

EXTERNAL CIVIL RIGHTS MANUAL

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Prepared by

North Dakota Department of Transportation

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INTRODUCTION

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

NDDOT's internal and external civil rights programs are a function of the Civil Rights Division (CRD). The CRD is located in the central office and is staffed by:

- CRD Director, overall internal and external civil rights program management: Ramona Bernard,
- Contractor Compliance, Internal EEO, and Labor Compliance: Gail Brown,
- Disadvantaged Business Enterprise (DBE): Amy Conklin
- On-the-Job Training (OJT), and DBE/OJT Supportive Services Programs: Amy Conklin,
- NDDOT's Title VI/Nondiscrimination and ADA Program: Paula Messmer, and
- Administrative office support, specific assignments in various programs: Sheila Kitzan.

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

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

- I. Title VI/Nondiscrimination and ADA Program
- II. Disadvantaged Business Enterprise
- III. Contractor Compliance
- IV. On-the-Job Training
- V. Labor Compliance

Each district is responsible for keeping the CRD informed of any EEO, OJT, Title VI and ADA, Title VII, DBE, contractor compliance, and labor compliance activities, either positive or negative, in a timely manner. The CRD Director and Civil Rights Program Administrators are available for technical assistance at any time by contacting the CRD:

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TITLE VI/NONDISCRIMINATION AND ADA SECTION 1

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I. TITLE VI/NONDISCRIMINATION AND ADA PROGRAM

A. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Title VI of the Civil Rights Act of 1964 prohibits discrimination in Federal and Federally-assisted projects, programs, and activities based upon race, color, and national origin.

1. Since 1964, additional related statutes have prohibited discrimination based on sex, age, and disability.
2. Two Executive Orders (E.O.) that place further emphasis upon Title VI protections are as follows:
 - a) Environmental Justice, E.O. 12898
 - 1) Entitled “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.” NDDOT considers the effects of our transportation decisions on minority and low-income populations.
 - b) Limited English Proficiency (LEP), E.O. 13166
 - 1) Entitled “Improving Access to Services for Persons With Limited English Proficiency.” NDDOT is committed to providing individuals with difficulty using and understanding English through meaningful access to programs and services.

B. AMERICANS WITH DISABILITIES ACT (ADA)

ADA implementing regulations for Title II of the Act prohibit discrimination in the provision of services, programs, and activities by state and local governments. Public agencies with 50 or more employees must create an ADA Transition Plan.

The NDDOT implements, monitors, and updates the NDDOT ADA Transition Plan. It is located on the NDDOT website on the “Title VI/Nondiscrimination and ADA Program” web page at <https://www.dot.nd.gov/divisions/civilrights/titlevi.htm>

C. STANDARD TITLE VI/NON-DISCRIMINATION ASSURANCES

William T. Panos, NDDOT Director, signed the Standard Title VI/Non-Discrimination Assurances on September 25, 2019. NDDOT agrees that, as a condition to receiving any Federal financial assistance from the U.S. DOT, through the FHWA, is subject to and will comply with the assurances.

1. The Assurances include Statutory/Regulatory Authorities; descriptions of requirements; General and Specific Assurances; and Appendices A-E.
 - a) Appendix A of the assurances requires prime contractors to insert Appendix A and E of the assurances in all subsequent subcontracts, all tiers, including procurement of materials and leases of equipment. The prime is responsible for compliance by any subcontractor, lower-tier subcontractor, supplier, and lessor of equipment.
 - b) Appendix E includes but is not limited to the pertinent non-discrimination authorities listed.

2. The Standard Title VI/Non-Discrimination Assurances are available online at NDDOT, CRD, Title VI/Nondiscrimination and ADA Program web page.
<https://www.dot.nd.gov/divisions/civilrights/titlevi.htm>

D. TITLE VI/NONDISCRIMINATION AND ADA PROGRAM IMPLEMENTATION PLAN

As a recipient of Federal financial assistance, NDDOT is required to protect the public interest by developing a Title VI/Nondiscrimination and ADA Program Implementation Plan for their benefit. NDDOT's Plan identifies implementation, compliance, and enforcement policies and procedures to ensure compliance with Title VI and nondiscrimination authorities at all levels which includes cities, counties, contractors, subcontractors, consultants, and subconsultants. It is located on the NDDOT website on the "Title VI/Nondiscrimination and ADA Program web page at <https://www.dot.nd.gov/divisions/civilrights/titlevi.htm>

1. PUBLIC INVOLVEMENT

As part of the Title VI/Nondiscrimination and ADA Program, the NDDOT is required to ensure everyone has the opportunity to comment on the transportation programs and activities that affect their community.

- a) Data Collection Process
 - 1) NDDOT has developed and implemented a data collection process to collect and process demographics from participants and beneficiaries of transportation projects. This process provides us the necessary information to measure the effectiveness of our public involvement activities.
 - 2) Data collection is an important part of our Title VI/Nondiscrimination and ADA Program as it ensures that transportation programs, services, activities, facilities, and projects effectively meet the needs of "all persons" without discrimination. For example, disproportionately benefitting or harming one group over another is a violation of Title VI. Timely and accurate data allows for better decision-making and provides support to the decisions made. NDDOT is required to file reports with FHWA annually and FTA every three years including the information and results of our data collection process.
- b) NDDOT Title VI Public Participation Survey
 - 1) NDDOT developed the Title VI Public Participation Survey (SFN 60149 Rev. 12-2014). It is available on NDDOT website at <http://www.dot.nd.gov/forms/sfn60149.pdf>
 - 2) This survey can be used by NDDOT staff, cities, counties, consultants, or sub recipients.
 - 3) This survey must be available to the public at public meetings for all NDDOT state and federally funded projects.
 - 4) There are two sets of instructions available for the Public Participation Survey.

- 5) The NDDOT Title VI Public Participation Survey Instructions is used by everyone who is not a sub recipient of NDDOT. You will know if you are a sub recipient of NDDOT because you will have had to meet specific sub recipient Title VI program criteria and approved for funding as a sub recipient by NDDOT staff.
 - 6) The NDDOT survey instructions are available on NDDOT website, CRD, Title VI/Nondiscrimination and ADA Program webpage at <https://www.dot.nd.gov/divisions/civilrights/titlevi.htm>
 - 7) The Sub Recipient Title VI Public Participation Survey Instructions are used by sub recipients only. The survey instructions are available on the NDDOT website, CRD, Title VI/Nondiscrimination and ADA Program, Sub recipient webpage at <https://www.dot.nd.gov/divisions/civilrights/titlevi-subrecipients.htm>
- c) Limited English Proficiency Plan
- 1) The State of North Dakota has entered into a NASPO Value Point contract with Language Link, telephonic interpreter service provider. The services are used to communicate with individuals that have limited English proficiency meaning that they have difficulty using and understanding English. The cost is \$0.57 per minute.
 - 2) State and local government agencies, and other agencies as listed in the contract, in North Dakota are able to join the contract with the same provisions. You can obtain more information and view the contract on the State of ND Procurement Office webpage at the following location:
<https://apps.nd.gov/csd/spo/services/bidder/listCurrentContracts.htm>

(Under State Contracts select List Contracts, and then scroll down to “ ON-DEMAND REMOTE INTERPRETING (OPI AND VRI) AND DOCUMENT TRANSLATION” contract #489. (This contract #489 has replaced the previous contract titled, “Telephone Based Interpreter Services (WSCA)” contract #488.)
 - 3) NDDOT provides use of the department’s telephonic interpreter services to consultants to conduct EEO/Labor Compliance interviews with limited English speaking employees.
 - 4) To arrange use of this service, please send your request through the chain of Project Engineer (PE) to Assistant District Engineer (ADE). The ADE will provide consultants the instructions, telephone number, and access code.
- d) Request For Reasonable Accommodations
- 1) NDDOT has developed a Request for Reasonable Accommodations form with Instructions (SFN 60135, 02-2016) for individuals to request accommodations for disabilities and language assistance to access NDDOT programs, services, and

activities. It is available on NDDOT website at
<http://www.dot.nd.gov/forms/sfn60135.pdf>

2. TITLE VI AND ADA COMPLIANCE OVERSIGHT

Enforcement responsibilities have been vested with NDDOT, which ultimately falls on the shoulders of the NDDOT, city, county, or consultant project engineer. The project engineer (PE) should be cognizant of these contractual requirements and monitor the contractor for compliance.

- a) If noncompliance with any provision is even suspected, the NDDOT, city, county, or consultant PE should notify the Assistant District Engineer (ADE) immediately. The ADE should consult with the CRD for a possible course of action.
- b) If department or project staff observe or receive a verbal report of discriminatory activity, they should direct the complainant and/or contact CRD immediately for a possible course of action. Make notes in your diary. NDDOT receives very few Title VI/ADA complaints from construction projects. Some examples of external discriminatory activity or complaints:
 - c) Telling racial jokes or using racial slurs where members of the public are present.
 - d) Making negative comments about minorities or LEP individuals where members of the public are present.
 - e) Making negative/derogatory comments about individuals with disabilities where members of the public are present.

3. EXTERNAL COMPLAINTS OF DISCRIMINATION PROCESS

The External Complaints of Discrimination process was revised in March 2020.

- a) FHWA Jurisdiction (Roads and Bridges)
 - 1) Title VI Complaints
 - (a) NDDOT will forward all Title VI complaints to the Division Office.
 - 2) ADA Complaints
 - (a) All ADA complaints will be investigated by the Division Office or the NDDOT.
- b) FTA Jurisdiction (Public Transit)
 - 1) Complaints filed under Title VI, related Statutes, and section 504/ADA in which NDDOT is named as respondent will be forwarded by NDDOT to FTA Office of Civil Rights.
 - 2) Title VI related statutes and Section 504/ADA complaints filed directly with NDDOT against its sub recipients or contractors will be processed by NDDOT in accordance with the FTA approved complaint procedures under FTA C 4710.1B, FTA C 4702.1B, 49 CFR 27.13(b).

- c) Complaints must be filed, in writing, no later than 180 calendar days of the last date of the alleged discrimination, unless the time for filing is extended. Complaints may be submitted to one of the following agencies authorized to receive complaints: NDDOT, FHWA, FTA, the United States Department of Transportation (USDOT), or the United States Department of Justice (USDOJ). NDDOT's External Complaints of Discrimination form should be used.
- d) NDDOT's External Complaints of Discrimination form, instructions, and process are available in English (SFN 51795, 03-2020) or in Spanish (SFN 51795S, 03-2020) on NDDOT website in English at www.dot.nd.gov/forms/sfn51795.pdf or in Spanish at <http://www.dot.nd.gov/forms/SFN51795S.pdf>

DISADVANTAGED BUSINESS ENTERPRISE (DBE) SECTION 2

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II. DISADVANTAGED BUSINESS ENTERPRISE

US Department of Transportation - 49 Code of Federal Regulations Part 26, requires NDDOT to implement a Disadvantaged Business Enterprise (DBE) Program to ensure nondiscrimination in the award and administration of federally assisted highway construction contracts. Civil Rights Division (CRD) has the overall responsibility for developing, implementing, and monitoring NDDOT's DBE Program. Day-to-day project monitoring is delegated to the districts.

*Throughout this chapter "self-perform" is defined as a contractor's use of its "own workforce" (employees who are on a contractor's weekly certified payrolls and for whom the contractor contributes to unemployment, social security, and worker's compensation) and its "own equipment" (equipment which is titled, licensed, and insured in the contractor's name or leased from a bona fide equipment supplier). The contractor is not self-performing if it is using equipment or employees from another firm, an affiliate, or a subsidiary firm in place of the contractor's own equipment and employees.

A. SPECIAL PROVISIONS DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

DBE Special Provisions (SP) outline the requirements bidders on federal-aid jobs must follow to comply with the DBE regulations. The DBE SPs outline all pre-bid and post-award requirements.

1. Federally-aided highway construction contracts will contain either the Special Provision DBE Race/Gender Conscious (RGC SP), or the Special Provision DBE Program Race/Gender Neutral (RGN SP). The SP in effect at the time of bid governs the project.
 - The Department's overall DBE goal is 4.91 percent.
2. Race/Gender Conscious (RGC) Goals are included in the project proposals and are expressed as a percentage (2%, 3%, 4%, etc.) of the total bid price. On a RGC job, the bidder is required to meet the goal by using DBEs certified or provide evidence of their good faith efforts to meet the goal. Prime contractors who do not meet or exceed the project goal follow good faith efforts to throughout the life of the project until the goal is met.

