regardless of the type of work performed.

4. Boring Machine Locator

A worker operating a piece of equipment tracking and providing guidance to a horizontal or directional drilling machine is a Group 4 Boring Machine Locator.

5. Bridge Painters and Sandblasters.

The ND Highway Heavy wage rate decision (ND 2) does not contain a category for Bridge Painters. Sandblasters are classified as Group 4 Laborers, regardless of the specific nature of the sandblasting work. After award of a contract involving complex bridge painting (use of a polymer type paint on a steel bridge), a conformance must be filed setting the bridge rates

for each project. While the rates set by the USDOL for bridge painters in ND have been historically comparable to rates for concrete masons, it is always possible that the USDOL will set the rate higher.

If the same employee does both bridge painting and sandblasting, the time for each must be kept separately, or they must be paid at the bridge painter rate for both. If a project involves painting a bridge with latex paint using a roller system, the employee completing the work will be classified as a Group 1 Laborer.

6. Carpentry

The Davis-Bacon wage rate decision for highway construction in North Dakota includes the classification **Carpenter** and the classification **Carpenter Tender** under the Laborer Group 2.

a. Carpenter:

(1) A **Carpenter** is a tradesperson who builds and assembles forms and their components for concrete used in engineering and construction projects (bridges, box culverts, retaining walls, etc.). Typically, a Carpenter:

- (a) Reads construction plans and sketches;
- (b) Lays out structures.
- (c) Measures, cuts, and shapes materials with power and hand tools.
- (d) Rigs and places forms and materials.
- (e) Assembles forms by hand with nails, bolts, and arc welding processes.
- (f) Handles a range of manual and power saws, drills, screw drivers, and hammers, among other tools.

(2) Carpentry work performed in connection with bridges and structures generally involves:

- (a) Pier, pile, and cap formwork;
- (b) Decking formwork
- (c) Endwall formwork;
- (d) Box culverts, inlet, and headwall formwork; and
- (e) Preparation of steel and other metals for use.

b. **Carpenter Tender:**

A Carpenter Tender is a laborer who directly assists a Carpenter by performing specific or general duties of lesser skill. Tending consists of the handling and conveying of materials and tools to be used by Carpenters.

(1) According to USDOL, helpers or tenders are permitted on DBRA covered contracts if the helper or tender classification is included in the applicable wage rate decision incorporated into the contract, or if conformed rates are approved by USDOL pursuant to 29 CFR Part 5, Subpart A, Section 5.5(a)(1)(ii). In either case, area practice determines the allowable duties of helpers or tenders; and their use is not restricted in a ratio to the number of journeyworkers employed by the contractor on a federal-aid highway construction project, or the site of the work. A request for a conformed helper or tender wage rate will be approved by USDOL only where the helper or tender in question constitutes a separate and distinct class of worker whose use is prevailing in the area and whose scope of duties can be differentiated from those of the journeyworker. A helper or tender may not be used as an informal apprentice or trainee, and it is not permissible for helpers or tenders to use the tools of the trade in assisting a journeyworker.

(2) A **Carpenter Tender** typically:

- (a) Moves and lifts building materials, tools, and supplies.
- (b) Hands materials, tools, and supplies to Carpenters.
- (c) Dismantles, moves, and cleans forms for reuse.
- (d) Cleans materials, equipment, and tools and clears all debris from the construction area.

(3) According to USDOL, a Carpenter Tender cannot saw wood, nail a board to a wall, etc., because that is what a Carpenter does. The moment an employee pounds a nail or cuts a piece of wood, he or she must be classified and paid as a Carpenter for all of the hours he or she works in connection with the carpentry work.

7. Concrete Finishing

The Davis-Bacon wage rate decision for highway construction in North Dakota includes the classification Cement Mason/Finisher; the classifications Sack Shaker (cement and

mineral filler) and Salamander Heater and Blower Tender under the Laborer Group 1; the classifications Bulk Cement Handler, Concrete Bucket Signalman, Concrete Curing Man (not water), Concrete Finisher Tender, Concrete Vibrator Operator, and Power Buggy Operator under the Laborer Group 2; and the classification Concrete Mixer Operator (one bag capacity) under the Laborer Group 3.

a. **Cement Mason/Finisher:**

A **Concrete Finisher, also known as a Cement Mason**, is a tradesperson who works with concrete. Duties include placing, finishing, protecting, and repairing concrete used in engineering and construction projects. Typically, a Concrete Finisher:

- (1) Sets (or directs the setting of) the forms for holding the concrete, checks, and properly aligns the forms to ensure they have the correct depth and pitch or angle.
- (2) Supervises Concrete Finisher Tenders who direct the placement of the concrete and use shovels and rakes to spread the poured concrete into inaccessible sections of the forms.
- (3) Levels, smoothes, edges, and finishes surfaces of poured concrete floors, walls, sidewalks, curbs, etc., to specified textures by performing the following steps using the tools of the trade:

- (a) Guides a straightedge back and forth across the top of the forms to screed, or level, the freshly placed concrete to the specified depth and workable consistency.
 - (b) Immediately after leveling the concrete, carefully smooths the concrete surface using either a hand masonry trowel (a long-handled bull float) or a powered float to bring water to the surface and produce a soft topping.
 - (c) After the concrete has been leveled and floated, presses an **edger** between the forms and the concrete and guides it along the edge and the surface. This produces slightly rounded edges and helps prevent chipping or cracking.
 - (d) Uses a special tool called a groover to make joints or grooves at specific intervals that help control cracking.
 - (e) Trowels the surface using either a powered or hand trowel (a small, smooth, rectangular metal tool).
 - (f) Applies architectural, exposed, patterned, stamped, broomed, or smooth finishes. The concrete surface is retroweled back and forth with powered and hand trowels to create a smooth finish. For a coarse, non-skid finish, the surface is brushed with a broom or stiff-bristled brush. For a pebble finish, small gravel chips are embedded into the surface. Any excess cement is then washed from the exposed chips with a mild acid solution. Colored premixed concrete is used for color. Refer to section J6, para e, 3, f for information concerning decorative concrete.
 - (g) Smooths any rough surfaces that remain when the pouring forms have been removed. High spots and loose concrete are cut away with a hammer and chisel, and any large indentations are filled with Portland cement paste. Any high spots are rubbed with a brick or carborundum stone to smooth them. A rich mixture of cement is then rubbed in with a sponge-rubber float or with burlap.

- (h) Applies hardening and sealing components to cure the surfaces.
- (4) Throughout this entire process, Concrete Finishers monitor how the wind, heat, or cold affects the curing of the concrete. They must have a thorough knowledge of concrete characteristics so that, by using sight and touch, they can determine what is happening to the concrete and take measures to prevent defects.
- b. **Group 1 Laborers:**
- (1) **Sack Shaker (cement and mineral filler)** – Empties, cleans, and bundles cement bags typically at a concrete mixing or batch plant.
 - (2) **Salamander Heater and Blower Tender** – Tends a portable, forced air heater used to dry concrete. The heater may be propane or kerosene fueled. This includes the connection and disconnection of fuel tanks and the turning on and off of the heater.
- c. **Group 2 Laborers (excluding Concrete Finisher Tenders):**
- (1) **Bulk Cement Handler** – Hauls cement from storage in bulk or bags typically at a concrete mixing or batch plant.
 - (2) **Concrete Bucket Signalman** – Directs the placement of the bucket used to deliver concrete by means of a tower crane. Signals the **Tower Crane Operator** when he or she cannot see the point of placement.
 - (3) **Concrete Curing Man (not water)** – Covers the new concrete with sheet plastic or sprays a liquid curing compound onto the new concrete to seal in moisture.
 - (4) **Concrete Vibrator Operator** – Operates a machine that vibrates the concrete to remove air pockets.
 - (5) **Power Buggy Operator** – Drives a self-propelled buggy to transport concrete from the mixer or source of supply to the place of deposit.

d. **Group 3 Laborers:**

- (1) **Concrete Mixer Operator** (one bag capacity) – Operates a portable concrete mixer.

e. **Concrete Finisher Tender:**

- (1) A **Concrete Finisher Tender** is a Group 4 Laborer who directly assists a Concrete Finisher by performing specific or general duties of lesser skill. Tending consists of the preparation of materials and the handling and conveying of materials and tools to be used by Concrete Finishers, whether such preparation is by hand or any other process.
- (2) According to USDOL, helpers or tenders are permitted on DBRA covered contracts if the helper or tender classification is included in the applicable wage rate decision incorporated into the contract, or if conformed rates are approved by USDOL pursuant to 29 CFR Part 5, Subpart A, Section 5.5(a)(1)(ii). In either case, area practice determines the allowable duties of helpers or tenders; and their use is not restricted in a ratio to the number of journeyperson employed by the contractor on a federal-aid highway construction project, or the site of the work. A request for a conformed helper or tender wage rate will be approved by USDOL only where the helper or tender in question constitutes a separate and distinct class of worker whose use is prevailing in the area and whose scope of duties can be differentiated from those of the journeyperson. A helper or tender may not be used as an informal apprentice or trainee, and it is not permissible for helpers or tenders to use the tools of the trade in assisting a journeyperson.
- (3) Under a **Concrete Finisher's supervision, a Concrete Finisher Tender** typically:
 - (a) Measure distances from grade stakes, sets stakes, and stretches string line.
 - (b) Directs the placement of the concrete either from the concrete wagon chute, concrete pump, concrete skip, or wheelbarrow. Signals the concrete deliverer to position the truck to facilitate the pouring of the concrete. Moves the discharge chute of the truck to direct the concrete into the forms.