RGC goals are set to level the playing field for woman and minority-owned firms in an effort to right past discrimination. In this case, prime bidders are asked to give priority to DBE firms, who may as a result, enjoy some advantage over other small businesses.

- The Department's RGC goal is 1.66 percent.
3. Federal rules require NDDOT to meet its overall DBE goal primarily through RGN means. Race/Gender Neutral (RGN) rules assume that the playing field is level for all small businesses; thus providing all small businesses an opportunity to compete equally in subcontracting or supplying prime bidders and large subcontractors. The RGN SP pertains to any contract that does not have a specific percentage goal which is expressed as a zero (0) percent goal.

Primes are strongly encouraged to solicit and use DBEs on RGN projects; however, bidders face fewer requirements as they prepare and submit their bids. No documentation of good faith efforts is required of the bidder on RGN jobs.

- Although RGN project goals are stated as zero percent (0%) and have "no assigned goal", the Department's RGN goal is 3.25 percent.

4. Under both RGN and RGC SPs, before award of the contract, the apparent low bidder intending to count DBE participation must provide:
 - [SFN 52013](#) - Form B – List of subcontractor quotes received by prime. The bidder will mark which subcontractor and supply quoters they will be using. (This list may be useful to cross check for the Request to Sublets received.)
 - [SFN 52160](#) - Form C - Notification of Intent to Use to the CRD for each DBE firm intended for use on the project. Under RGC SP only, the apparent low bidder must also provide a SFN 52160 for each non-DBE firm intended for use instead of a DBE firm quoting on the same items. (Bid differential)

USING CERTIFICATION AND COMPLIANCE SYSTEM (CCS) – PRE-AWARD REQUIREMENTS

The following information explains the requirements of using CCS. A copy of the SP can be viewed at <https://www.dot.nd.gov/divisions/civilrights/docs/dbe/DBE-PROJECT-PAYMENTS%20SP-B2GNOW-10-03-17.pdf>

When CCS is in use on a project proposal, each awarded bidder on the project receives notice that a Utilization Plan (UP) has been set up to report their plans.

Within 14 days of it being set up in the system, all bidders must complete an individual UP which identifies the bidder's plan for all subcontractors and other vendors who will provide services and/or products to complete the project. A bidder's UP will include

- A List of Businesses Submitting Quotes – selected from a drop down list
- The subcontractor, manufacturer, broker, regular dealer and supply quoters to be used on the project.
- Their overall intended DBE participation amount at time of award. If the amount on the UP submitted differs from the DBE Participation Review sheet the project was awarded with it will be returned for and update to be corrected until they match.

B. DBE PARTICIPATION REVIEW (RGC) AND (RGN)

DBE Participation Review is the Project Engineer's guide to the job as awarded. The title of the form states whether the RGC or RGN Special Provision governs the job. Any projects that are 100% state funded will not have a DBE Participation Review sheet as there are no DBE requirements.

1. SFN 13743a - RGC Participation Review - (internal form) states the project goal and the prime's achievement in the upper right corner. Any updates to participation after award will be included at the end of the packet in FileNet/CARS.
2. SFN 13743b - RGN Participation Review - (internal form) states the prime's achievement in the upper right corner. Any updates to participation after award will be included at the end of the packet in FileNet/CARS.
3. The prime's documentation (submitted to comply with the requirements of the SP) is attached to the Participation Review. They are:
 - a. [SFN 52160](#) *Intent to Use - Form C* (used for both RGC & RGN)
 - b. Form A submitted electronically at the time of bid through Project Bids.

- c. [SFN 60829](#) Contractor Good Faith Efforts Documentation (RGC only)
 - (1) The form guides the prime through the documentation required to support its efforts to meet the project goal.
 - (2) **Throughout the life of the contract, the prime must supply the same documentation to support its Good Faith Efforts prior to requesting approval to replace contractors listed on the participation review at the time of award. SFN 60829 provides the list of required supporting documents.**
 - d. Memo explaining efforts to attain goal and any other applicable documentation.
4. Following contract award, CRD stores Participation Reviews for every project awarded in FileNet, which makes the reviews available through CARS.
- a. To retrieve the participation review prior to the Pre-Construction Conference:
 - Access CARS
 - Enter PCN for the project
 - Click Search Documents
 - Change the Document Type to REFERENCE
 - Click Search.
 - CARS will locate the PCN's participation review

C. PRE-AWARD & POST-AWARD REQUIREMENTS

DBE SPs outline the pre-award and post-award requirements.

- a. Race/Gender Neutral DBE Special Provision
<https://www.dot.nd.gov/divisions/civilrights/docs/dbe/raceneutral/20180201.pdf>
- b. Race/Gender Conscious DBE Special Provision
<https://www.dot.nd.gov/divisions/civilrights/docs/dbe/raceconscious/20180201.pdf>

D. PRIME CONTRACTOR RESPONSIBILITIES

The prime is responsible for compliance with the applicable DBE SP on the part of all subcontractors, suppliers, manufacturers on the project.

1. Pre-Construction Conference
 - a. The prime contractor is responsible for gathering all subcontractors to the pre-construction conference, especially DBEs.
 - (1) The prime must invite and notify all subcontractors on the project.
 - (2) The prime must provide a copy of the pre-construction conference form and minutes to all firms identified on the DBE Participation Review/Form B.
 - (a) If a firm listed in the DBE participation review and is unable to attend the prime must send copies of the conference form and the minutes to those firms not in attendance.
 - b. The prime is responsible to communicate pertinent issues during the pre-construction conference including the following:
 - (1) The DBE firms and non-DBE firms listed on the Participation Review.

- (2) The products or items of work the DBE firms, and non-DBE firms used in bid differentials, are to provide or to perform.
- (3) The time period for the products to be provided or the work to be performed.
- (4) Other items such as project scheduling; expected overtime; payment schedule; Davis-Bacon wage and payroll requirements; borrow pit, stockpile site, concrete or asphalt batch plant site, etc., locations; quantities; length of haul; type of haul road; etc.

2. Proposed Progress Charts

- a. Prime contractors must provide DBE firms to be used on the project with a [SFN 7721 Proposed Progress Chart](#). The progress charts must have been submitted prior to award.
- b. The progress chart details each firm's type of work, designates the expected start dates for the prime, DBE, and non-DBE firms and when their phase of the work will be completed.
- c. Project engineer's uses for Progress Charts.
 - (1) Track progress of the apparent low bidder, intended DBE firms, and non-DBE firms used in bid differentials.
 - (2) Refer to missed start dates, document any omissions, and make written inquiry with the contractor regarding an amended start date.
 - (3) Request revised progress chart.
 - (4) Inform prime that any revised progress charts must specifically note any new dates for work completion and that the new charts must be sent to all firms affected by the changes.

3. Monitoring DBE Performance

- a. For the life of the project, the prime contractor is responsible to monitor and report any changes in the makeup of contract work to be performed and supplied on the project as stated in the DBE participation review. This includes DBEs, non-DBEs, and any work the prime indicated it would self-perform.
- b. It is the prime contractor's responsibility to:
 - (1) Ensure the prime contractor and its DBE and non-DBE subcontractors, suppliers, vendors, brokers, regular dealers, and manufacturers comply with the requirements of the applicable DBE special provision
 - (2) Monitor and report DBE performance
 - (a) Submit [SFN 60597](#) DBE Performance - CUF Certification to the project engineer to certify that the DBE firms on the project perform commercially useful function(s) (CUF) with the Prime Contractor's Request to Sublet;
 - (b) Submit UP in CCS within 14 days of receiving notice. Once approved and payments start being made to the prime they must complete monthly audits of all their non-DBE and DBE subcontractor and supplier payments through the system.

Months with no payments must still be reported as zero. The sub/supplier will then be prompted to confirm that the payment reported is correct. If a discrepancy is initiated the prime and sub/supplier must try to resolve the issue amongst themselves. If they cannot the Project Engineer and CRD will have to get involved.

- (c) Submit [SFN 60595](#) Replacement Approval Request when **any** DBE changes are proposed;

4. Monitoring Trucking Operations

The prime is responsible to monitor all trucking operations to ensure compliance with both the DBE and the labor standards provisions of the contract. The prime must obtain subcontracts and weekly certified payrolls as required from all tiers of subcontracting on the project.

The prime must monitor and verify the status of all truck owner-operators whether the truckers work directly for the prime or for its subcontractors while they are working on federal-aid highway construction projects or the site of the work.

If the prime does not maintain documentation, wage rate complaints filed by individuals with adequate documentation may not be disputed by the prime.

Leased trucks must display the name and identification number (USDOT number issued for interstate commerce) of the DBE firm, including non-DBE match trucks.

To assist the prime in correctly counting participation for DBE trucking operations, DBEs must track trucking daily and summarize and submit [SFN 60781](#) DBE Weekly Trucking Participation Summary - <http://www.dot.nd.gov/forms/sfn60781.pdf> to the prime with a copy to the project engineer weekly on the Monday following the work.

a. DBE Trucking

- (1) CUF is defined in each of the DBE SPs and outlined in [SFN 60597](#) DBE Performance – CUF Certification. SFN 60597 must be signed by the prime and the DBE and submitted to the project engineer at the same time as the SFN 5682 - Prime Contractor's Request to Sublet.
- (2) Counting DBE Participation:
 - (a) The DBE firm receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
 - (b) The DBE firm may lease trucks from another DBE firm, including a DBE owner-operator. The DBE firm receives credit for the total value of the transportation services the DBE lessee provides on the contract.
 - (c) A DBE trucking firm drives her own truck and arranges for a non-DBE to work with her – both trucks count as DBE transportation = value of two trucks. This is called one-for-one.
 - If the DBE owns 10 trucks they may match those trucks with 10 non-DBE trucks and count the transportation value of 20 trucks toward the goal.
 - This same DBE trucking firm arranges more non-DBE trucks to work on the project over their one-for-one matched 20 trucks.

- Any contract dollar amount over the 20 trucks counts as broker or expeditor achievement - only the amount between their contracted price and what they are paying the non-DBE truckers to work on the project may count toward the goal. If the prime is paying the DBE \$110 per hour and the DBE is paying an owner/operator \$100, \$10 per hour may be counted toward the goal.
- (d) For more detailed information on leased trucks, refer to either DBE SP under Commercially Useful Function and Counting DBE Participation.
- (3) [SFN 60781](#) DBE Weekly Trucking Participation Summary:
 - (a) To accurately track DBE trucking firms' participation, the DBE will track its transportation services daily and submit a weekly summary of direct participation of its own trucks and employees, any non-DBE trucks to be matched with the DBE's trucks, and any trucks over and above the one-for-one match to the project engineer.
 - (b) The DBE Weekly Trucking Participation Summary must be submitted to the project engineer on the Monday following the work week, with a copy to the prime contractor.
 - (c) A sample form will be available online and will be sent to DBE trucking firms for their use.

5. Records and Reports

- a. The prime must maintain records and documents of payments for three (3) years following satisfactory completion of the contract work.
- b. These records must be made available for inspection, upon request, by any authorized representative of NDDOT or USDOT.
- c. The prime must use CCS to submit any payments made to non-DBE and DBE subcontractors on the project. Payments must be reported timely to ensure prompt pay. If a dispute of payment is initiated the firms must work between each other to resolve the discrepancy. If a resolution is not reached between the firms the project engineer must intervene.
- d. This includes all DBE firms used regardless of whether they were included in the project's DBE Participation Review.

Monitoring Payments/Performance:

All firms with federal aid projects are required to use CCS to report payments to non-DBE and DBE subcontractors and suppliers. Upon receipt of progress payments from the Department, enter the amounts paid to subcontractors and others paid as a result of their work on the project. After payments are entered into CCS, the system automatically sends notification to the payees. Each payee will then reply with confirmation or a different amount than the prime entered. The prime must report zero payments in months that no payment to subcontractor(s) were made or the system will identify that month as an incomplete audit. Any projects with discrepancies, unconfirmed payments and/or incomplete audits cannot be closed until they are resolved.

The system's functionality allows payment records, purchase orders, and other payment advice to be attached to the contract record. This functionality is optional and additional to the required 3-year period files must be maintained.

CCS replaces the necessity of tracking payments and achievement through paper Monthly DBE Payment Records and DBE Participation Certifications.

1. Monitoring DBE Performance
 - a. For the life of the project, the prime contractor is responsible to monitor and report any changes in the makeup of contract work to be self-performed and/or performed or supplied by others on the project as stated in the Utilization Plan.
 - b. Enter payments made to subcontractors, suppliers, etc. through CCS within 5 working days from receipt of payment by the DOT.
 - c. Indicate through CCS when final payments to subcontractors, suppliers, etc. are made.