- (c) Spreads the poured concrete into inaccessible sections of the forms using shovels and rakes.
 - (d) Dismantles, moves, and cleans the forms once the concrete is set.
 - (e) May rub concrete surfaces with abrasive stone to remove rough spots.
 - (f) Ages and cures the finished concrete by any mode or method. For example, places mats on newly poured concrete and keeps them moist for curing purposes.
 - (g) Cleans equipment and tools and clears all debris from the construction area.
- (4) According to USDOL, a **Concrete Finisher Tender cannot use a straightedge, bull float, edger, groover, etc.**, because those are the tools used by a Concrete Finisher. **The moment an employee uses any tools of the trade, he or she MUST be classified and paid as a Concrete Finisher** for all of the hours he or she works in connection with the concrete work.

f. **Decorative Concrete:**

- (1) The transformation of concrete into decorative concrete is achieved through the use of a variety of materials that may be applied during the pouring process or after the concrete is cured. These materials and/or systems include stamped concrete, acid staining, decorative overlays, polished concrete, etc.
- (2) Stamped concrete is the process of adding texture and color to concrete to make it resemble stone, brick, slate, cobblestone, and many other products found in nature including wood, fossils, shells, etc.
- (3) The installation consists of pressing molds into the concrete while the concrete is still in its plastic state. Color is achieved by using dry shakes or color hardeners, powder or liquid releases, integral colors, or acid stains. All these products may be combined to create even

more intricate designs.

- (4) According to USDOL, concrete stamping is work that could be performed by a **Concrete Finisher Tender** if it is not already being performed by a **Concrete Finisher**. Tasks include:
 - (a) Hand broadcasting the color hardener onto the concrete surface.
 - (b) Once a Concrete Finisher has troweled the hardener into the concrete, hand broadcasting the release agent onto the concrete surface.
 - (c) Placing textured mats onto the concrete surface and tapping the mats down with a pounder.
 - (d) Removing the stamping mats.
 - (e) After the concrete has been allowed to dry for 24 hours, washing any excess release agent from the concrete surface with a water hose.

8. Concrete Saw Operators

The Davis-Bacon wage rate decision for highway construction in North Dakota includes a Concrete Saw (power operated) under the Power Equipment Operator Group 5 and a Concrete Saw Operator under the Laborer Group 2. An employee who walks behind a concrete saw is considered a Group 2 Laborer and must be paid not less than the appropriate Davis-Bacon wage. It does not matter what size the engine is or whether it is self-propelled. An employee who rides a concrete saw is considered a Group 5 Power Equipment Operator and must be paid not less than the appropriate Davis-Bacon wage, including applicable fringe benefits.

9. Core Sampling

- a. Some federal-aid concrete projects, mainly on the interstate and major expressways in North Dakota, now contain a separate bid item for cored samples (specification 950, code 9700). **An employee who cuts the core**

samples is considered a laborer and must be paid not less than the appropriate Davis-Bacon wage for Group 1 Laborers (similar to Drill Runner Tender). For example:

To cut the cores, the contractor employee stands alongside a trailer on which the coring machine is mounted. The coring machine is powered by a generator and has a metal bit. The employee spins a wheel to drill up and down. The employee does not ride the machine. The core sample is taken out and laid along the roadway for an NDDOT employee to pick up. NDDOT personnel perform the actual testing.

b. The employee driving the truck that is pulling the trailer would receive the wages of a truck driver for the type of truck being driven as described in paragraph 19 e) of this section.

10. Cure Bridge Operator

The classification "Cure Bridge Operator" first appeared in the November 1, 2013 Wage Decision. Cure Bridge Operators must be classified and paid as Group 5 Power Equipment Operators.

11. Dowel Basket and Dowel Bar Placement

Contractor employees placing dowel baskets and dowel bars on federal-aid concrete pavement projects in North Dakota are considered laborers and must be paid not less than the appropriate Davis-Bacon wage for Group 4 Laborers (Reinforcing Steel Setters/Tiers).

12. Flaggers

a. According to USDOL and FHWA, flagging is not considered hazardous work under federal and state child labor laws. Therefore, **the minimum age for Flaggers is 16**. Refer to paragraph H of this section for additional information concerning child labor laws.

b. Other Standards For Flagging are specified in Section 704.03X of the 2008 Standard Specifications For Road and Bridge Construction (Volume 1) available online at:

www.dot.nd.gov/dotnet/supplspecs/standardspecs.aspx

- c. In addition, FHWA encourages contractors to check out information from:

www.workzonesafety.org

13. Ironworker

- a. There is no classification on the ND Highway Wage Decision (ND 02) for an Ironworker. If a worker does no more than sets iron rebar, he or she should be classified as a Group 4 Laborer, Reinforced Steel Setter. If they do more complex work, including decorative ironwork, the position should be conformed. Contact CRD on the filing of a conformance request for Ironworkers.

14. Joint Sealing

- a. Contractor employees performing **joint sealant work** on federal-aid highway construction projects in North Dakota are considered laborers and must be paid not less than the appropriate Davis-Bacon wage for **Group 4 Laborers** (similar to Powderman, Gunitite and Sandblast, and Nozzleman). For example:

The employees operate an air compressor and tar kettle (hot pour sealant) mounted in the box of a pickup. The pickup also pulls a trailer on which an air compressor and silicone drums with a pump are mounted. The employees use a sandblasting nozzle to clean the joints before the sealant is applied. Either a hot pour or a silicone sealant is applied with a nozzle. Before the silicone sealant is applied, backer rod is placed into the cracks.

- b. The employee **driving the pickup** would receive the wages of a **Group 1 Laborer (Light Truck and Pickup Driver)** as described in paragraph 19 e of this section.

15. Line Construction and Electricians

- a. **When electrical work is performed on or within a commercial building only, such as a rest area, the job classification Electrician must be used. Any other electrical work on a federal-aid highway construction**

project in North Dakota is covered by line construction. The following types of electrical construction are considered line construction:

- (1) Pole line construction (whether built of wood, metal, or other material); digging and backfilling of holes for poles or anchors (by hand or mechanical equipment); and the handling, assembling, or erecting of all materials, including the guying, stringing of conductors, or other work necessary, on through to the ultimate completion of such pole line work.
 - (2) Highway lighting systems and motor vehicle traffic controls (traffic signals, flashing beacons, etc.). Handled in the same manner as pole line construction.
 - (3) Electrical underground construction, including the placing of fish wires, the pulling of cables or wires through such raceways, and the splicing of such conductors.
 - (4) Underground construction, including excavation, trenching, and installation of raceways or ducts; construction of manholes, transformer vaults, and hand holes; backfilling; installation of fish wire; and pulling, splicing, and laying of wire or cables installed in raceways, ducts, or direct burial.
 - (5) Underground construction, including apparatus and fixtures on public property such as street lighting, highway lighting, lines, or equipment.
- b. This includes not only new installation work but also the repair, maintenance, or dismantling of all above structures, lines, or equipment.
- c. The job classifications and duties performed in line construction are:
- (1) **Lineman** – Responsible for all aerial work performed, whether from a bucket or by the use of belts and climbers. May perform any underground work, including but not limited to: installing duct work, raceway, pulling cables or wires, installing direct burial cable or wires, junction boxes, terminating cable or wire, setting poles, and

assembling lights or signals.

- (2) **Cable Splicer** – In addition to the same duties as lineman, may be required to splice and terminate high voltage cable and multi-conducted cable when special procedures or kits are required to accomplish the task.
- (3) **Line Equipment Operator** – Operates any equipment needed to complete the project, including but not limited to: backhoe, front-end loader, trencher, and hole auger.
- (4) **Groundman** – Performs basic laborer work such as hand excavation; assists in pouring cement, site cleanup, etc.; and assists other crafts while they are performing aerial work.

NOTE: This is the only laborer classification that can be used in connection with the line construction work.

16. Mechanics, Greasers, and Oilers

The Davis-Bacon wage rate decision for highway construction in North Dakota includes Mechanics, Greasers, and Oilers under the following Power Equipment Operator groups:

a. **Group 2: Master Mechanic**

The employee supervises five or more Mechanics employed on the same project.

b. **Group 3: Mechanic or Welder, Heavy Duty**

The employee operates a service truck used in the repair and maintenance of equipment, using Mechanic's tools, welding equipment, and hoists.

c. **Group 4: Fuel and Lube Operator**

The employee operates a truck with a large tank body suitable for transporting fuel or lube oil in bulk, and delivers fuel and lube oil to various other equipment.

d. **Group 4: Truck Mechanic**

The employee operates a smaller service truck used in the repair and maintenance of equipment, without the use of welding equipment and hoists.

e. **Group 4: Greaser**

The employee operates a self-contained service truck used in greasing equipment and adding fluids such as oil.

f. **Group 5: Oiler**

The employee assists the operating engineer of a track or truck crane by greasing and oiling the crane while the operating engineer runs it.