E. ON-SITE MONITORING BY PROJECT ENGINEER

The following activities and procedures must be monitored by the project engineer. Document and keep these items in the project records and diaries.

It is the project engineer's responsibility to immediately notify the ADE of any questions or issues concerning discrimination of any kind, and any labor compliance problems or concerns.

For instruction to retrieve the project's DBE Participation Review for reference, see B. 4a of this manual.

1. Pre-Construction Conference

Refer to [SFN 9423](#) Pre-Construction Conference Form for instructions and an outline of the items to be read and discussed at the Pre-Construction conference.

2. Field monitoring by the project engineer must include:

- a. Compare Request to Sublet forms and subcontracts for firms (excluding oil haulers, suppliers, brokers, vendors, regular dealers, and manufacturers);
- b. Receive and check for accuracy all weekly certified payrolls for DBE and non-DBE subcontractors working on the site of the work of a federal-aid highway construction project;
- c. Review work of prime contractors and any firms listed in the DBE participation review form; and,
- d. Other monitoring duties as set forth in the Construction Services Division's *Construction Records Manual* available online at:

www.dot.nd.gov/manuals/construction/constr-records/constructionmanual.htm

3. REQUEST TO SUBLET AND REPLACEMENT APPROVAL

For DBE participation to be counted toward the Department's DBE goal, SFN 60597 DBE CUF Certification must be received with SFN 5682 Prime Contractors Request to Sublet.

- a. Before signing/approving a request to sublet, retrieve the job's DBE Participation Review.
 - (1) Compare the dollar value and material amounts.
 - (2) Review SFN 60597 – DBE CUF Certification. Do not sign/approve the Request to Sublet without having a SFN 60597 signed by both the DBE and prime in hand.

- (3) Determine whether the prime is subcontracting work they intended to self-perform at the time of award.
 - (a) If so, SFN 60595 Replacement Approval Request is required.
 - (4) Check signature dates on any requests to sublet against the replacement approval request. If they are dated prior to the replacement approval request, contact the ADE.
 - (a) Request clarification in writing from the prime prior to approving the request to sublet.
 - (5) Note any discrepancies found between the documents included in the DBE Participation Review.
 - (a) If there are discrepancies and/or issues with a DBE or non-DBE/BD request to sublet, contact the prime and the DBE or DBE/BD for clarification.
 - b. The project engineer is not responsible for monitoring spec/code items that are not specified in the DBE participation review unless an approved substitution/replacement is made and the participation review is updated to include any new participation.
 - c. The original of every approved request to sublet must be submitted to the Construction Services Division as soon as they are available.
4. Trucking Operations
- a. Project engineers and ADEs must review trucking operations and procedures according to specifications.
 - b. If DBE or non-DBE trucking firms listed in the DBE participation review form are not complying with trucking requirements, notify the prime and the ADE. It is the prime's responsibility to take corrective action to ensure compliance with the DBE and labor standards provisions of the contract.
5. Complete [SFN 60596](#) prior to uploading it and [SFN 60597](#) into CARS.
6. Review [SFN 60595](#) for completeness and make recommendation(s) on necessity and adherence to RGC SP for processes to be followed concerning replacement approval requests for the termination, unfulfilled obligations, and/or replacement of work to be self-performed by the prime as listed on the DBE Participation Review (at the time of award).

F. COMMERCIALLY USEFUL FUNCTION (CUF)

1. NDDOT counts expenditures to a DBE firm toward DBE goals only if the DBE firm is performing a commercially useful function review on the contract. The prime contractor is responsible for assuring that DBEs working on the prime's contract are performing a commercially useful function and not acting as a pass-through for the purpose of meeting the project goal.

For each DBE performing on a project, the prime contractor and DBE must complete [SFN 60597](#) *DBE PERFORMANCE – COMMERCIALLY USEFUL FUNCTION CERTIFICATION* to certify that the DBE is performing a commercially useful function. [SFN 60597](#) must be completed and submitted to the project engineer at the same time as the Contractor's Request to Sublet.

Upon receipt of the completed [SFN 60597](#), the project engineer must review whether the DBE and prime have certified their intention to perform a CUF on the project. The project engineer

should upload and store the CUF Certification in CARS until the Onsite Work Confirmation can be completed while the DBE is actively working on the job. Sign [SFN 60597](#) only after completing [SFN 60596](#) DBE Performance – Project Engineer’s Onsite Work Confirmation. DBEs who are suppliers, brokers, regular dealers, and/or manufacturers perform a CUF by delivering their products. In these cases, select NA.

To complete [SFN 60596](#), the project engineer must review the listed questions to determine whether he or she agrees with the information submitted by the prime and the DBE.

The answers to the questions should be as illustrated below. If you are unable to answer the questions as illustrated, follow up with the prime to determine the reasons for any differences.

1. Is the DBE providing the work and/or supplies intended at the time of award?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
2. Is the DBE performing the work indicated on the subcontract or providing the supplies on the purchase order?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
3. Are all of the DBEs employees reported on the DBEs payroll?	<input type="checkbox"/> NA	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
4. Does the DBEs equipment have the DBEs name or logo on it?	<input type="checkbox"/> NA	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
5. Is the DBEs equipment leased from any other contractor on the project?	<input type="checkbox"/> NA	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
6. Is the DBE superintendent or foreman working as an employee of any other contractor or subcontractor on the project?	<input type="checkbox"/> NA	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
7. Are any DBE employees also working for the prime contractor?	<input type="checkbox"/> NA	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

Please note any questions or concern. If you've marked "No" on questions 1-4 or a "Yes" on questions 5-7, contact the Assistant District Engineer. The NA options are only applicable to regular dealers, suppliers, brokers, and manufacturers.

Contact the ADE immediately if you are unable to answer the questions as shown and indicate in the space provided the issues you have.

If you are in agreement with the prime’s [SFN 60597](#), sign it and upload your completed [SFN 60596](#) along with the signed [SFN 60597](#) into CARS within five days of conducting the onsite work confirmation.

CRD WILL BE DOING RANDOM CHECKS ON PROJECTS QUARTERLY TO ENSURE CUF FORMS ARE BEING COMPLETED AS THIS WAS A RISK AREA IDENTIFIED BY FHWA.

BOTH forms need to be completed for each and every DBE being counted towards the overall participation on the project and uploaded to FileNet/CARS.

If either of these forms are not completed NDDOT cannot count any of the work completed by the DBE firm(s) and subsequent DBE participation on the project. Any DBE work made ineligible because of missing paperwork/requirements could result in a DBE shortfall for the Department.

This process is also required for DBE firms used on preliminary consulting projects. The Prime Consultant request to Sublet DBE Consultant – Commercially Useful Function (CUF) Certification – [SFN 61412](#) must be completed by the Prime Consultant and submitted with the Prime Consultant Request to Sublet – SFN 60233 form.

For a more detailed definition of CUF for DBE firms, refer to the Commercially Useful Function section in either DBE SP.

2. If there is a question concerning the total value of services provided by a DBE firm with owned equipment, or a question regarding employees who are driving, a truck registration card check must be made. This information must be used to determine truck ownership and driver relationships and/or to establish employee and owner-operator relationships and how drivers are listed on weekly certified payrolls. Information needed for a registration card check includes:
 - a. Driver's name;
 - b. Valid commercial driver's license;
 - c. Truck owner (from registration card);
 - d. Truck license number;
 - e. Truck number being used on scale tickets and haul sheets;
 - f. Truck make and model; and
 - g. Copies of signed lease or rental agreements.

G. REPLACEMENT APPROVAL REQUEST REQUIRED

Any request for replacement of the work indicated on the DBE Participation Review at the time of award must be reviewed prior to approval.

Primes do not have to submit a [SFN 60595](#) - *Replacement Approval Request* or go through GFE to replace a subcontractor if the total amount being counted toward the project goal has actually been paid to the DBE. If the DBE work is complete and the ADE determines the payment on the completed work will meet or exceed the project goal, the prime is not required to submit the approval request or go through GFE to replace a subcontractor on the job.

If the prime has not yet paid the DBE for the amount being counted toward the project goal and payment is not imminent, the prime must submit [SFN 60595](#). Any replacement approval request must be accompanied by the Good Faith Efforts of the prime in replacing the work. Prior to replacement approval, the prime must contact all DBEs in the Directory for the specific work they are looking to replace or substitute.

Prior to submitting the prime's [SFN 60595](#) and its accompanying documentation to the ADE, the project engineer must review the request for completeness and make recommendation(s) on necessity and adherence to RGC SP. Review the request to determine on how to proceed according to the documentation submitted, i.e., whether the prime followed the processes required concerning replacement approval requests for the termination, unfulfilled obligations, and/or replacement of work to be self-performed by the prime as listed on the DBE Participation Review (at the time of award).

Do not submit incomplete documentation to the ADE.

The prime is not limited to replace the exact same type of work. Therefore, a prime has the option to rearrange their self-performance work to solicit replacements for the contract value by substituting some other work.

The prime's GFE responsibility is outlined in the SP at page 6 of the Special Provision.

The prime is also required to submit [SFN 60595](#) and its accompanying documentation for Termination of Use, Unfulfilled Obligations, and Noncompliance/Failure to Perform. The RGN SP details the reasons for each type of situation under the same named sections.

QUICK FACTS - INFO ON PRIME'S REPLACEMENT APPROVAL REQUEST REQUIREMENTS

What is required by prime contractors when changes are made to “project specific workforces” after award?

1. Job with a goal, contractor hasn't met goal, non DBE sub approved in a bid differential can't perform

The prime must submit SFN60595 Replacement Approval Request for a replacement subcontractor. Must go through GFE, contact all DBEs certified for the work to be replaced, and submit documentation of efforts to project engineer. Project engineer forwards to ADE for decision – the decision will be in writing.

2. Job with a goal, contractor hasn't met goal, prime cannot self-perform as indicated at time of award

The prime must submit SFN60595 Replacement Approval Request for a replacement subcontractor. Must go through GFE, contact all DBEs certified for the work to be replaced, and submit documentation of efforts to project engineer. Project engineer forwards to ADE for decision – the decision will be in writing.

3. Job with a goal, contractor hasn't met goal, DBE sub can't perform *Reduces RGC achievement*

The prime must submit SFN60595 Replacement Approval Request for a replacement subcontractor. Must go through GFE, contact all DBEs certified for the work to be replaced, and submit documentation of efforts to project engineer. Documentation must include a written explanation/acknowledgement from DBE stating they are unable or unwilling to perform. Project engineer forwards to ADE for decision – the decision will be in writing.

4. Job with a goal, contractor has met goal, DBE sub can't perform *Reduces RGC achievement*

If the goal achievement \$\$ has been paid to DBEs, no GFE or Replacement Approval Request is required. If the DBE work is completed and the District indicates that the payment is pending, no GFE or Replacement Approval is required.

If payment in full has not been made to the DBE, the prime must submit SFN60595 Replacement Approval Request for a replacement subcontractor. Must go through GFE, and contact all DBEs certified for the work to be replaced, and submit documentation of efforts to project engineer. Documentation must include a written explanation/acknowledgement from DBE stating they are unable or unwilling to perform. Project engineer forwards to ADE for decision – the decision will be in writing.

5. Job with a goal, contractor has met goal, non DBE sub can't perform

If the goal achievement \$\$ has been paid to DBEs, no GFE or Replacement Approval Request is required. If the DBE work is completed and the District indicates that the payment is pending, no GFE or Replacement Approval is required.

If payment in full has not been made to the DBE, the prime must submit SFN60595 Replacement Approval Request for a replacement subcontractor. Must go through GFE, and contact all DBEs certified for the work to be replaced, and submit documentation of efforts to project engineer. Documentation must include a written explanation/acknowledgement from DBE stating they are unable or unwilling to perform. Project engineer forwards to ADE for decision – the decision will be in writing.

6. Job with a goal, contractor has met goal, prime cannot self-perform as indicated at time of award

If the goal achievement \$\$ has been paid to DBEs, no GFE or Replacement Approval Request is required. If the DBE work is completed and the District indicates that the payment is pending, no GFE or Replacement Approval is required.

If payment in full has not been made to the DBE, the prime must submit SFN60595 Replacement Approval Request for a replacement subcontractor. Must go through GFE, and contact all DBEs certified for the work to be replaced, and submit documentation of efforts to project engineer. Documentation must include a written explanation/acknowledgement from DBE stating they are unable or unwilling to perform. Project engineer forwards to ADE for decision – the decision will be in writing.

7. Job without a goal, DBE sub can't perform - *Reduces RGN achievement*

Written explanation/acknowledgement from DBE stating they are unable or unwilling to perform. Project engineer forwards documentation to ADE.

8. Job without a goal, non DBE sub can't perform, non DBE prime can't self-perform

Prime can hire without going through GFE or Replacement Approval Request.

TABLE - PRIME'S REPLACEMENT APPROVAL REQUEST REQUIREMENTS

What is required by prime contractors when changes are made to “project specific workforces” after award?

	RGC with Goal	RGN No Goal	Goal MET	Goal NOT MET	DBE Can't Perform	Non-DBE (used in approved Bid Differential) Can't Perform	Prime Can't Self-perform	Is GFE Required in this Situation?
1.	X			X		X		YES
2.	X			X			X	YES
3.	X			X	X			YES
4.	X		X		X			YES (unless Prime has paid out an amount that satisfies the goal or work equivalent to goal \$\$ has been completed and is expected to be paid)
5.	X		X			X		YES (unless Prime has paid out an amount that satisfies the goal or work equivalent to goal \$\$ has been completed and is expected to be paid)
6.	X		X				X	YES (unless Prime has paid out an amount that satisfies the goal or work equivalent to goal \$\$ has been completed and is expected to be paid)
7.		X			X			NO (Get statement from DBE explaining that they have withdrawn or are unable/unwilling to perform. Submit to ADE)
8.		X				X	X	NO

H. PROMPT PAYMENT

See [2014 Standard Specifications for Road and Bridge Construction](#) for detailed information of prompt payment procedures.

NDDOT personnel may be granted access to CCS to monitor payments on a project. Contact CRD to request access. To log in go to: <https://dotnd.diversitycompliance.com>

I. FORM LINKS

The following may be obtained from the Department's website:

www.dot.nd.gov/dotnet/forms/forms.aspx (choose Category in the View forms by: drop-down box)

- SFN 60597 - DBE Performance - Commercially Useful Function Certification
<http://www.dot.nd.gov/forms/sfn60597.pdf>
- SFN 60596 - DBE Performance - Project Engineer On-Site Work Confirmation
<http://www.dot.nd.gov/forms/sfn60596.pdf>
- SFN 60595 - Replacement Approval Request
<http://www.dot.nd.gov/forms/sfn60595.pdf>
- SFN 60781 - DBE Weekly Trucking Summary
<http://www.dot.nd.gov/forms/sfn60781.pdf>
- SFN 5682 - Prime Contractor's Request to Sublet
www.dot.nd.gov/forms/sfn05682.pdf
- SFN 7721 - Proposed Progress Chart
www.dot.nd.gov/forms/sfn07721.pdf

CONTRACTOR COMPLIANCE

SECTION 3

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III. CONTRACTOR COMPLIANCE

Under 23 CFR 230, Subpart D, NDDOT is responsible for assuring contractor compliance with the requirements of federal-aid highway construction contracts, including the equal employment opportunity (EEO), on-the-job training (OJT), disadvantaged business enterprise (DBE), Title VI and nondiscrimination, and labor compliance responsibilities set forth in 23 CFR 230; 49 CFR 21; 49 CFR 26; 41 CFR 60; 49 CFR 29; and 29 CFR 1, 3, 5, 6, and 7. The CRD has the overall responsibility for monitoring and assuring prime contractor and covered subcontractor compliance with the above federal rules and regulations. Day-to-day project monitoring has been delegated to the districts.

A. CONTRACT SPECIAL PROVISIONS

1. All federally-aided highway construction contracts contain the following special provisions relative to the equal employment opportunity (EEO) responsibilities of contractors:
 - a. *Required Contract Provisions, Federal-Aid Construction Contracts (USDOT Form FHWA 1273 - Rev. 5-1-12)*. This special provision:
 - (1) Includes requirements not to discriminate and to take affirmative action to assure EEO as required by the Civil Rights Act of 1964, as amended;
 - (2) Incorporates, by reference, the requirements of 49 Code of Federal Regulations Part 26 and the State DOT's USDOT-approved DBE program; and
 - (3) Provides for the maintenance of statistical records, company reports, and related materials and information.
 - b. *EEO Affirmative Action Requirements (03-15-2014)*. This special provision:
 - (1) Specifies a statewide employment goal of 6.9 percent for females in each trade and an assigned percentage goal, by county, for minorities in each trade; and
 - (2) Includes additional affirmative action steps contractors are required to implement to assure EEO in achieving the minority and female employment goals.
 - c. Prime contractors are required to include these special provisions in all subcontracts of \$10,000 or more 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.
2. All federally-aided highway construction contracts contain the following special provisions relative to the labor compliance responsibilities of contractors:
 - a. *Required Contract Provisions, Federal-Aid Construction Contracts (USDOT Form FHWA 1273 - Rev. 5-1-12)*. This special provision includes specific requirements

for compliance with the rules, regulations, and relevant orders of USDOL as they pertain to the Davis-Bacon and Related Acts (DBRA).

- b. *Labor Rates from U.S. Department of Labor.* This special provision specifies basic hourly rates and applicable fringe benefit payments for job classifications related to highway construction.
 - c. ***Contract Special Provision Mandatory Use of Automated Certified Payroll (9/06/2017).*** **From the October 13, 2017 and forward, this provision is required and the mandatory use of LCPtracker will be required by all contractors for the filing of certified payroll.**
 - c. 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.
3. With the exception of contracts funded solely with county funds and emergency relief projects that are not included in NDDOT's bid openings, all highway construction contracts (state and federally funded) contain *Special Provision On-the-Job Training Program (1-15-13)*. This special provision:
 - a. Includes the formula used to determine the number of trainee positions assigned to prime contractors and
 - b. Specifies standards contractors are required to follow in order to fulfill the training requirement.
 4. Most federally-aided highway construction contracts will contain either the *Special Provision Disadvantaged Business Enterprise Program Race/Gender Conscious (RGC)* or the *Special Provision Disadvantaged Business Enterprise Program Race/Gender Neutral (RGN)*. Please refer to the DBE portion of this manual for information on these provisions.
 5. The following prompt payment and retainage procedures are contained in Section 109.04, D, E, and F of the *Standard Specifications for Road and Bridge Construction* available online at:
<http://www.dot.nd.gov/dotnet/supplspecs/standardspecs.aspx>
 6. All federally-aided highway construction contracts contain *Appendix A & E of the Title VI Assurances*. They can be found online at:
<http://www.dot.nd.gov/divisions/civilrights/docs/titlevi/title-vi-assurances.pdf>
 7. Pursuant to Executive Order 13672, codified as 41 CFR, 60-1, 60-2, 60-4 and 60-50, for contracts awarded after April 9, 2015, discrimination on the basis of gender identity or sexual orientation is prohibited on federal-aid contracts. Contractors on federal-aid jobs must include "gender identity or sexual orientation" as protected classes in the EEO policy and must act to rectify discrimination or harassment based on gender identity or sexual orientation." Contractors must use updated posters on job site bulletin boards and update their EEO policies accordingly.

Contractors are not required to list all protected classes in advertisements, but if they do list (race, sex, age, for instance), they may not exclude “gender identity or sexual orientation” from the advertisement.

B. DISCRIMINATION ISSUES AND CONCERNS

1. Nondiscrimination Provisions/FHWA 1273:

- (1) The provisions of Section II of FHWA 1273 are related to 23 CFR Part 230 and are applicable to all federal-aid construction contracts and to all related subcontracts of \$10,000 or more. In addition, the contractor and all subcontractors must comply with the following laws, regulations and orders: Executive Order 11246; 41 CFR 60; 29 CFR 1625-1627; 23 USC 140; and the Rehabilitation Act of 1973, as amended (29 USC 794). The contractor and all subcontractors must also 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 EEO Construction Contract Specifications in 41 CFR 60-4.3.

NOTE: The U.S. Department of Labor (USDOL), Office of Federal Contract Compliance has exclusive authority to determine compliance with Executive Order 11246.

By signing the contract, the contractor agrees to comply with the following minimum specific requirement activities of EEO:

- (a) Section II.1 requires the contractor ensure that it has made every good faith effort to provide equal opportunity with respect to all of its terms and conditions of employment and in their review of activities under the contract. Pursuant to this Section, the contractor must have an EEO Policy that prohibits discrimination and provides for affirmative action in its employment practices.
- (b) Section II.2 requires the contractor to have a designated EEO Officer who has the responsibility and authority to administer the contractor’s EEO program.
- (c) Section II.3 requires all of the contractor’s employees who have an active role in the hiring, supervision, or advancement of employees to be aware of, and to implement the contractor’s EEO Policy. In addition, it is required that employees, including applicants and potential employees, be informed of the contractor’s EEO Policy through posted notices, posters, handbooks, and employee meetings.
- (d) Section II.4 requires the contractor not to discriminate in its recruitment practices and to make an effort to identify sources for potential minority and female employees.
- (e) Section II.5 requires the contractor to periodically review project sites, wages, personnel actions, etc., for evidence of discriminatory treatment. The contractor is to promptly investigate

all alleged discrimination complaints.

- Contractors are required to have and to post a discrimination complaint procedure and form on their project-site bulletin board.
 - A sample discrimination complaint procedure and form is included as an attachment to the pre-construction conference form.
 - The contractor's discrimination complaint procedure must include the avenues of appeal available to employees and applicants should the contractor fail to resolve the complaint to the employee's or applicant's satisfaction or should the employee or applicant choose to file the complaint directly with the Equal Employment Opportunity Commission (EEOC) or The North Dakota Department of Labor, a Fair Employment Practices Agency.
 - The contractor is also required to notify the Civil Rights Division of any discrimination complaints received (to include a copy of the complaint). Upon resolution of the complaint, the contractor is required to provide a "Report of Investigation" to the Civil Rights Division.
- (f) Section II.6 requires the contractor to advise employees and applicants of training programs available and to assist in the improvement of the skills of minorities, females, and applicants through such programs.
- (g) Section II.7 requires any contractor that relies on unions as a source of employees to obtain the cooperation of such unions to increase opportunities for minorities and females. The contractor is required to use good faith efforts to incorporate an EEO clause into each union agreement.
- (h) Section II.8 requires the contractor to become familiar with the requirements for and to comply with the Americans with Disabilities Act and all rules and regulations established thereunder.
- (i) Section II.9 requires the contractor to not discriminate in its selection and retention of subcontractors, including material suppliers and equipment leasing companies. Furthermore, the contractor is required to notify all subcontractors, suppliers, and lessors of their EEO obligations and to use good faith efforts to ensure that the subcontractors comply with those obligations.
- (j) Section II.10 incorporates the requirements of 49 CFR Part 26 and NDDOT's approved DBE program into the contract and requires the contractor to not discriminate in the performance of the contract.

- (k) Section II.11 requires the contractor to keep records that document compliance with the EEO requirements and to retain these records for a period of three years after project completion. The records should include the number and work hours of minority, female, and nonminority employees in each work classification on the project, and the progress and effort being made to increase the employment opportunities for minorities and females. The contractor is required to submit an annual EEO report to NDDOT each July for the duration of the project. If the project contains the training special provision, this information is also required to be collected and reported.

2. Compliance Oversight

- a. Enforcement responsibilities are vested with NDDOT, which ultimately falls on the shoulders of the project engineers and ADEs. The project engineer should be aware on nondiscrimination requirements and monitor the contractor for compliance. Noncompliance with the EEO specifications may be considered a breach of contract for which sanctions can be imposed as detailed in FHWA 1273.
- b. If noncompliance with any provision is suspected, the project engineer should notify the ADE immediately. The ADE should consult with the CRD for a possible course of action.
- c. In addition, complaints of discrimination can surface at any time. Both Title VI and Title VII of the Civil Rights Act of 1964, and their related statutes, prohibit discrimination on federal-aid construction projects.
- d. If anyone on the project observes conduct or activity of a discriminatory nature, or is approached by an employee of the prime contractor or a subcontractor with a complaint of discrimination, the Assistant District Engineer and the Civil Rights Division should be notified immediately. The Civil Rights Division will determine whether the conduct, activity, or complaint falls under Title VI or Title VII and whether it should be investigated by the contractor, NDDOT, or FHWA.