17. Micro Machine and Slurry Seal Machine Operators

The classification of “Micro Surfacer Machine” Operator and “Slurry Seal Machine” Operator first appeared in the November 1, 2013 Wage Decision. These employees MUST be classified and paid as:

a. **Power Equipment Operator Group 4: Micro Machine Operator**

The employee drives the Micro Machine.

b. **Power Equipment Operator Group 4: Slurry Seal Machine Operator**

The employee operates a self-propelled machine for delivering a mix, such as asphalt emulsion slurry seal.

c. **Power Equipment Operator Group 4: Pugmill Operator**

The employee operates the Pugmill hooked onto the back of the machine.

d. **Power Equipment Operator Group 4: Box Person**

Two employees run the conveyors and levers.

- e. **Laborer Group 1: Cement Person or Sack Shaker (cement and mineral filler)**

The employee dumps bags of cement onto the conveyors.

- f. **Laborer Group 1: Oil and Water Person or General Construction Laborer**

Two employees sit on the front of the machine and regulate the water and oil for proper consistency.

18. Pipelayers

The Davis-Bacon wage rate decision for highway construction in North Dakota includes Pipelayers under the following Laborer groups:

- a. Group 1: **Pipe Handler**

The employee loads and unloads pipe from a truck, boxcar, etc. When unloading, the employee stockpiles the pipe only.

- b. Group 2: **Multiplate Pipelayer, Culvert Pipelayer**

The employee places galvanized pipe and some PVC (plastic pipe) into trenches and assembles. The employee may also work with 6- and 8-inch PVC sanitary sewer pipe.

- c. Group 3: **Bottom Man (Sanitary Sewer, Storm Sewer, Water, and Gas Lines)**

The employee is lowered into a tunnel, well, or caisson (elongated box that is put into a sewer – no water runs through) with a bucket and cleans out the bottom of the hole making it wider or ready for concrete pouring. The employee cleans out loose dirt.

- d. Group 4: **Pipelayer (Sanitary Sewer, Storm Sewer, Water, and Gas Lines)**

The employee places special, low pressure type pipe into trenches and assembles. The employee may also work with some 18- to 48-inch reinforced concrete pipe and some 24- to 60-inch reinforced concrete storm sewer pipe.

19. Rumble Strip Machine Operators

The classification for “Rumble Strip Machine” Operator first appeared in the November 1, 2013 Wage Decision. An employee who operates the Rumble Strip Machine (grinder with rotating blade) is considered a Group 4 Power Equipment Operator.

20. Sign Installation

- a. Contractor employees performing sign installation work on federal-aid highway construction projects in North Dakota are considered laborers and must be paid not less than the appropriate Davis-Bacon wage for **Group 1 Laborers**. For example, the employees install, remove, relocate, etc., metal traffic signs such as stop, yield, exit destination, etc. The employees bolt the signs onto a metal sign post or base.
- b. However, if an employee is also required to install the sign posts or bases; and in so doing is required to operate a piece of equipment, that employee must be classified and paid not less than the appropriate Davis-Bacon wage, including applicable fringe benefits, for the Power Equipment Operator group under which the piece of equipment falls.

21. Truck Drivers

- a. The driver of any single vehicle which has a gross vehicle weight rating of 26,000 pounds or less, or any combination of vehicles which has a gross combination weight rating of 26,000 pounds or less, will be included in Group 1 Laborers.
- b. The driver of any single vehicle which has a gross vehicle weight rating of 26,001 pounds or more, or any combination of vehicles which has a gross combination weight rating of 26,001 pounds or more, will be included in the Truck Drivers category.

- c. An employee operating a **tractor or a modified scraper** on a federal-aid highway construction project, or the site of the work, that is pulling a water tank mounted on a trailer or a wagon is considered an equipment operator and must be paid not less than the appropriate Davis-Bacon wage, including applicable fringe benefits, for the Power Equipment Operator group under which the tractor or scraper falls.
- d. An employee operating a “**post pounder truck**” (hydraulically powered sign and/or guardrail post pounder mounted on a truck) on a federal-aid highway construction project in North Dakota, or the site of the work, **MUST** be classified and paid as either a Pavement Breaker, Hydro Hammer Type, Operator or a Tamping Machine Operator under the **Power Equipment Operator Group 4**.
- e. An employee driving a **pickup carrying a signal or message board** behind or ahead of other equipment on a federal-aid highway construction project, or the site of the work, is considered a **Group 1 Laborer (Pilot Car Driver)** and must be paid not less than the appropriate Davis-Bacon wage.
- f. Subcontractors
 - (1) If the prime contractor is using subcontractors for hauling on a federal-aid highway construction project, or the site of the work of a federal-aid highway construction project, approved Prime Contractor’s Request to Sublet (SFN 5682 - Rev. 07-2012) forms and subcontract agreements between the prime contractor and the subcontractors are required prior to performing any hauling. The Required Contract Provisions, Federal-aid Construction Contracts (USDOT Form FHWA 1273 - Rev.5-1-12) and the applicable Davis-Bacon wage rate decision must be incorporated into the subcontract agreements. **The subcontractors must pay their employees the appropriate Davis-Bacon wage**, including applicable fringe benefits, and provide weekly certified payrolls. This applies to all tiers of subcontracts.
 - (2) If the prime contractor is using subcontractors for hauling from a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., that has not been open and making sales to the general public within the previous twelve months of the day a federal-aid highway construction project was let to contract (not awarded), and the boundary to the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is located more than one-half mile from the closest right of way boundary to the project, approved Prime Contractor’s Request to Sublet (SFN5682 - Rev. 07-2012) forms and subcontract agreements between the prime contractor and the subcontractors are required prior to performing any hauling. The Required Contract

Provisions, Federal-aid Construction Contracts (USDOT Form FHWA 1273 - Rev. 5-1-12) and the applicable Davis-Bacon wage rate decision must be incorporated into the subcontract agreements. **The subcontractors must pay their truck drivers the appropriate Davis-Bacon wage, including applicable fringe benefits, and provide weekly certified payrolls only for the amount of time spent within the project boundaries** that is more than de minimis. This applies to all tiers of subcontracts. Refer to paragraph B of this section for additional information concerning de minimis.

- (3) If the prime contractor, or a subcontractor, is using a DBE firm for hauling from a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., that has been open and making sales to the general public within the previous twelve months of the day a federal-aid highway construction project was let to contract (not awarded), no matter what its location, approved Prime Contractor's Request to Sublet (SFN 5682 - Rev. 07-2012) forms and subcontract agreements between the prime contractor, or subcontractor, and the DBE firm are required prior to performing any hauling. This includes non-DBE match trucks, as required under the DBE race-conscious special provision. Only the Required Contract Provisions, Federal-aid Construction Contracts (USDOT Form FHWA 1273 - Rev. 5-1-12) must be incorporated into the subcontract agreements because it contains more than just the labor standards provisions (i.e., Davis-Bacon wages and payrolls are not required).
- (4) NDDOT will not consider off-site commercial production of materials and manufactured component products that the contractor purchases or their transportation to the project as subcontracted work.
- (5) When a project contains a DBE goal, a subcontract is required with any DBE firms used to meet the goal; unless the DBE firm is classified as an oil hauler, supplier, broker, vendor, regular dealer, or manufacturer.

g. Truck Owner-Operators

- (1) 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 which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics."

[29 CFR 5.2(m) states: "The term laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including

those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial.”]

- (2) The only exception is bona fide owner-operators of trucks (also referred to as independent truck owner-operators or ITOs). Bona fide owner-operators of trucks are not covered by DBRA. However, if the prime contractor or a subcontractor is using truck owner-operators for hauling on a federal-aid highway construction project, or the site of the work, they must appear on either the prime contractor’s or the subcontractor’s weekly certified payrolls as:
 - (a) Owner-operator’s name and an individual identifying number (e.g., the last four digits of the owner-operator’s social security number), with the notation owner-operator after the name.
 - (b) Neither the hours worked nor the wages paid need be shown.
 - (c) On LCPtracker, owner-operators are placed on the certified payroll of the contractor, with the “owner-operator” box checked and no hours or rate of pay.

- (3) When on the site of the work of a federal-aid highway construction project, the actual **owner-operator must drive the truck at all times**. If, for any reason, he or she does not drive the truck, even for a short period of time, the **replacement driver must be paid the appropriate Davis-Bacon wage, including applicable fringe benefits, and must appear on weekly certified payrolls showing the hours worked and the wages paid**.

- (4) **The prime contractor is responsible for ensuring compliance with the labor standards provisions of the contract**. This includes obtaining subcontracts and weekly certified payrolls as required, as well as monitoring and verifying the status of all truck owner-operators working on a federal-aid highway construction project, or the site of the work, either directly for the prime contractor or for its subcontractors. To determine bona fide owner-operator status, the prime contractor must request, verify, and provide the following information to the NDDOT, city, county, or consultant project manager-engineer before the truck owner-operator begins work:

- Owner-operator's name;
- Valid commercial driver's license;
- Vehicle registration in the owner-operator's name;
- Current vehicle license number;
- Truck number that will or is being used on scale tickets and haul sheets; and
- Copies of any signed lease or rental agreements for owner-operator trucks. The lease or rental agreement must be between the driver and a reputable dealership (e.g., Nelson Leasing, Inc., Allstate Peterbilt of Fargo, Inc., W. W. Wallwork, Inc., etc.); not the driver and the prime contractor or the driver and a subcontractor on the project.