C. IN-DEPTH REVIEW SELECTION CRITERIA

- 1. The CRD conducts at least ten in-depth contractor compliance reviews annually. Selection criteria include project size (\$3 million or more), type, location, whether OJT or DBE requirements are a part of the contract, and when the contractor was last reviewed.
- 2. All reviews must be conducted prior to or at peak employment. In addition, enough work must have been completed to generate three or more weekly certified payrolls. Contracts and subcontracts must also be large enough to produce meaningful employment figures.
- 3. Reviews are scheduled at least three weeks in advance in order to give the contractor enough time to gather and submit their review materials one week prior to the review

date.

4. All reviews must be completed prior to **October 1 each year** in order to be counted toward NDDOT's annual goal.
5. The Contract Compliance Coordinator will contact ADEs and Team Leads in the spring to collect information on which projects the ADE would like to see reviewed and to receive guidance on time frames for review. After doing this, the ADE and project engineer will be notified when a project is selected for review. The ADE and PE should keep the Coordinator informed on the construction schedule as it might affect the scheduling of the review. Generally speaking, there should be 3-5 weeks of payroll and the project should be at peak employment before an Exit Conference is scheduled.
6. The CRD conducts a desk audit, or a review of all paperwork submitted by the contractor on the project selected, prior to the interview portion of the audit.
7. The interview portion of the Compliance Review may be done by conference call, by video conference, or by an onsite or district site meeting. The Department conducts a conference call or video conference when the following criteria have been met:
 - a. No serious noncompliance issues have been raised; and
 - b. All of the required information is received timely and, after review, there are only a few basic questions.
8. A video conference will typically be done with the contractor and district staff in the district office and the reviewing officer in the central office. If an onsite interview is done, it will typically take place in the district office conference space. A decision will be made and conveyed to the contractor and other participants approximately forty-eight hours in advance of the scheduled review concerning the method used to conduct the interview.
9. **Prior to** the scheduled review, the ADE is responsible for ensuring that the district, city, county, or consultant project engineer has done the following and for reporting his or her findings during the conference call or on-site visit:
 - a. Conducted labor compliance and EEO contractor compliance job-site interviews;
 - b. Completed the Project Bulletin Board Review Form to ensure that all required notices and posters are displayed, current, and legible, to include a photo of the Board (typically with a cell phone) attached electronically to the Bulletin Board Review Form when filing in CARS/FileNet; and
 - c. Inspected the project site to ensure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel and that non-segregated facilities are maintained.

D. LABOR COMPLIANCE AND EEO CONTRACTOR COMPLIANCE JOB-SITE INTERVIEWS

1. Labor compliance and EEO contractor compliance job-site interviews must be conducted on those projects scheduled for in-depth contractor compliance reviews. ADE and project engineers will receive prior notification of scheduled contractor compliance reviews and are required to attend the reviews.
2. The interviews must be conducted at least 3 days but not more than 15 days prior to the Review Conference. **At some point in 2019, it is expected that labor interviews will be completed on LCPtracker, an automated labor compliance system. More information will be forthcoming.**
3. Interviews should be conducted with a cross-section of the prime contractor's project employees. Selection criteria should include race, sex, job classification, and age. One minority, one nonminority, and one female, if available, should be interviewed. Ideally, five (5) interviews should be conducted.
4. Interviews should not be conducted with bona fide owner-operators of trucks or with haulers and suppliers of petroleum products.
5. All statements and questions on interview forms must be answered fully and detailed information and/or explanations provided where necessary. *All statements made by an employee, whether orally or in writing, must be treated as confidential to avoid disclosure of the employee's identity to the contractor without the employee's consent.*
6. All follow-up data should be obtained on the same day the employee interview data is gathered. The only exception would be verification of the certified payroll for the week of the interviews.

E. BULLETIN BOARDS

1. **An inspection of the contractor's bulletin board must be made to ensure that all required notices and posters are displayed. Posted on the bulletin board must be:**
 - a. ***Poster Boards (DOT 3350 - 1 of 3, 2 of 3, and 3 of 3 - Rev. 07-2017) provided by NDDOT, or their equivalents;***
 - b. **DBRA wage rate decision found in the contract;**
 - c. **Contractor's discrimination complaint procedure (a sample is attached to the pre- job conference form); and**
2. Bulletin Boards should be inspected for every federal-aid project within 15 days of work commencing on the project. It should also be done immediately prior to an in-depth Contractor Compliance Review. After inspecting the Prime Contractor's Bulletin Board,

fill out the Project Bulletin Board Review Form, SFN 60547 (Exhibit III-B). This Form provides a record in the CCR file that an onsite inspection was done pursuant to the Compliance Review and that the required posters and notices were on the Board. Fill this out only for the Prime Contractor and not for subcontractors who might also be using the Board. Use the link in CARS to the SFN 60547, under “Add Documents/Civil Rights Forms.”

3. When completing the Project Bulletin Board Review Form, take a photo of the Bulletin Board and file it in CARS/FileNet together with the Project Bulletin Board Review Form. This photo provides a context for accessibility and location of the Board.
4. Prime Contractors must always have a Bulletin Board on site, regardless of the proximity to the home office.
5. 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 DBRA wage rate decision.
6. When a subcontractor is on a federal-aid highway construction project, or the *site of 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., pavement markers, 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’s employees know where the bulletin board is located.
7. The ADE in which the subcontractor’s home office is located must 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 ADE must initiate the supplemental review whenever the subcontractor begins work on a project in the district or whenever another ADE requests a supplemental review be conducted. The supplemental review must then be shared with the other seven ADEs.
8. 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 ADE of the district in which the project is located.
9. Whenever the subcontractor performs any work on the federal-aid highway construction project, a copy of the supplemental review or a copy of each

acknowledgement of receipt must be attached to the *Monthly EEO Project Inspection Report (SFN 9425 - Rev. 06-2012)* for the month in which the subcontractor worked. Refer to paragraph B of Section I for information concerning the *Monthly EEO Project Inspection Report*.

10. 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 must 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 project site will be re-evaluated at that time.

F. CONDUCTING EEO INTERVIEWS

1. Immediately prior to an in-depth contractor compliance review, the project engineer should arrange for EEO interviews of on-site workers. **It is anticipated that these interviews will be conducted on LCPtracker during construction season 2019. As the Administrator prepares this Manual, the module is in set-up and will shortly be operational.**
2. In selecting employees for these interviews, try to concentrate on those most vulnerable to mistreatment – i.e. laborers as opposed to higher paid workers, anyone who does not speak English proficiently, females, minorities, those recently hired, etc.
3. Use the Department's interpreter service on your cell phone to interview any worker with Limited English Proficiency (LEP). Do not fail to interview a worker because he or she has LEP.
4. If any interviewee reports suspected discrimination, contact the ADE immediately. The allegations will need to be addressed at the Exit Conference, and must be investigated by the contractor.
5. Even if the report of discrimination is made on another project – i.e. the worker reports alleged illegal discrimination or harassment on another project he or she is working on, report the allegations to ADE.

G. NONSEGREGATED FACILITIES

The project site must be inspected to ensure that working conditions and employee facilities do not indicate discriminatory treatment of project personnel and that the contractor does not maintain segregated facilities or allow their employees to work at any location under their control where segregated facilities are maintained. Segregated facilities include waiting rooms, work areas, restrooms and washrooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, and transportation and housing facilities. The only exceptions would be when the demands for accessibility override (handicap parking) and where separate or single- user toilet and necessary changing facilities are provided to assure privacy between the sexes.

H. MONTHLY EEO PROJECT INSPECTION REPORT

1. The Monthly EEO Project Inspection Report (***SFN 9425 - Rev. 08-2017***) must be submitted monthly by district, city, county, and consultant project engineers for each active federal-aid highway construction project under their supervision.
2. The Monthly EEO Project Inspection Report should be filed by the 10th day of each month, beginning the first full month following commencement of a federal-aid project.
3. The report should include an ongoing inspection of the project bulletin board, a verification of efforts to ensure that trucking operations are in compliance with DBE and DBRA standards, and a summary of labor compliance interviews planned or completed.
4. The Monthly EEO Project Inspection Report is attached as Exhibit III-C and is available at www.dot.nd.gov/forms/sfn09425.pdf

I. TOILET FACILITIES

Complaints with regard to adequate toilet facilities are sometimes characterized as discriminatory treatment. It is, however, the prime contractor's responsibility to provide adequate toilet facilities and access to these facilities to *all* workers. Toilet facilities on construction sites, including highway construction, are regulated under 29 CFR 1926.51(c) (1), which requires that, on construction jobsites, a specified minimum number of "toilets shall be provided for employees . . ." in accordance with Table D-1.

Toilets at construction jobsites. (1) Toilets shall be provided for employees according to the following table:

Table 1 – Toilets at Construction Sites

Number of employees	Minimum number of facilities
20 or less	1
20 or more	1 toilet seat and 1 urinal per 40 workers.
200 or more	1 toilet seat and 1 urinal per 50 workers.

OSHA has ruled "provide" means to make available, and that access to toilet facilities must be provided to employees in a prompt manner. This means that it must not take an employee more than 10 minutes, generally, to walk, drive or be driven to a toilet. In the case of flagger, who must be relieved by another worker in order to use the toilet, the prime contractor must ensure that there is a method under which the flagger can call for relief and be able to use toilet facilities within a reasonable amount of time, or the contractor is not "providing" a toilet to the flagger. Similarly, toilets that are unsanitary to the point of being unusable and not "provided" under §1926.51(c)(1).

The following may be obtained from the CRD, phone: 701-328-2605, civilrights@nd.gov, and web

site: www.dot.nd.gov/dotnet/forms/forms.aspx (choose *Category* in the *View Forms by:* drop-down box).

- *Labor Compliance Job-site Interview* (SFN 9426 - Rev. 01-2016)
www.dot.nd.gov/forms/sfn09426.pdf
- *Poster Boards DOT 3350-1 of 3, 2 of 3 and 3 of 3* (Rev. 07-2017). Available by Request from CRD.
- *Project Bulletin Board Review Form*, (SFN 60547 - Rev. 1-2014).
<https://www.dot.nd.gov/forms/sfn60547.pdf>
- *Monthly EEO Project Inspection Report* (SFN 9425 - Rev. 08-2017)
<https://www.dot.nd.gov/forms/sfn09425.pdf>

EXHIBIT III-A: LABOR COMPLIANCE AND EEO CONTRACTOR COMPLIANCE JOB-SITE INTERVIEW

Note: It is anticipated that interviews will be done in the Construction season of 2019 will be done electronically in the LCPtracker Labor Module. Set up of this Manual is ongoing at the time this Manual is published. Information on LCPtracker interviews will be forthcoming.

To access SFN 9426, click on the following: www.dot.nd.gov/forms/sfn09426.pdf

LABOR COMPLIANCE JOB-SITE INTERVIEW	
North Dakota Department of Transportation, Civil Rights Division SFN 9426 (Rev. 01-2016)	
<p>INTERVIEWER: Labor compliance interviews (site interviews) should be conducted on all federal-aid highway construction contractors annually. You should interview a cross-section of project employees on at least one job per district for each contractor. If possible, interview 5 employees, with a cross section of the workforce, including women, minorities, and individuals with limited English proficiency (LEP). The Department's telephonic interpreter service is available for interviewing employees with limited English proficiency via cell phone. The phone number and instructions must be obtained from the District Office. Please call Civil Rights Division at (701)328-2605 for assistance and guidance on job-site interviews.</p>	
PART A - PROJECT INFORMATION	
Project Number	District
Name And Title of Interviewer	PCN
Contractor Name	<input type="checkbox"/> Prime <input type="checkbox"/> Sub
If Subcontractor, Name of Prime	
Date of Interview	
PART B - LABOR COMPLIANCE INTERVIEW DATA	
1. Employee name	Telephone Number
2. Job classification:	
3. Is the employee properly classified? <input type="checkbox"/> Yes <input type="checkbox"/> No	
4. Does the classification, duties, and wage information provided by the employee correspond to field office records? If no, list office information: <input type="checkbox"/> Yes <input type="checkbox"/> No	
5. What is your fringe benefit amount? \$ <input type="checkbox"/> Does not apply	
6. If applicable, are fringe benefits paid to you in cash or does the contractor pay them into approved plans, funds, or programs? <input type="checkbox"/> Cash <input type="checkbox"/> Funds Have you experienced any problems? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:	
7. How often are you paid? <input type="checkbox"/> Weekly <input type="checkbox"/> Other (specify):	
8. Other than the required deductions for social security and federal withholding tax, are other deductions being made to your paycheck? <input type="checkbox"/> State tax <input type="checkbox"/> Union dues <input type="checkbox"/> Insurance <input type="checkbox"/> Pension <input type="checkbox"/> Other (specify):	
9. Did you pay a fee to secure this job? <input type="checkbox"/> Yes <input type="checkbox"/> No	
10. Are you required to return any of your wages to your employer? If yes, for what reason? <input type="checkbox"/> Yes <input type="checkbox"/> No	
11. Dates employed on this project: From: To:	
12. Supervisor's name:	
13. How is your time reported? <input type="checkbox"/> Daily time card <input type="checkbox"/> Weekly time card <input type="checkbox"/> Verbal <input type="checkbox"/> Other (specify):	
14. Do you have a wage grievance based on the above questions? <input type="checkbox"/> Yes <input type="checkbox"/> No	
15. Additional comments:	

Figure 1 – Labor Compliance and EEO Contract Compliance Job-Site Interview

EXHIBIT III-B: PROJECT BULLETIN BOARD REVIEW

North Dakota Department of Transportation, CRD, SFN 60547 (Rev. 01-2014)

To access SFN 60547, click the following: <https://intranetapps.nd.gov/dot/forms/sfn60547.pdf>

PROJECT BULLETIN BOARD REVIEW
North Dakota Department of Transportation, Civil Rights Division
SFN 60547 (01-2014)

Review Date	Inspected by	Project Number	PCN
Project Location			
Contractor			

A. Bulletin Board

<input type="checkbox"/> Yes <input type="checkbox"/> No	Is bulletin board accessible to all employees on a continual basis?
<input type="checkbox"/> Yes <input type="checkbox"/> No	Is bulletin board located in any area where employees generally congregate?
<input type="checkbox"/> Yes <input type="checkbox"/> No	Is it maintained properly and contents easy to read?