(5) According to USDOL, **a lease or rental agreement does not constitute ownership.** However, NDDOT chooses to recognize lease or rental agreements with **reputable dealerships only.** Those dealerships have no vested interest in when, where, for whom, or if the truck driver works.

(6) Determinations made by the North Dakota Department of Labor (DOL), or any other state agency, concerning independent contractor status for wage and hour, tax, worker's compensation, etc., purposes **do not apply to DBRA** covered contracts. The North Dakota DOL's determinations concerning independent contractor status are for state wage and hour purposes and are based on state law only. DBRA and USDOL rules and regulations are controlling in wage and hour matters concerning federal-aid highway construction projects.

h. Equipment Owner-Operators

- (1) **Owner-operators of other types of equipment are considered employees under DBRA.** Consequently, they must be paid the appropriate Davis-Bacon wage, including applicable fringe benefits, and be included on weekly certified payrolls showing the hours worked and the wages paid.
- (2) When a contractor pays an equipment owner-operator a lump sum amount, it may be difficult to determine whether the owner-operator was paid the correct hourly wage. If a wage dispute ensues, USDOL suggests:

- (a) Researching the open market for the rate required to rent the same piece of equipment by the hour;
- (b) Multiplying that figure by the total number of hours the owner-operator worked;
- (c) Figuring the wages the owner-operator should have been paid based on the total number of hours worked and the required rate of pay (straight time, overtime, and fringe benefits);
- (d) Adding the two figures together; and
- (e) Comparing the total to the lump sum amount.

If the total is substantially greater than the lump sum amount, the owner-operator would be due the difference.

22. Water Spraying Equipment

The Davis-Bacon wage rate decision for highway construction in North Dakota includes Water Spraying Equipment, Self-propelled under the Power Equipment Operator Group 5. This is a piece of equipment that is not being pulled by another piece of equipment or a truck. If an employee:

- a. Is driving a tandem-axle truck with a water tank mounted on the back of the truck, the employee must be classified and paid as a **Tandem-axle Truck Driver**.
- b. Is driving a semi that is pulling a water tank mounted on a trailer or a wagon, the employee must be classified and paid as a **Tandem-axle or Tri-axle Semi Driver**.
- c. Is operating a tractor or a modified scraper that is pulling a water tank mounted on a trailer or a wagon, the employee would be considered an equipment operator and must be paid not less than the appropriate Davis-Bacon wage, including applicable fringe benefits, for the Power Equipment Operator group under which the tractor or scraper falls.

- d. If the piece of equipment is hand held and is not self-propelled, then the person using the water sprayer/vacuum (often used in horizontal boring) is a Group 4 Laborer.

23. Weed Sprayers

Some federal-aid thin lift overlay projects in North Dakota now contain a separate bid item for spraying herbicide on the shoulders to kill weeds and grass. An employee who sprays the weeds and grass is considered a laborer and must be paid not less than the appropriate Davis-Bacon wage for **Group 1 Laborers**. The employee should be listed on the weekly certified payroll as: Group 1 Laborer (Weed Sprayer). For example:

The contractor employee rides a four-wheeler or ATV with attached spraying equipment and sprays the weeds and grass on the shoulders of the road.

24. Welders

- a. The Davis-Bacon wage rate decision for highway construction in North Dakota states: **Welders** receive rate prescribed for craft performing operation to which welding is incidental. In the case of Welders employed on structural projects during pile driving operations, NDDOT has determined:

- (1) The **Carpenter rate** will apply when an actual Carpenter is working with the Welder (not a person classified as a Foreman who has carpentry skills).
- (2) The **Crane Operator rate** will apply when it is the only other skilled craft present during the welding.

- b. Whatever rate is chosen must be used for the life of the project. For example, if the Crane Operator rate is used and all the piling is in place and the crane has left, those individuals who later weld ice nose angle or rebar on the piling should continue to receive the Crane Operator rate. This would be so even though an actual Carpenter is also present on the project.

K. EXEMPTIONS FROM DBRA COVERAGE

1. The Required Contract Provisions, Federal-aid Construction Contracts (USDOT Form FHWA 1273 - Rev. 5-1-12), which is included in every federal-aid highway construction

contract and is further required to be included in all subsequent subcontract agreements, states in part:

"All **mechanics and laborers** employed or working upon the **site of the work** will be paid unconditionally and **not less often than once a week** and without subsequent deduction or rebate on any account [except such payroll deductions as are permitted by regulations (29 CFR Part 3) issued by the Secretary of Labor under the Copeland Act (40 U.S.C. 276c)] the full amounts of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment. The payment shall be computed at wage rates **not** less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor or its subcontractors and such **laborers or mechanics**."

2. In addition, Title 29, Code of Federal Regulations, Part 5.2(m) states:

"The term **laborer or mechanic** includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term **laborer or mechanic** includes apprentices, trainees, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity, as defined in Title 29, Part 541, are not deemed to be **laborers or mechanics**. Working foremen who devote **more than 20 percent of their time** during a workweek to mechanic or laborer duties, and who **do not** meet the criteria of Part 541, are **laborers and mechanics** for the time so spent."

3. Title 29, Part 541, includes the following definitions for **Executive Employees**:

a. "Business Owners"

The term **employee employed in a bona fide executive capacity** in Section 13(a) (1) of the Act also includes any employee who **owns at least a bona fide 20 percent equity interest** in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management.

b. Management

Generally, **management** includes but is not limited to activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of

materials, supplies, machinery, equipment, or tools to be used or merchandise to be bought, stocked, and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures."

4. In consideration of the foregoing, NDDOT requires:

a. Company Owners

Those individuals who **own at least 20 percent** of the company (prime contractor or subcontractor) and who perform the work of a **laborer or mechanic** on a federal-aid highway construction project, or the **site of the work, are not due Davis-Bacon wages.**

b. Supervisory Personnel

- (1) As a general rule, those employees who work in a supervisory capacity on a federal-aid highway construction project, or the **site of the work**, are not covered under DBRA. However, the mere fact that an employee is called a **working supervisor** does not necessarily mean the worker is not a **laborer or mechanic** as defined under DBRA (one who performs manual labor) and is, therefore, subject to the provisions of DBRA.
- (2) If a person employed in a supervisory capacity performs the work of a **laborer or mechanic more than 20 percent of the time** in any given workweek, he or she is subject to the provisions of DBRA during the periods while so employed as a **laborer or mechanic**. Consequently, he or she must be paid not less than the appropriate Davis-Bacon wage, including applicable fringe benefits, for the job classification of work performed.
- (3) In LCPtracker, the supervisor is not listed on certified payroll unless he/she is a working foreman.

5. Surveyors, Gravel Testers, Technicians, Scale Operators

a. Contractor employees working in the capacity of **Surveyors, Gravel Testers, Quality Control Technicians** (testing and/or laboratory technicians), and **Scale Operators** (operating a scale and a computer) on a federal-aid highway construction project, or the **site of the work**, are not **laborers or mechanics** within the definition of DBRA (one who performs manual labor) and

are, therefore, not covered. **They are not due Davis-Bacon wages and do not have to appear on the weekly certified payrolls.**

b. The above includes **Bituminous Mix Testers, Bituminous Pavement Inspectors, Bituminous Mix Controllers, and Aggregate Testers** as defined in the NDDOT Transportation Technician Qualification Program (TTQP).

6. Field Office Employees

Contractor employees whose duties are primarily administrative, executive, or clerical in nature are not considered **laborers or mechanics** within the definition of DBRA (one who performs manual labor). Those duties include but are not limited to: bookkeeping; recordkeeping; inspecting; operating computers; receiving, reviewing, and otherwise handling material invoices; collecting scale tickets and haul sheets; collecting oil samples from transport tankers; transferring oil from transport tankers to storage tanks and from storage tanks to haul trucks and distributors; flushing hoses, pumps, and distributor spray bars; etc. These employees are not due Davis-Bacon wages and do not have to appear on the weekly certified payrolls.

7. Traffic Control Suppliers

a. Employees of a traffic service company operating as a subcontractor on a federal-aid highway construction project, or the **site of the work**, to set up and service traffic control devices (e.g., barricades, directional signs, lights, arrowboards, etc.) are generally covered by DBRA. However, a traffic service company that rents equipment to the prime contractor or a subcontractor and performs only incidental functions on a federal-aid highway construction project, or the **site of the work**, in connection with delivery of the equipment is regarded as a material supplier whose employees would not be subject to DBRA, unless the employees spend a substantial amount of time (**20 percent or more**) in the workweek on the federal-aid highway construction project, or the **site of the work**.

b. A traffic control supplier on a federal-aid highway construction project, or the **site of the work**, who furnishes traffic control devices, delivers the devices to the **first use** location, sets the devices up at the **first use** location, and picks the devices up after the project has been completed is considered a material supplier if, after the initial setup, the prime contractor or subcontractor maintains the devices on the project or the **site of the work** and assumes the responsibility of relocating the devices on a day-to-day basis. Bona fide material suppliers are not covered under DBRA. Thus, their employees are not due Davis-Bacon wages and weekly certified payrolls are not required by NDDOT.

c. If, after initial setup, the traffic control supplier performs any of the following **more than 20 percent of the time in any given workweek**, it is

treated as a subcontractor in the same manner as a temporary employment agency:

- (1) Provides regular surveillance, cleaning, routine maintenance, and repair of devices or
- (2) Changes the system between stages.

d. **The traffic control supplier's employees would be subject to the provisions of DBRA during the periods while so employed on the federal-aid highway construction project, or the site of the work.** Consequently, the employees must be paid the appropriate Davis-Bacon wage, including applicable fringe benefits, for the job classification of work performed. The contractor must acknowledge joint employment and either put the traffic control supplier's employees on its weekly certified payrolls or require the traffic control supplier to generate and provide weekly certified payrolls.

NOTE: If the traffic control supplier's employees are working on two or more federally funded highway construction contracts (held by one or more contractors) in any given workweek, all of the hours worked on the contracts must be combined and considered in determining whether the employees met the 20 percent. Hours worked on commercial, non-government work may be excluded. [See **Section F** for information concerning the payment of overtime hours.]

8. 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 which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics."

[29 CFR 5.2(m) states: "The term laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial."]

b. The **only** exception is bona fide owner-operators of trucks (also referred to as independent truck owner-operators or ITOs). Bona fide owner-operators of trucks are not covered under DBRA. However, if the prime contractor or subcontractor is using truck owner-operators for hauling on a federal-aid highway construction project, or the **site of the work**, they must appear on either the prime contractor's or the subcontractor's weekly certified payrolls as:

- (1) Owner-operator's name and an individual identifying number (e.g., the last four digits of the owner-operator's social security number), with the notation **owner-operator** after the name.

- (2) Vehicle identification number or license plate number of the vehicle being driven.
- (3) Truck number being used on scale tickets and haul sheets.
- (4) Neither the hours worked nor the wages paid need be shown.

c. When on the **site of the work** of a federal-aid highway construction project, the actual owner-operator must **drive the truck at all times**. If, for any reason, he or she does not drive the truck, even for a short period of time, the replacement driver must be paid the appropriate Davis-Bacon wage, including applicable fringe benefits, and must appear on weekly certified payrolls showing the hours worked and the wages paid.

d. The prime contractor is responsible for ensuring compliance with the labor standards provisions of the contract. This includes obtaining subcontracts and weekly certified payrolls as required, as well as monitoring and verifying the status of all truck owner-operators working on a federal-aid highway construction project, or the **site of the work**, either directly for the prime contractor or for its subcontractors. To determine bona fide owner-operator status, the prime contractor must request, verify, and provide the following information to the project manager-engineer (NDDOT, city, county, or consultant) **BEFORE** the truck owner-operator begins work:

- (1) Owner-operator's name;
- (2) Valid commercial driver's license;
- (3) Vehicle registration in the owner-operator's name;
- (4) Current vehicle license number;
- (5) Truck number that will or is being used on scale tickets and haul sheets; and
- (6) Copies of any signed lease or rental agreements for owner-operator trucks. The lease or rental agreement **must** be between the driver and a reputable dealership (e.g., Nelson Leasing, Inc., Allstate Peterbilt of Fargo, Inc., W.W. Wallwork, Inc., etc.); not the driver and the prime contractor or the driver and a subcontractor on the project.

e. According to USDOL, a lease or rental agreement does not constitute ownership. However, NDDOT chooses to recognize lease or rental agreements with reputable dealerships **only**. Those dealerships have no vested interest in when, where, for whom, or if the truck driver works.

f. Determinations made by the North Dakota Department of Labor (DOL), or any other state agency, concerning independent contractor status for wage and hour, tax, worker's compensation, etc., purposes do not apply to DBRA covered contracts. The North Dakota DOL's determinations concerning independent contractor status are for state wage and hour purposes and are based on state

law only. DBRA and USDOL rules and regulations are controlling in wage and hour matters concerning federal-aid highway construction projects.

g. Owner-operators of other types of equipment are considered employees under DBRA. They must be paid not less than the appropriate Davis-Bacon wage, including applicable fringe benefits, and must be included on the prime contractor's or subcontractors' weekly certified payrolls showing the hours worked and the wages paid. [See Section J, paragraph 19, for additional information concerning equipment owner-operators.]

9. Utility Relocations, Adjustments, and Accommodation

Whenever federal-aid funds are included in utility work, DBRA applies to only that work which is included as part of an NDDOT-let contract. DBRA is not applicable to utility-let contracts, including continuing contracts.

10. Relatives

There are no exceptions from coverage under DBRA on the basis of family relationships, or for relatives who are performing the work of **laborers or mechanics** on a federal-aid highway construction project, or the **site of the work**. They must be paid not less than the appropriate Davis-Bacon wage, including applicable fringe benefits, for the job classification of work performed and must be included on weekly certified payrolls.

L. CONFORMANCE PROCESS

1. When a job classification is not included in the Davis-Bacon wage rate decision incorporated into the contract, the job classification and wage rate, including any fringe benefit amounts, must be conformed **after the contract has been awarded**. This means the contractor must submit a proposed job classification and base hourly rate, plus any fringe benefits, to the NDDOT Civil Rights Division. The Civil Rights Division forwards the contractor's request to USDOL for approval. Included with the contractor's request must be the following supporting documentation:

- a. Request For Authorization of Additional Classification and Rate (SF-1444);
- b. Statements by the employees involved concerning whether they agree or disagree with the proposed job classification and wage rate, including fringe benefits where appropriate, or if the employees are unknown, a statement to that effect.

NOTE: Contractors may use Block 16 of the Request for Authorization of Additional Classification and Rate (SF-1444) to provide this information or the Classification & Wage Rate

Request – Employee Information (SFN 50043) form provided by NDDOT.

2. See **EXHIBIT 2** for additional information concerning the conformance process, including:
 - a. A sample letter to NDDOT requesting a job classification and wage rate determination;
 - b. The federal requirements;
 - c. The USDOL form Request For Authorization of Additional Classification and Rate (SF-1444); and
 - d. The Classification & Wage Rate Request – Employee Information (SFN 50043 - Rev. 08/2006) form developed by NDDOT for providing the employee statements.

M. CHILD LABOR LAWS

1. There are federal and state child labor laws:
 - a. Prohibited Employment - State Law

State child labor provisions establish a minimum age of 14 to be employed and regulate the employment of teens ages 14 and 15. Generally, persons age 14 and 15 are required to file an **Employment and Age Certificate** (work permit) with NDDOL, are limited in the hours they can work, and are prohibited from performing certain types of work. Prohibited work includes construction work other than cleaning, errand-running, moving, stacking, and loading or unloading materials by hand.

- b. Prohibited Employment - Federal Law

Federal child labor laws further limit the types of work that can be performed by teens 14 and 15 years of age and prohibit teens ages 16 and 17 from working in certain occupations USDOL deems to be hazardous. Hazardous work includes:

Manufacturing and storing of explosives; driving a motor vehicle and being an outside helper on a motor vehicle; coal mining; logging and sawmilling; power-driven woodworking machines; exposure to radioactive substances; power-driven hoisting apparatus; power-driven metal-forming, punching, and shearing machines; mining, other than coal mining; meat packaging or processing (including the use of power-driven meat slicing machines); power-driven bakery machines; power-driven paper-product machines; manufacturing brick, tile, and related products; power-driven circular saws, band saws, and guillotine shears; wrecking, demolition, and shipbreaking operations; roofing operations; and excavation operations.

2. When state and federal child labor provisions differ, the more stringent standard prevails and must be followed. For example, if federal law prohibits a type of employment that is allowed under state law, the federal law would apply and the work would be prohibited.

3. In consideration of the foregoing, the following will apply to federal-aid highway construction projects:

- a. Individuals age 14 and 15 may **NOT** work in any construction or repair jobs.
- b. Individuals age 16 and 17 may perform **only** non-hazardous work (laborer or grunt work).
- c. Individuals age 18 and older may perform **any job**, whether hazardous or not.

NOTE: According to USDOL and FHWA, flagging is **NOT** considered hazardous work. Therefore, the minimum age for **Flaggers** is 16. [See **Section O** for additional information concerning **Flaggers**.]

4. If it is found that an under-aged individual was employed on a federal-aid highway construction project, or the **site of the work**, he or she **MUST** be paid the appropriate Davis-Bacon wage, including applicable fringe benefits, and be shown on the weekly certified payrolls for the time worked.

N. UNCLAIMED PAYCHECKS

If, for any reason, a contractor is unable to deliver a paycheck to a current or former employee, the money must be turned over to the Unclaimed Property Division of the North Dakota Department of Trust Lands. The Unclaimed Property Division makes every effort to reunite the money with its rightful owner or with the rightful owner's heirs. The procedure for turning over unclaimed property to the Department of Trust Lands can be found on their Web site at: www.land.nd.gov. Contact Linda Fisher at llfisher@nd.gov or 701-328-2800 for needed assistance.