B. Poster Required

<input type="checkbox"/> Yes <input type="checkbox"/> No	Form DOT 3350, 1 of 3 - EEO Notice Poster.
<input type="checkbox"/> Yes <input type="checkbox"/> No	Form DOT 3350, 2 of 3 - Wage/Hour Poster
<input type="checkbox"/> Yes <input type="checkbox"/> No	Form DOT 3350, 3 of 3 - Various Other Laws Poster

C. Additional Notices Required

<input type="checkbox"/> Yes <input type="checkbox"/> No	Applicable Davis Bacon Wage Rates
<input type="checkbox"/> Yes <input type="checkbox"/> No	Prime Contractor EEO Policy (may be filled out on Poster 1)
<input type="checkbox"/> Yes <input type="checkbox"/> No	Discrimination Complaint Procedure

Comments

Please take a photo of the bulletin board and enter as an attachment to this file.

This Form should be completed and entered into CARS/FileNet within 15 days of commencement of work on any federally-assisted project. It should also be done and filed up to 15 days prior to a scheduled Contractor Compliance Review conference.

EXHIBIT III-C: MONTHLY EEO PROJECT INSPECTION REPORT

North Dakota Department of Transportation, CRD, SFN 9425 (Rev. 08-2017)

MONTHLY EEO PROJECT INSPECTION REPORT

North Dakota Department of Transportation, Civil Rights
SFN 9425 (8-2017)

		Date
District	Date Filed	Project Number
Project Manager - Engineer (NDDOT or Consultant)		Title
Prime Contractor		PCN

A. Bulletin Boards

1. Are bulletin boards current?	<input type="checkbox"/> Yes <input type="checkbox"/> No
2. If not, describe corrective action requested and due date:	

B. Trucking Operations

1. Have trucking operations and procedures been reviewed and documented?	<input type="checkbox"/> Yes <input type="checkbox"/> No
2. If not, describe corrective action requested and due date:	

C. Labor Compliance Interviews (SFN 9426)

1. Is the prime contractor targeted for labor compliance interviews?	<input type="checkbox"/> Yes <input type="checkbox"/> No																				
2. If yes, and interviews have not been conducted, list target date for interviews:																					
3. List subcontractors targeted for labor compliance interview and anticipated dates of interviews:																					
<table border="1"> <thead> <tr> <th>Name</th> <th>Date</th> </tr> </thead> <tbody> <tr><td> </td><td> </td></tr> </tbody> </table>		Name	Date																		
Name	Date																				

Submit this form to the NDDOT Civil Rights Division by adding document in the CARS application within 14 days of the date the form was completed.

ON THE JOB TRAINING (OJT)

SECTION 4

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IV. ON-THE-JOB TRAINING (OJT)

Under 23 Code of Federal Regulations Part 230, NDDOT must provide training and skill improvement opportunities to increase participation of minorities, women, and economically disadvantaged persons in the highway construction industry. CRD has the overall responsibility for developing, implementing, and monitoring NDDOT's On-the-Job Training Program (OJT). The Department's approved OJT completion goal for 2020 is 16 trainees. The OJT Program Administration Manual and the OJT Special Provision (SP) are submitted each year to Federal Highway Administration for approval. Thereafter, the OJT SP and Program Administration Manual govern the program, contractors with trainee assignments, and the contractor's approved trainees.

A. STRATEGIC PLANNING INITIATIVE

In 2015-2016 the Department used special FHWA funding to examine the OJT program in an effort to make practical improvements. The primary change in the program is a heightened focus on the trainee's success in their training and their continuation in building a career path in highway construction skilled crafts. The following modifications were made in the On-the-Job Training Program Administration Manual as a result.

1. Contractors may count 100 percent of the training hours worked on municipal, private, out-of-state projects or other non-highway work toward the OJT Program completion in addition to counting training hours on state and federal funded jobs.
 - Hours counted toward completion of the trainee's program must be paid at the OJT Program's minimum wage scale.
 - Contractors may count the hours worked on other than state or federal jobs toward completion, however, no program reimbursement will be made for those hours.
2. The federal-aid contract dollar thresholds for the number of trainee position assignments are:

6,000,000	to 15,000,000	1 trainee
15,000,001	to 23,000,000	2 trainees
22,000,001	to 31,000,000	3 trainees
31,000,001	and above	4 trainees

B. PROJECT ENGINEERS' PRIMARY RESPONSIBILITIES

The project engineer's primary responsibility for an OJT trainee working on a NDDOT project is to observe and note in the project diary such things as: how is the trainee(s) being treated, whether a trainee is on the job, whether the trainee is learning the craft and working on the equipment related to the approved program, etc.

Under NDDOT's OJT Program, trainees may be moved from project to project which makes your oversight of the OJT Program and its participants "incidental."

It is the contractor's responsibility to provide training hours so the trainee can adequately learn the skills required by the program's curriculum.

It is the project engineer's responsibility, when notified by CRD, to withhold progress payments when/if the contractor is not responding or complying with the OJT contract provision.

Additionally, if a contractor indicates interest in having a trainee, please have them contact CRD. Contractors may be granted voluntary trainee assignments per the OJT Program Manual towards the bottom of page 3. Voluntary trainees must be preapproved by CRD, may be paid the lower trainee wage and are not reimbursed.

C. OJT PROGRAM ADMINISTRATION

The OJT Program Administration Manual is located on NDDOT's website at [On-the-Job Training Program Administration Manual](#). The program administration manual contains all pertinent programmatic and operational details.

1. **TRAINEES ASSIGNED TO CONTRACTORS:** NDDOT trainee positions are not assigned specifically to projects. Trainees are assigned by formula based on cumulative contract dollars to prime contractors who may provide training on any of the contractor's projects.
2. **TRAINEE ASSIGNMENT NOTIFICATION:** In early spring, a summary of the trainee positions required to date and links to the OJT package are emailed to participating prime contractors. Because assignments are made on projects awarded the previous year contractors will only receive one notification of trainee assignments and will not receive updated numbers throughout the construction season as was previously done.
3. **NUMBER OF TRAINEES ASSIGNED:**
 - CRD takes into consideration whether there is enough work for a trainee to successfully complete a program, and whether the contractor will be exceeding the allowable ratio of trainees to journeyworkers (generally considered to be one trainee or apprentice to every three to five journeyworkers).
 - CRD may seek the ADE's feedback to determine whether there is sufficient work on a contractor's projects to warrant a trainee assignment.
4. **TRAINEE TRANSFERS:** Contractors may transfer trainees to and from any of the contractor's projects regardless of project funding - municipal, private, or other non-highway work and work performed out of state to complete the OJT program. If a contractor needs to drop a trainee from a program for any reason other than the trainee leaving the company it must be approved by CRD.
5. **TERO PROJECTS:** Contractors may use trainees on projects subject to TERO requirements as part of the core crew or as part of the skilled labor supplied by the contractor.
6. **ABBREVIATED TRAINING PROGRAMS:** Commercial driver's license (CDL) holders having over-the-road driving experience, with little or no highway construction experience, may be considered to have completed the Class C truck driver training curriculum and, therefore, are eligible to be upgraded to a Class B truck driver trainee, with the approval of the CRD.
7. **MULTIPLE PROGRAMS:** Contractors may use a trainee on a piece of equipment in groups 1-3 or 4-6 for one assigned position, but contractors may not use one trainee to simultaneously fill multiple positions.
8. **DELEGATING TRAINING TO SUBCONTRACTORS:** A prime contractor may delegate or reassign one or more of the assigned trainee positions to subcontractors, by

agreement with the subcontractor(s) and the approval of CRD. Other training programs could be abbreviated if approved by CRD.

9. UNION APPRENTICESHIPS: Union apprenticeships and on-the-job training programs registered with the Bureau of Apprenticeship and training (BAT), USDOL, are recognized by NDDOT.

D. SPECIAL PROVISION ON-THE-JOB TRAINING PROGRAM

All state and federally funded highway construction contracts contain the [Special Provision On-the-Job Training Program](#). The OJT SP, while not contained in contracts solely funded by private companies/entities, municipalities, counties, TERO, etc, must be followed with a contractor's trainee as approved under the program. This means that at all times a trainee's training hours may be counted toward completion of their approved program, the training wage stated in the program approval must be paid.

E. APPROVALS REQUIRED

1. The process for selecting training programs and trainee candidates is covered in the OJT Program Administration Manual (<https://www.dot.nd.gov/divisions/civilrights/docs/ojtprogram.pdf>).
2. Prior to any of a trainee's hours counting toward their program completion, contractors must submit [Request for OJT Program and Trainee Approval \(SFN 60226\)](#), submit the trainee candidate's job application, the program curriculum proposed for approval, and the wage rates associated with the program.

F. TRAINEE CANDIDATE REQUIREMENTS

1. A contractor may not employ an individual as a trainee in a classification for which the individual has completed training or been employed as a journeyworker.
 - The proposed candidate's work experience will be reviewed to determine whether the candidate is eligible.
2. Individuals enrolled in the truck driver training program must possess appropriate driver permits or licenses for the operation of Class A, B, and C trucks.
3. The contractor must notify CRD when a trainee completes the program.
 - A certificate of completion and a laminated, wallet-sized certificate will be issued to each OJT program graduate.

G. CONTRACTOR REIMBURSEMENTS

1. Contractors are reimbursed \$4.00 per hour for each eligible hour of training provided. To request reimbursement, contractors must complete [SFN 51023 Voucher for On-the-Job Training Program Hourly Reimbursement](#) for each OJT program trainee.
 - Project engineers must ACCEPT payrolls so they can be "seen" and reviewed by OJT Supportive Services. If payroll remains unapproved/unaccepted in LCPtracker, OJT Supportive Services cannot

see them. Contractor's reimbursement requests and the trainee's hours cannot be approved without them.

- Any NDDOT project bid on October 13, 2017 or later included an SP for mandatory use of LCPTracker to report payrolls. Only non NDDOT projects or NDDOT projects bid before that date should have paper payrolls, which CRD would receive directly from the contractor.

H. MINIMUM WAGE RATES and FRINGE BENEFITS

1. All wage rates are specifically stated in the Program Administration Manual according to trade. All wages are based on the federal Davis-Bacon Wage rate decision in the contract proposal.
2. Basic hourly rates for all job classifications and fringe benefit payments, are established by USDOL under the Davis-Bacon and Related Acts.
3. On-the-job trainees and apprentices must be paid fringe benefits in accordance with the provisions of the approved program and its wage scale or apprenticeship program and its indenture agreement.