O. EMPLOYEES HIRED THROUGH TEMPORARY EMPLOYMENT AGENCIES

1. Employees, such as **Flaggers**, who are hired through temporary employment agencies must be paid not less than the appropriate Davis-Bacon wage, including applicable fringe benefits, and must appear on either the contractor's weekly certified payroll or the temporary employment agency's weekly certified payroll when employed on a federal-aid highway construction project, or the **site of the work**. Since the temporary employment agency

is the employer, it is treated as a subcontractor in the same way a company providing traffic control devices would be treated.

2. The contractor must acknowledge joint employment and either put the employee on its weekly certified payroll or require the employment agency to generate and provide a weekly certified payroll. If the employee has a wage grievance, the employee would file against the employment agency.

3. According to USDOL, no subcontract agreement between the contractor and the temporary employment agency is required. Therefore, no Prime Contractor’s Request to Sublet (SFN 5682 - Rev. 07-2012) is required. However, NDDOT cautions prime contractors and subcontractors that any agreement they have with a temporary employment agency should clearly indicate that the employees must be paid full Davis-Bacon wages, including fringe benefits where applicable. Any additional charges or fees to be paid to the temporary employment agency must be above and beyond the required Davis-Bacon wages. If an employee has a wage grievance, the prime contractor will be held ultimately responsible for compliance with DBRA. This means if the wages cannot be recouped from the temporary employment agency, the prime contractor will be held responsible for paying the wages.

4. The above guidance also applies to third-party recruiters or search firms (headhunters) who seek out job candidates when normal recruitment efforts have failed.

P. BULLETIN BOARDS

1. The following must be displayed on federal-aid highway construction projects, or the **site of the work**, in an area readily accessible to all employees, applicants for employment, and other interested parties:

EEOC P/E-1 (Rev 11/09) (English)(.pdf) and Mandatory Supplement to EEOC P/E-1 (Rev 9/15) (English)(.pdf)	"Equal Employment Opportunity is THE LAW"	Required by Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; 38 U.S.C. 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; 41 CFR Chapter 60-I .42; 41 CFR 60-250.4(k);41 CFR 60-74 1.5(a); and FHWA-1273, §II(3)(d). Available in English, Spanish, and Chinese.
	"EEO is the Law" Mandatory Poster Supplement	Required by Executive Order 11246, as amended by Executive Order 13665 (April 8, 2014); and Executive Order 13672: Further Amendments to Executive Order 11478, & Executive Order 11246 (July 21, 2014). Available in English, Spanish, and Chinese.

	Contractor's EEO policy statement	Required by 41 CFR 60-741.44 through FHWA-1273, §II(1)(b).
	Contractor's letter appointing EEO officer for project	Required by 41 CFR 60-741.44 through FHWA-1273, §II(2).
Pay Transparency Nondiscrimination Provision Version December 2016 (English)(.pdf)	Pay Transparency Nondiscrimination Provision	Required by Executive Order 11246, as amended by Executive Order 13665 (April 8, 2014); Required by 41 CFR 60-1.35; and FHWA-1273, §II(1)(b). The requirement to display the notice may be accomplished by posting the provision electronically or by posting a copy of the provision at the Contractor's job site in a conspicuous place available for employees and applicants to see. Available in English and Spanish.
Form FHWA-1022 (Revised May 2015) (English) (.pdf)	"NOTICE Federal-Aid Project" (False Statement Notice)	Required by 18 U.S.C. 1020, 23 CFR 635.119 , and FHWA-1273, §VIII. Available on FHWA Web site. Available in English and Spanish.
WH1321 (Revised April 2009) (English)(.pdf)	"Employee Rights Under the Davis-Bacon Act"	Required by 29 CFR 5.5(a)(1) and FHWA-1273, §IV(1)(a). Enforcement by STA and/or USDOL. Available in English and Spanish
	Actual wage rates	Contained in the proposal and available at https://www.dot.nd.gov/divisions/civilrights/laborcompliance.htm
OSHA 3165-04R 2015 (English)(.pdf)	"Job Safety and Health IT'S THE LAW"	Required by 29 U.S.C. 657(c), 29 CFR 1903.2 through FHWA-1273, §VII(1). Enforcement through OSHA. Available in English, Spanish, Polish, Portuguese, Korean, Nepali, Chinese, Arabic, Haitian Creole, and Vietnamese.
	Emergency phone numbers	Required by 29 CFR 1926.50(f) through FHWA-1273, §VII(1) except on areas with 911 for emergencies
USERRA Poster - April 2017 (English)(.pdf)	"Your Rights Under USERRA"	Required by 38 U.S.C. 4334(a) and 20 CFR 1002. Employers are required to inform persons covered by USERRA of their rights, benefits, and the obligations of the employer and employees under USERRA. Employers may post the notice where employer notices are customarily placed, mail it, or distribute it via electronic mail. Enforcement by USDOL Veterans' Employment and Training Services (VETS).
WH1088 Rev 07/16 (English)(.pdf)	"Employee Rights Under the Fair Labor Standards Act" (FLSA)	Needed on projects where Davis-Bacon rates do not apply per 29 U.S.C. Chapter 8. Requirement to post notice at 29 CFR

		516.4. Enforcement by USDOL. Available in English, Spanish, and Haitian Creole.
WHD1420 Rev 04/16 (English)(.pdf)	"Employee Rights And Responsibilities Under The Family And Medical Leave Act" (FMLA)	Required by 29 CFR 825.300 and 825.400 for employers of more than 50 people. Enforcement by USDOL. Available in English and Spanish.
WH1462 Rev 07/16 (English)(.pdf)	"Employee Polygraph Protection Act" (EPPA)	Required by 29 CFR 801.6. Enforcement by USDOL. Available in English and Spanish.

2. Contractors can meet these requirements by posting DOT 3350 (1 of 3), DOT 3350 (2 of 3) and DOT 3350 (3 of 3) (revised 7-2017), an adequate EEO policy of the contractor, an adequate EEO grievance policy of the contractor and the applicable Labor Rates (Davis Bacon) from the USDOL.

3. Instead of providing their own bulletin board, subcontractors may opt to post their company EEO policy, letters appointing their EEO and DBE officers, and their discrimination complaint procedure on the prime contractor's bulletin board and to share the prime contractor's poster boards and Davis-Bacon wage rate decision.

4. When a subcontractor is on a federal-aid highway construction project, or the **site of the work**, for less than one week (**seven calendar days**), or when a subcontractor is extremely mobile on a federal-aid highway construction project, or the **site of the work** (e.g., paint strippers, guardrail installers, fencers, etc.), the subcontractor will not be required to provide a **project-site** bulletin board if:

- a. The subcontractor's home office is located in North Dakota.
- b. The subcontractor maintains a bulletin board at their home office location in an area readily accessible to all employees, applicants for employment, and other interested parties.
- c. The bulletin board contains all of the required notices and posters.
- d. The subcontractor provides documentation that their employees are required to check in at the home office on a daily and/or weekly basis and do so.
- e. The subcontractor employees know where the bulletin board is located.

5. The district in which the subcontractor's home office is located will conduct an annual supplemental review of the subcontractor's bulletin board at the location identified to ensure all of the required notices and posters are displayed, current, and legible. The district

will initiate the supplemental review whenever the subcontractor begins working on a federal-aid highway construction project within its jurisdiction, or whenever another district requests a supplemental review be conducted. The supplemental review will then be shared with the other seven NDDOT district offices.

6. In cases where a subcontractor works away from their home office location and hires local individuals who do not check in at the home office, a copy of each of the required notices and posters must be given to those individuals. The subcontractor must obtain an acknowledgement of receipt from each individual and provide a copy of each acknowledgement to the district in which the federal-aid highway construction project is located.

7. During routine labor compliance job-site interviews, contractor employees are asked if they know where the bulletin board is located. Any negative answers by the subcontractor's employees will be brought to the attention of the subcontractor. The allowance for the subcontractor to display the required notices and posters at their home office rather than at the federal-aid highway construction project site will be re-evaluated at that time .

Q. LABOR COMPLIANCE JOB-SITE INTERVIEWS

1. Systematic spot interviews with the contractor's federal-aid highway construction project employees may be conducted by the project manager-engineer (NDDOT, city, county, or consultant), or a representative of the contracting agency (NDDOT). The interviews are used to determine whether the Davis-Bacon wage rate decision and other labor standards provisions of the contract are being fully complied with, and that there is no misclassification of employees.

2. Each prime contractor and subcontractor will have job-site interviews conducted on at least one federal-aid highway construction project in each NDDOT district annually.

3. All answers and statements made by the employees, whether orally or in writing, are treated as confidential. An employee's identity will not be disclosed to the contractor without the employee's written consent.

4. A good cross-section of the contractor's project employees will be selected for interviews. Selection criteria will include race, sex, job classification, and age. One minority, one nonminority, and one female in each trade, job classification, or occupation will possibly be interviewed.

5. Contractors must allow their employees to be interviewed.

R. NDDOT CIVIL RIGHTS DIVISION PERSONNEL

For further information or assistance, contact either of the following:

Ramona Bernard, Director
rbernard@nd.gov

Phone: 701-328-2576

Gail Brown,
Civil Rights Program Administrator
gbrown@nd.gov

Phone: 701-328-2605

Civil Rights Division
North Dakota Department of Transportation
608 East Boulevard Avenue
Bismarck, ND 58505-0700
civilrights@nd.gov

FAX: 701-328-0343

S. FEDERAL AND STATE DEPARTMENT OF LABOR PERSONNEL

Jeffrey Simek
Wage and Hour Specialist
U.S. Department of Labor
Room 323
220 East Rosser Avenue
Bismarck, ND 58501-3869
Phone: 701-250-4320

North Dakota Department of Labor
Thirteen Floor
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0340
Phone: 701-328-2660 or
In-state, toll-free: 1-800-582-8032
Email: labor@nd.gov

Wage and Hour Division
U.S. Department of Labor
Denver District Office
Phone: 720-264-3250

Jason Helm
Government Contracts Enforcement Coordinator
U.S. Department of Labor
Suite 800
525 South Griffin Street
Dallas, TX 75202
Phone: 972-850-2648 or 972-850-2647

T. REFERENCE SOURCES

NOTE: The following were used in the development of this handbook but are **NOT** all inclusive of the federal laws, rules, regulations, regulatory guidance, etc., that are available concerning DBRA coverage and other labor standards provisions of federal-aid highway construction projects.

- 29 CFR Parts 1, 3, 5, 6, and 7
- USDOL Field Operations Handbook - Chapter 15 available online at:
www.dol.gov/whd/FOH/FOH_Ch15.pdf
- Required Contract Provisions, Federal-aid Construction Contracts (USDOT Form FHWA 1273 - Rev. 5-1-12) available online at:
www.fhwa.dot.gov/programadmin/contracts/1273/1273.pdf
- Contract Special Provision Mandatory Use of Automated Certified Payroll
<https://www.dot.nd.gov/divisions/civilrights/docs/revisedcertifiedpayrollsp10242015.pdf>

EXHIBIT 1: CONFORMANCE PROCESS

REQUESTS FOR ADDITIONAL CLASSIFICATIONS AND WAGE RATES

Criteria for the approval of additional classifications and wage rates are set forth in the Code of Federal Regulations, Title 29, Part 5, Subpart A, Section 5.5 (a) (1) (ii). Section 5.5 (a) (1) (ii) (A) states:

"The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

1. The work to be performed by the classification requested is not performed by a classification in the wage determination; and
2. The classification is utilized in the area by the construction industry; and
3. The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination."

Section 5.5 (a) (1) (ii) (B) further states:

"If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits, where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and will so advise the contracting officer, or will notify the contracting officer within the 30-day period that additional time is necessary."

The U.S. Department of Labor's policy in conforming a job classification and wage rate is:

1. If the proposed classification is a skilled craft, the proposed rate cannot be less than the lowest rate already established for a skilled job classification in the wage determination.
2. Exceptions to the skilled job classifications are the Power Equipment Operator and Truck Driver groups.
3. If the established rate for a skilled job classification varies between counties, the proposed rate cannot be less than the established rate for the county in which the project is located.
4. If the established rate for a skilled job classification includes a fringe benefit amount, the proposed rate does not have to specify an amount for fringe benefits. The fringe benefit amount could be added to the hourly wage. In other words, the proposed rate must be equal to or higher than the total of the established hourly rate plus the amount designated for fringe benefits.

NOTE: Requests for Additional Classifications and Wage Rates should be made prior to commencement of work on the contract. For necessary forms and procedures, contact:

Ramona Bernard, Director
Civil Rights Division
North Dakota Department of Transportation
608 East Boulevard Avenue

Bismarck, ND 58505-0700
Telephone: (701) 328-2576 FAX: (701) 328-0343
Email: civilrights@nd.gov

REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND RATE

Standard Form 1444 (Rev. 12-2001)

To access SF-1444, click on the following:

<http://www.dol.gov/whd/recovery/dbsurvey/sf1444.pdf>

REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND RATE			CHECK APPROPRIATE BOX <input type="checkbox"/> SERVICE CONTRACT <input type="checkbox"/> CONSTRUCTION CONTRACT	OMB No.: 9000-0089 Expires: 02/28/96
Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, DC 20408; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0089), Washington, DC 20503.				
NOTE: THE CONTRACTOR SHALL COMPLETE ITEMS 3 THROUGH 16 AND SUBMIT THE REQUEST, IN QUADRUPPLICATE, TO THE CONTRACTING OFFICER				
1. TO: ADMINISTRATOR, Employment Standards Administration WAGE AND HOUR DIVISION U.S. DEPARTMENT OF LABOR WASHINGTON, D.C. 20210			2. FROM: (REPORTING OFFICE)	
3. CONTRACTOR			4. DATE OF REQUEST	
5. CONTRACT NUMBER	6. DATE BID OPENED (SEALED BIDDING)	7. DATE OF AWARD	8. DATE CONTRACT WORK STARTED	9. DATE OPTION EXERCISED (IF APPLICABLE) (SCA ONLY)
10. SUBCONTRACTOR (IF ANY)				
11. PROJECT AND DESCRIPTION OF WORK (ATTACH ADDITIONAL SHEET IF NEEDED)				
12. LOCATION (CITY, COUNTY AND STATE)				
13. IN ORDER TO COMPLETE THE WORK PROVIDED FOR UNDER THE ABOVE CONTRACT, IT IS NECESSARY TO ESTABLISH THE FOLLOWING RATE(S) FOR THE INDICATED CLASSIFICATION(S) NOT INCLUDED IN THE DEPARTMENT OF LABOR DETERMINATION				
NUMBER: _____		DATED: _____		
a. LIST IN ORDER: PROPOSED CLASSIFICATION TITLE(S); JOB DESCRIPTION(S); DUTIES; AND RATIONALE FOR PROPOSED CLASSIFICATIONS (SCA ONLY)		b. WAGE RATE(S)	c. FRINGE BENEFITS PAYMENT S	
(Use reverse or attach additional sheets, if necessary)				
14. SIGNATURE AND TITLE OF SUBCONTRACTOR REPRESENTATIVE (IF ANY)		15. SIGNATURE AND TITLE OF PRIME CONTRACTOR REPRESENTATIVE		
16. SIGNATURE OF EMPLOYEE OR REPRESENTATIVE		TITLE	CHECK APPROPRIATE BOX-REFERENCING BLOCK 13. <input type="checkbox"/> AGREE <input type="checkbox"/> DISAGREE	
TO BE COMPLETED BY CONTRACTING OFFICER (CHECK AS APPROPRIATE - SEE FAR 22.1019 (SCA) OR FAR 22.406-3 (DBA))				
<input type="checkbox"/> THE INTERESTED PARTIES AGREE AND THE CONTRACTING OFFICER RECOMMENDS APPROVAL BY THE WAGE AND HOUR DIVISION. AVAILABLE INFORMATION AND RECOMMENDATIONS ARE ATTACHED.				
<input type="checkbox"/> THE INTERESTED PARTIES CANNOT AGREE ON THE PROPOSED CLASSIFICATION AND WAGE RATE. A DETERMINATION OF THE QUESTION BY THE WAGE AND HOUR DIVISION IS THEREFORE REQUESTED. AVAILABLE INFORMATION AND RECOMMENDATIONS ARE ATTACHED.				
(Send copies 1, 2, and 3 to Department of Labor)				
SIGNATURE OF CONTRACTING OFFICER OR REPRESENTATIVE		TITLE AND COMMERCIAL TELEPHONE NO.	DATE SUBMITTED	
NSN 7540-01-268-0631 Previous edition is usable		DEPARTMENT OF LABOR	STANDARD FORM 1444 (REV. 12-90) Prescribed by GSA-FAR (48 CFR) 53.222(f)	

Instructions:

- Block 1 Pre-printed on form.
Block 2 To be completed by Contracting Officer (NDDOT).

The contractor completes:

- Block 3 Enter complete name and mailing address.
Block 4 Enter date of request.
Block 5 Enter contract number.
Block 6 Enter date bid opened. If not sure, call NDDOT to obtain.
Block 7 Enter date of contract award. If not sure, call NDDOT to obtain.
Block 8 Enter date contract work started.
Block 9 Enter date contract option was exercised (if applicable).
Block 10 Enter name and address of subcontractor (if applicable).
Block 11 Enter summary of project's statement of work.
Block 12 Enter location of project (city, county, and state).
Block 13 List numbers and dates of all applicable wage determinations (consult proposal/contract).
Block 13a List the classification title and level and provide the job description for the work of the classification being conformed. (If the work to be performed is the same as the work described in the SCA Directory for the title and level entered here, do not repeat the job description.) Also list the Federal Grade Equivalency (FGE) and the source of the FGE for the classification being conformed.
Block 13b Enter the proposed wage rate.
Block 13c Enter the required fringe benefits already established on the applicable wage determination.
Block 14 Enter the signature(s) and title(s) of the subcontractor's representative (if applicable). Attach additional sheet(s) if necessary.
Block 15 Enter the signature and title of the prime contractor representative.
Block 16 If there is an official representative of the employees who are working under the proposed conformed rates, contact that individual and inform him/her of the conformance proposal. Ask that individual to sign Block 16 and indicate whether or not there is agreement with the conformance proposal, and the reasons for the position. Also, make sure the applicable box in Block 16 is checked.