I. ON-SITE MONITORING BY PROJECT ENGINEER

1. When a trainee completes their program, the wages will then be monitored by the District staff, as part of the regular payroll monitoring responsibilities.
 - Project engineers should be aware of trainees working on a highway construction project under their jurisdiction, regardless of the funding source. Particular attention should be paid to the type of work the trainees are performing, i.e., an equipment operator or a truck driver trainee should not be continually performing laborer work.
2. All project engineers should immediately report observed abuses of the OJT program requirements to the ADE and note the abuses in the project diary.
 - The ADE must bring the matter to the contractor's project superintendent attention.
 - The project superintendent must direct the assigned trainer to provide the training required under the contractor's contract with NDDOT.
 - If abuse continues, the assistant district engineer must immediately notify CRD.
3. Project engineers are responsible for immediately reporting any observed abuses of the trainees and note the abuses in the project diary.
 - If the project engineer or their project staff observe other contractor employees verbally abusing a trainee, making derogatory remarks within hearing distance of a trainee, throwing tools or materials at or in the direction of a trainee, or any other such inappropriate activity, the project engineer must first step in and stop the behavior, then notify the contractor's project superintendent, and the ADE. The ADE will notify CRD.

J. TRAINEE ON-SITE VISITS

1. Approved trainees are monitored by NDDOT's OJTSS consultant.
 - The OJTSS consultant:
 - (1) Makes two work-site visits to trainees working on the job
 - (a) Contractors must make the trainees available to the OJTSS consultant for on-site visits.
 - (b) OJTSS will confer with the project engineer and the contractor's project superintendent regarding the trainee's progress.
 - (c) The project engineer should reassure the contractor that OJTSS has a contract with NDDOT and that the process is part of the contractor's contractual responsibility under the OJTSP.
 - (2) Contacts contractors responsible for completion of trainee positions each week to determine trainee progress
 - (a) Contractor's appointees who do not respond timely, risk sanctions as noted in the OJTSP and Sections J & K of this manual.
 - (3) Reviews all requests for reimbursement prior to CRD approval.
 - (4) Analyzes weekly payroll excerpts (on federal and state funded projects) which are submitted monthly with reimbursement requests.
 - (5) Assesses trainee hours and ascertains whether their wages and fringes are paid correctly and appropriately

K. FAILURE TO COMPLY

1. No payment will be made to a contractor for failure to provide the required training or failure to hire the trainee when such failure is caused by the contractor and evidences a lack of good faith on the part of the contractor in meeting the requirements of [Special Provision On-the-Job Training Program](#).
 - If payments have been made, the CRD will notify the ADE to withhold the amount paid from the contractor's progress payment.
 - The contractor may be subject to sanctions up to and including revocation of bidding privileges.
2. It is normally expected that all trainees will begin their training as soon as feasible after start of work utilizing the skill involved and remain employed as long as training opportunities exist in their work classifications or until they have completed their training programs
3. It is not required that all trainees be employed for the entire length of the construction season. A contractor will have fulfilled its responsibilities under [Special Provision On-the-Job Training Program](#) if it has provided acceptable training to the number of trainees specified. The number trained will be determined on the basis of the total number enrolled for a significant period (AKA Good Faith Efforts made to provide training as required.)
4. Any OJT positions not completed during the construction year they were assigned in will

need to be completed the following year and/or the assigned contractor will have carryover positions each subsequent year until they fulfill their obligations.

To contact CRD, phone: 701-328-3116, Email: civilrights@nd.gov

Forms necessary for the OJT Program are available on the NDDOT web site at:
www.dot.nd.gov/dotnet/forms/forms.aspx (choose *Category* in the *View forms by:* drop-down box)

- NDDOT OJT Special Provision
<https://www.dot.nd.gov/divisions/civilrights/docs/ojtspecialprovision.pdf>
- NDDOT's OJT Program Manual, includes the Minimum Wage Scales
www.dot.nd.gov/divisions/civilrights/docs/ojtprogram.pdf
- SFN 60226 Request for OJT Trainee Candidate Approval
www.dot.nd.gov/forms/sfn60226.pdf
- SFN 51023 Voucher for On-the-Job Training Program Hourly Reimbursement
<https://www.dot.nd.gov/forms/sfn51023.pdf>

LABOR COMPLIANCE

SECTION 5

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V. LABOR COMPLIANCE

The Davis-Bacon and Related Acts (DBRA) and the Contract Work Hours and Safety Standards Act (CWHSSA), 29 CFR 1, 3, 5, 6, and 7, contain wage and payroll requirements applicable to federal –aid highway construction projects and are incorporated into contracts and subcontracts through FHWA 1273 (*Required Contract Provisions, Federal-aid Construction Contracts ,USDOT Form FHWA 1273 - Rev. 5-1-12*). DBRA are binding on all federal-aid highway construction contracts.

NDDOT has the primary responsibility for the enforcement of the labor standards provisions included in all federally funded highway construction contracts. Overall monitoring of contractors for labor compliance is the responsibility of the assistant district engineer. District, city, county, and consultant project managers-engineers have the responsibility for day-to-day monitoring at the project level.

The *U.S. Department of Labor (USDOL) Field Operations Handbook - Chapter 15 (revised 10-25-10)* covers the federal rules and regulations that govern labor compliance, and assistant district engineers and district, city, county, and consultant project managers-engineers must familiarize themselves with this handbook. This Handbook does not contain all laws and rulings surrounding DBRA, but rather it contains material on guidelines contained hereinafter 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 contracts. [Refer to paragraph M of this section for reference sources.] The guidelines are not meant to preclude, replace, supersede, or otherwise circumvent any previously existing or future federal laws, rules, regulations, regulatory guidance, etc., that have or may be issued by USDOL. These guidelines are provided to assist district, city, county, and consultant project managers-engineers in monitoring contractors for compliance with the federal wage and payroll requirements of DBRA on NDDOT federally funded highway construction projects only. Although the information has been obtained from reputable sources in accordance with currently available information, it may not be applicable to other contracting agencies or other State Departments of Transportation. The CRD provides technical assistance to only those district, city, county, and consultant project managers-engineers who administer federally funded highway construction projects in North Dakota.

A. DAVIS-BACON AND RELATED ACTS COVERAGE

1. Introduction

a. Davis-Bacon and Related Acts (DBRA)

1. Davis-Bacon Act: The Davis-Bacon Act requires payment of prevailing wages and fringe benefits, as determined by the U.S. Department of Labor (USDOL), to all laborers and mechanics working on the site of federal and federal-aid government construction projects in excess of \$2,000.00. Construction includes the alteration and/or repair of public buildings and public works and roads.
2. Contract Work Hours and Safety Standards Act: The Contract Work Hours and Safety Standards Act (CWHSSA) requires payment at time and one-half of the basic hourly rate of pay for overtime (OT) hours (over 40 hours in any seven-day work week) worked on covered project(s). Violations may result in liquidated damage penalties (\$10/day per violation).
3. Copeland Act: The Copeland (Anti-Kickback) Act makes it a crime for anyone to require any laborer or mechanic employed on a federally funded project to pay back any part of his or her wages. In addition, the Act prohibits any deductions

from pay other than those specifically listed as permissible. The Copeland Act also requires that contractors and subcontractors at all tiers submit weekly certified payrolls.

b. Responsibility of Prime Contractor

1. Prime Contractor is Responsible for Compliance of Subcontractors.

The prime contractor is responsible for the full compliance of all employers (the contractor and all subcontractors, regardless of tier) with the labor standard provisions applicable to the project. Because of the contractual relationship between a prime contractor and the subcontractors, questions concerning compliance by subcontractors must always be directed to the prime contractor. The prime contractor must include all applicable special provisions and the wage decision in all subcontracts and require its subcontractors to include the special provisions/wage decision in all lower-tier subcontracts.

2. Burden of Proof.

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.

3. Failure to keep time records

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. Further, if a contractor is investigated by the USDOL, they also may assume that a complaint for Davis-Bacon wages has merit if the contractor has no documentation of the employee's time on the project. The burden of proof is with the employer/contractor and a failure to keep paperwork can make it very difficult to meet this burden.

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.

2. Special Provisions

- a. Under DBRA, all persons employed on or working upon the *site of the work* of a federally funded highway construction contract must be paid the wage rates and fringe benefits determined by the Secretary, USDOL, to be prevailing in the area of

the project. In addition, DBRA requires that certain labor standards provisions be specified in the contract awarded to the successful bidder and that the applicable Davis-Bacon wage rate decision also be included in the contract documents. Consequently, all federally-aided highway construction contracts contain the following special provisions:

- (1) *FHWA Form 1273, Required Contract Provisions (USDOT Form FHWA 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

- (2) *Labor Rates from U.S. Department of Labor*. This special provision 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):

- (3) **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. See Exhibit IV-E Special Provision Mandatory Use of Automated Certified Payroll. Please Note: This provision is in all projects bid on or after Oct. 13, 2017.**

- b. Prime contractors must include these special provisions in all subcontracts and must require their inclusion in any lower-tier subcontracts. The prime contractor is responsible for compliance by all subcontractor(s) or lower-tier subcontractor(s).
- c. Whenever any state, county, or city-funded project is combined with or tied to a federally funded highway construction project as one contract, the entire contract is subject to Davis-Bacon requirements as a federal-aid contract. Therefore, the contractors must pay DBRA wages to covered employees and submit certified payrolls through LCPTracker on all aspects of the tied project.
- d. Any contractor or subcontractor who falsifies certified payroll may be subject to civil or criminal penalties. See *The USDOL Prevailing Wage Resource Book, DBRA Investigations, p.5*. Knowledge of falsification by project personnel or consultants must be disclosed to the ADE, and paperwork evidencing falsification must be preserved. Consult CRD with any questions.
- e. For projects bid prior to October 13, 2017, Contractors may file certified payroll either through the traditional paper method, or electronically through LCPTracker, an internet-based system for certified payroll. For projects bid after October 13, 2017, all payrolls must be filed electronically and paper payrolls will no longer be accepted.

3. Site of the Work Definition

- a. The federal regulations at 29 CFR 5.2(l) define the term *site of the work* as:

- “(1) 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;
- (2) 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;
- (3) 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.”

(4) Site of work for District-wide projects is the area immediately surrounding area where work is done. It is not a central staging area and DBRA wages are not required for travel between work areas, unless they are immediately adjacent.

- b. The federal regulations at 29 CFR 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.”
- c. The key is *dedicated* to the job site and *adjacent or virtually adjacent* to the location where the work is being constructed. Inasmuch as the federal regulations do not define *adjacent or virtually adjacent*, 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. The Davis-Bacon and Related Acts (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.
 - (1) 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*.
 - (2) *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. Refer to paragraph B of this section for information concerning the application of DBRA to truck drivers.

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

www.dot.nd.gov/manuals/civilrights/davisbacon.pdf

5. 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. It does not matter when the project was *let to contract* (i.e. the bid opening date) because the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is *more than one-half mile* away.

Please note: There appears to be disagreement between the NDDOT and the local USDOL office as to the treatment of mobile batch plants. The NDDOT has asked for an opinion letter on this issue. In the meantime, all staff should continue to enforce the above rule – that a batch plant more than ½ mile from project boundaries is off-site for DBRA purposes. If it appears that the USDOL is investigating a project, CRD should be contacted immediately.

6. 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,
 - (1) 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).

- (2) 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).
7. 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.
8. 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.
9. 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 certified payrolls are generally not required by NDDOT.
10. 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.
11. Bona Fide Material Suppliers
 - a. Pursuant to paragraph 15e16 of USDOL's *Field Operations Handbook - Chapter 15 (10-25-10)*:
 - (1) *“(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.*
 - (2) *“(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.

- (3) (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. 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.*
- (4) (d) *29 CFR Part 5.2(l) specifically excludes from the definition of site of the work permanent fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial supplier or materialman that are established by a supplier of materials for the project before opening of bids and near to but not on the actual project site, even where such operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.*

- b. A bona fide material supplier must be able to demonstrate that he or she has *routinely been selling to the general public* from the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., and that the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., was opened for that use, not for the federal-aid highway construction project in question. In other words, if they are normally considered a supplier but they opened the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., just for the federal-aid highway construction project, and the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is located *one-half mile or less* from the closest right of way boundary to the project, they would be considered a subcontractor and not a supplier. Consequently, Davis-Bacon wages would be due and weekly certified payrolls would be required.
- c. If a bona fide material supplier has demonstrated that he or she was open and making sales to the general public from a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., within the previous *twelve months* of the *day* the federal-aid highway construction project was *let to contract* (not awarded), DBRA does not apply no matter where the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is located.