If there is no duly elected representative, ask each employee working in the class being conformed to sign a separate sheet, indicating agreement or disagreement with the proposal. These employees also must be offered an opportunity to explain their position(s).

If no employees have been hired yet, indicate in Block 16.

Once the contractor has completed the form, send it to the Contracting Officer (NDDOT). **DO NOT** send directly to the Department of Labor's Wage and Hour Division.

The Contracting Officer (NDDOT) completes the bottom of the form, checking the applicable box, signing, dating, providing a commercial telephone number at which he/she may be reached, and presenting the agency recommendation and other relevant information as an attachment. If the Contracting Officer does not agree with any proposed classes or rates, a statement of the agency's position and rationale must be attached.

NOTE: After receipt/review of SF-1444, the Contracting Officer completes bottom of form and forwards, with contractor supporting documentation, to the DOL address listed in Block 1.

CLASSIFICATION & WAGE RATE REQUEST
EMPLOYEE INFORMATION
 North Dakota Department of Transportation, Civil Rights Division
 SFN 50043 (Rev. 08-2006)

To access SFN 50043, click on the following:

www.dot.nd.gov/forms/sfn50043.pdf

NOTE: May be used in lieu of filling out Block 16 of *Request For Authorization of Additional Classification and Rate (Standard Form 1444)*.

CLASSIFICATION & WAGE RATE REQUEST EMPLOYEE INFORMATION North Dakota Department of Transportation, Civil Rights Division SFN 50043 (Rev. 08-2006)	
Contractor	Job Classification
Project Number	Proposed Hourly Rate \$
Location	Fringe Benefits \$

I agree with the hourly rate and fringe benefits for _____ as proposed above.
Job Classification

I disagree with the hourly rate and fringe benefits for _____ as proposed above.
Job Classification

I propose the rate of \$ _____ and fringe benefits in the amount of \$ _____. My reasons are as follows:

Name (Please Pprint)	Date
Signature	

TO BE FILLED OUT BY CONTRACTOR:

Employees are unknown at this time.
 Individual has left employment and cannot be reached.

Oi9

EXHIBIT 2: REQUIRED CONTRACT PROVISIONS, FEDERAL-AID CONSTRUCTION CONTRACTS (USDOT FORM FHWA 1273)

To access *Required Contract Provisions, Federal-aid Construction Contracts (USDOT Form FHWA 1273 - Rev. 5-1-12)*, click on the following:

www.fhwa.dot.gov/programadmin/contracts/1273/1273.pdf

FHWA-1273 -- Revised May 1, 2012

**REQUIRED CONTRACT PROVISIONS
FEDERAL-AID CONSTRUCTION CONTRACTS**

<p>I. General</p> <p>II. Nondiscrimination</p> <p>III. Nonsegregated Facilities</p> <p>IV. Davis-Bacon and Related Act Provisions</p> <p>V. Contract Work Hours and Safety Standards Act Provisions</p> <p>VI. Subletting or Assigning the Contract</p> <p>VII. Safety, Accident Prevention</p> <p>VIII. False Statements Concerning Highway Projects</p> <p>IX. Implementation of Clean Air Act and Federal Water Pollution Control Act</p> <p>X. Compliance with Governmentwide Suspension and Debarment Requirements</p> <p>XI. Certification Regarding Use of Contract Funds for Lobbying</p> <p>ATTACHMENTS</p> <p>A. Employment and Material Preference for Appalachian Development Highway System or Appalachian Local Access Road Contracts (Included in Appalachian contracts only)</p> <p>I. GENERAL</p> <p>1. Form FHWA-1273 must be physically incorporated in each construction contract funded under Title 23 (excluding emergency contracts solely intended for debris removal). The contractor (or subcontractor) must insert this form in each subcontract and further require its inclusion in all lower tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services).</p> <p>The applicable requirements of Form FHWA-1273 are incorporated by reference for work done under any purchase order, rental agreement or agreement for other services. The prime contractor shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.</p> <p>Form FHWA-1273 must be included in all Federal-aid design-build contracts, in all subcontracts and in lower tier subcontracts (excluding subcontracts for design services, purchase orders, rental agreements and other agreements for supplies or services). The design-builder shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.</p> <p>Contracting agencies may reference Form FHWA-1273 in bid proposal or request for proposal documents, however, the Form FHWA-1273 must be physically incorporated (not referenced) in all contracts, subcontracts and lower-tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services related to a construction contract).</p> <p>2. Subject to the applicability criteria noted in the following sections, these contract provisions shall apply to all work performed on the contract by the contractor's own organization and with the assistance of workers under the contractor's immediate supervision and to all work performed on the contract by piecework, station work, or by subcontract.</p>	<p>3. A breach of any of the stipulations contained in these Required Contract Provisions may be sufficient grounds for withholding of progress payments, withholding of final payment, termination of the contract, suspension / debarment or any other action determined to be appropriate by the contracting agency and FHWA.</p> <p>4. Selection of Labor: During the performance of this contract, the contractor shall not use convict labor for any purpose within the limits of a construction project on a Federal-aid highway unless it is labor performed by convicts who are on parole, supervised release, or probation. The term Federal-aid highway does not include roadways functionally classified as local roads or rural minor collectors.</p> <p>II. NONDISCRIMINATION</p> <p>The provisions of this section related to 23 CFR Part 230 are applicable to all Federal-aid construction contracts and to all related construction subcontracts of \$10,000 or more. The provisions of 23 CFR Part 230 are not applicable to material supply, engineering, or architectural service contracts.</p> <p>In addition, the contractor and all subcontractors must comply with the following policies: Executive Order 11246, 41 CFR 60, 29 CFR 1625-1627, Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27, and 23 CFR Parts 200, 230, and 653.</p> <p>The contractor and all subcontractors must comply with: the requirements of the Equal Opportunity Clause in 41 CFR 60-1.4(b) and, for all construction contracts exceeding \$10,000, the Standard Federal Equal Employment Opportunity Construction Contract Specifications in 41 CFR 60-4.3.</p> <p>Note: The U.S. Department of Labor has exclusive authority to determine compliance with Executive Order 11246 and the policies of the Secretary of Labor including 41 CFR 60, and 29 CFR 1625-1627. The contracting agency and the FHWA have the authority and the responsibility to ensure compliance with Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), and Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27, and 23 CFR Parts 200, 230, and 653.</p> <p>The following provision is adopted from 23 CFR 230, Appendix A, with appropriate revisions to conform to the U.S. Department of Labor (US DOL) and FHWA requirements.</p> <p>1. Equal Employment Opportunity. Equal employment opportunity (EEO) requirements not to discriminate and to take affirmative action to assure equal opportunity as set forth under laws, executive orders, rules, regulations (29 CFR 26, 29 CFR 1630, 29 CFR 1625-1627, 41 CFR 60 and 49 CFR 27) and orders of the Secretary of Labor as modified by the provisions prescribed herein, and imposed pursuant to 23 U.S.C. 140 shall constitute the EEO and specific affirmative action standards for the contractor's project activities under</p>
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EXHIBIT 3: LCPTRACKER LINKS AND INFORMATION

To establish an Account:

Call (701) 328-2605 at Civil Rights Division and speak to Gail Brown.

To sign in to an existing LCPtracker Account:

Go to www.LCPtracker.net

To establish a Prime Approver account after award of Contract:

Call (701) 328-2605 at Civil Rights Division and speak to Gail Brown or Amy Conklin.

To learn more about LCPtracker:

Sign into your account on LCPtracker and book a Training Webinar or view training materials – please see the red arrows below:

NDDOT
North Dakota
Department of Transportation
NORTH DAKOTA DOT - B2GNOW

Contract Compliance | User Portal | **Training Materials** | Logout | Live C

Projects | 1. Payroll Records | 2. Notices | 3. Certification | Reports | eDocuments | Set Up | Daily Reporter | LCPcertified

WELCOME Brown Construction Company | Sign up for No Charge Web Based Training | **Book Now**

Project: Test Project

Reminder: You have temporary records to certify. Click on the orange "Edit" button to review the records.

Payroll Certifications			
Week End Date	Performing	Accept Status	Prime Approval
02/21/2016	YES	ACCEPTED	
02/07/2016	YES	ACCEPTED	Approved
01/31/2016	YES	ACCEPTED	Approved
01/30/2016	YES	ACCEPTED	Approved
06/13/2015	YES	Resubmitted	

Page 1

To see materials particular to NDDOT:

Go to the dot.nd.gov website, and click on the Civil Rights Program Areas link:



Scroll Down to the "LCPTracker/Civil Rights Compliance System" area:

On this webpage, you can find links to the Prime Approver Guide (for prime contractors) and the Contractor User Guide (for all contractors). Additionally, you can find answers to Frequently Asked Questions and the Automated Payroll Special Provision.

If you need guidance, please call Gail Brown at (701) 328-2605.