12. Whenever any state, county or city-funded project is combined with or tied to a federally funded highway construction project as one contract, Davis-Bacon wages must be paid and weekly certified payrolls must be generated and submitted for all portions or segments of the contract. (Note: If the tied projects have separate contracts, performance bonds, pay items and distinct funding sources, the prevailing wage rates apply only to the Federal-aid portion of the contract. See FHWA *Davis-Bacon and Related Acts, Questions and Answers, 2014*.) Consequently, the principles previously described apply to borrow pits, stockpile sites, concrete or asphalt batch plant sites, etc., used for the contract or project. For example:

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

- a. Because two of the portions or segments are federally funded, the entire project is viewed as federally funded.
 - b. Since the borrow pit is located *less than one-half mile* from the closest right of way boundary to the state funded portion or segment,
 - (1) DBRA generally does not apply if the borrow pit has been open and making sales to the general public within the previous *twelve months of the day* the project was *let to contract* (not awarded).
 - (2) DBRA does apply if the borrow pit has not been open and making sales to the general public within the previous twelve months of the day the project was let to contract (not awarded).
 - c. DBRA applies to anyone working *adjacent* (within one-half mile) to the boundaries of the project site, normally at a borrow pit, stockpile site, concrete or asphalt batch plant site, etc.
 - d. If material is hauled from that same borrow pit to any one of the other two portions or segments, which are not *adjacent* to the borrow pit, DBRA still applies because the portions or segments are looked at as a whole.
13. There are times when, at the end of a federal-aid highway construction project, NDDOT adds another mile or two to the project through the issuance of a change order. If it was previously determined that the boundary to a borrow pit, stockpile site, concrete or asphalt batch plant site, etc., was located *more than one-half mile* from the closest right of way boundary to the project but the added segment brings the boundary to the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., *within one-half mile* of the project boundary:
 - a. Those employees working on the additional segment under the change order would be due Davis-Bacon wages, including applicable fringe benefits, and weekly-certified payrolls would be required.

- b. Those employees hauling from and working at the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., under the change order would be due Davis-Bacon wages, including applicable fringe benefits, and weekly certified payrolls would be required by NDDOT only if the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., was not open and making sales to the general public within the previous 12 months of the day the project was let to contract (not awarded).
- c. If the borrow pit, stockpile site, concrete or asphalt batch plant site, etc., was open and making sales to the general public within the previous *twelve months* of the *day* the project was *let to contract* (not awarded), the truck drivers employed by the prime contractor, and/or any subcontractor, who haul the materials to and from the additional segment and spend *more than a de minimis* amount of time on the additional segment would be due Davis-Bacon wages, including applicable fringe benefits, for all time spent on the additional segment that is *more than de minimis*.

B. TRUCK DRIVERS AND DBRA

1. The following is taken from USDOL's final rule amending 29 CFR 5 (12-20-2000):
 - a. The Department of Labor adopted as a final rule an amendment to the regulations, 29 CFR 5, which defines the Davis-Bacon Act language construction, prosecution, completion, or repair at 29 CFR 5.2(j), and site of the work at 29 CFR 5.2(l). Specifically, this document revises the site of the work definition to include material or supply sources, tool yards, job headquarters, etc., in the site of the work only where they are dedicated to the covered construction project and are adjacent or virtually adjacent to the location where the building or work is being constructed. The final rule also changed the regulatory definition of construction to provide that the off-site transportation of materials, supplies, tools, etc., is not covered unless such transportation occurs between the construction work site and a dedicated facility located "adjacent or virtually adjacent" to the construction site.
 - b. The final rule revised section 5.2(l)(1) to include within the *site of the work*, secondary sites, other than the project's final resting place, which have been established specifically for the performance of the Davis-Bacon covered contract and at which a significant portion of the public building or work called for by the contract is constructed. In conjunction with this change, section 5.2(j) was amended to provide that transportation of portion(s) of the building or work between a secondary covered construction site and the site where the building or work will remain when it is completed is subject to Davis-Bacon requirements.
 - c. The USDOL's regulations provide a three-part definition of the *site of the work*.
2. The first part at 29 CFR 5.2(l) (1) provides that "the *site of the work* is the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (l)(2) of this section, other adjacent or nearby

property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site.”

3. The second part at 29 CFR 5.2(l) (2) provides that “fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc.” are part of the *site of the work* provided they meet two tests—a geographic test of being “so located in proximity to the actual construction location that it would be reasonable to include them,” and a functional test of being “dedicated exclusively, or nearly so, to performance of the contract or project.”
4. The third part at 29 CFR 5.2(l)(3) states that fabrication plants, batch plants, borrow pits, tool yards, job headquarters, etc., “of a commercial supplier or materialman which are established by a supplier of materials for the project before the opening of bids and not on the project site, are not included in the *site of the work*.” In other words, facilities such as batch plants and borrow pits are not covered if they are ongoing businesses apart from the federal contract work.
5. The USDOL disagreed that the *Midway* decision exempts all material delivery truck drivers regardless of how much time they spend on the *site of the work*. Clearly, 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.
6. It is also the USDOL’s position, as stated in the NPRM (Notice of Proposed Rulemaking), 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*. It must be noted that this is not a regulatory change, nor is it a subject of this rulemaking. However, the USDOL will provide some discussion on this issue in order to provide some clarification as to its position.
7. The USDOL ruled that “our reading of *Midway* 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 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.”
8. USDOL publishes a *Field Operations Handbook - Chapter 15*, which supplements 29 CFR 1, 3, 5, 6, and 7 pertaining to a group of statutes generally identified as the Davis-Bacon and Related Acts (DBRA) and the Contract Work Hours and Safety Standards Act (CWHSSA).
 - a. Federal contracting or other administering agencies have the primary responsibility for the enforcement of DBRA and CWHSSA labor standards provisions included in its contracts. USDOL has coordination and oversight responsibilities, including the authority to investigate labor standards compliance

as warranted. USDOL issued the regulations referenced in Chapter 15 to coordinate the administration and enforcement of DBRA and CWHSSA labor standards. In other words, NDDOT is to refer to Chapter 15 in its labor standards enforcement responsibilities.

b. The following is taken verbatim from USDOL's *FOH- Chapter 15 (10-25-10)*:

(1) 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. 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.*

(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).)

(2) 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.

(3) 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, Dec 20, 2000)

(a) Truck drivers are covered by Davis-Bacon in the following circumstances:

- (1) Drivers of a contractor or subcontractor for time spent working on the site of the work.
- (2) Drivers of a 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).
- (3) Truck drivers transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site.
- (4) 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:

- (1) Material delivery truck drivers while off the “site of the work.”
- (2) 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.”
- (3) 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.

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

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.

- g. *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* (i.e. the bid opening date).
- h. 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:
 - (1) The *de minimis* ruling is a result of the *Midway* court 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*.
 - (2) Situations involving *de minimis* rulings normally arise when:
 - (a) A borrow pit, stockpile site, concrete or asphalt batch plant site, etc., is *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.
 - (3) 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.

- (4) 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.
- i. 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:
 - (1) Pay the appropriate Davis-Bacon wage, including applicable fringe benefits, for all of the hours the truck drivers spend on the *site of the work*; or
 - (2) Keep accurate records of the time so spent on the *site of the work* and pay the appropriate Davis-Bacon wage, including applicable fringe benefits, for all of the time spent on-site that is *more than de minimis*.

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*.

- (3) A prime contractor's or subcontractor's failure to keep accurate records may cause NDDOT **or USDOL** to find for the complainant should a wage dispute ensue.
 - (4) 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.
 - (5) 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.
10. Both USDOL's final rule amending 29 CFR 5, and the *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.

11. 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), which are not covered by DBRA. 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:
 - (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 *owner-operator* box checked on LCPtracker (see LCPtracker Procedure Manual for Engineers);
 - (2) After checking this box, the areas for wages and paycheck details will become "greyed out" and will not allow entries. While the contractor can input daily hours total, this is not required and the payroll is accepted by the system without this information.
- 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 NDDOT, city, county, or consultant project manager-engineer 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.

C. PAYMENT OF PREDETERMINED MINIMUM WAGE

1. All **laborers, operators and other journeyworkers** 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*, unless these employees fit under some type of exception, such as an equipment lease subcontractor where employee time is incidental and less than 20%

of the workweek. **Professional and technical employees are not subject to this requirement.**

2. Therefore, 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). Any deviation from this schedule may indicate the contractor is attempting to circumvent the overtime requirements.
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. Refer to paragraph C of this section for information concerning fringe benefit payments.
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.
5. The wage rate and fringe per hour total must not be less than those contained in the Davis-Bacon wage rate decision incorporated into the contract, regardless of any contractual relationship that may or may not exist between the contractor, its subcontractors, and their employees. On LCP Tracker, the Wage Decision is assigned to a Project at the commencement, and rates will be checked automatically.
6. Employees must be paid the appropriate 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. On LCPtracker, contractors must use care in separating wage payments from fringe cash payments. Failure to do this will inflate the required overtime (1.5 x straight time) wage.
7. Apprentices and trainees must be paid at not less than the percentage rate (specified in the registered or approved program) of the assigned wage for a journeyworker on the Project. Example – if an apprentice carpenter is at 75% level, he or she must be paid 75% of the full carpenter wage assigned to the Project. If the program specifies a fringe amount, that fringe should be used as the minimum fringe. If not, the contractor should pay the fringe amount required for a journeyworker at that classification. (The fringe is not paid at 75% in the previous scenario, unless such a fringe amount is specified as part of a USDOL-approved apprentice program.) Please see LCPtracker Manuals for apprentice approval – each apprentice is approved by the Program Administrator, who also ensures that the apprentice classification is contained in the Master Wage Data for the project(s) in question.
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.
9. If an employee's job classification is doubtful, contact the CRD.

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* as described in paragraph G of this section.

11. Counting and Reporting Time

- a. An employee's time starts for the day whenever he or she does any of the following in any sequence:
 - (1) Checks in to get instructions for the day;
 - (2) Loads, services, or does preventive maintenance on equipment;
 - (3) Cleans any part of the equipment; and
 - (4) 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 site.
- b. An employee's time ends for the day after any of these same duties are performed at the end of the day.
- c. For the time spent performing the above duties, employees must be paid at least the federal minimum wage. Davis-Bacon wages are due when the employee reaches a federal-aid highway construction project, or the *site of the work*. For example:
 - (1) 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.
 - (2) 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).
 - (3) For Friday, the employee would be entitled to 2 hours at \$15.00 per hour ($\10.00×1.5) and 8 hours at \$30.00 per hour ($\20.00×1.5).
 - (4) Refer to paragraph C, 12 of this section for additional information concerning the payment of overtime hours.
- d. Truck drivers who have reached 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

the appropriate Davis-Bacon wage, including applicable fringe benefits, for their waiting time.

- e. Except as noted in Section B, 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 by DBRA, to and from a project site that is covered by 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 by DBRA*.
- f. Rounding Time
 - (1) 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.
 - (2) Rounding is allowed, but is not required. Actual minutes may be used rather than rounding.
 - (3) 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.
 - (4) 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.
 - (5) Rounding must not be done in such a way that the employee is consistently deprived of wages.
- g. Breaks
 - (1) There is no federal law covering breaks.
 - (2) There is a state law, which reads, "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."
 - (3) 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.
- (4) 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.
 - (5) NDDOT does not enforce the state law on breaks. Any problems or questions should be addressed to the North Dakota Department of Labor (NDDOL). Refer to paragraph L of this section for addresses and phone numbers.
- h. Timecards
- (1) There are no mandatory formats or procedures for employees to report their daily and weekly hours worked. Generally, 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.
 - (2) 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.
 - (3) 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.

12. Overtime Hours

- a. 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.
- b. 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.

- c. 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. Refer to paragraph C, 13 of this section for information concerning fringe benefit payments.
- d. 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 (now \$7.25 per hour at time this manual printed) 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. Refer to paragraph L of this section for addresses and phone numbers.

- e. 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. Refer to paragraph J of this section for additional information concerning employees hired through temporary employment agencies.
- f. 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 C, 12, h of this section. This also applies to employees of a temporary employment agency. Refer to paragraph J of this section for additional information concerning employees hired through temporary employment agencies.
- g. 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:
 - (1) The contractor can compute the overtime premium based on the *basic rate of pay* in effect when the overtime hours were worked; or
 - (2) 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 and \$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

$$\begin{aligned}
 24 \times \$10 &= \$240 \text{ (as Painter)} \\
 \underline{20} \times \$12 &= \underline{\$240} \text{ (as Electrician)} \\
 44 &\quad \$480 \text{ (total straight time wages)}
 \end{aligned}$$

Step 2: Calculate the *regular rate*

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

Step 3: Compute the overtime premium due

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

- h. In the example above, the employee is working on one federal-aid highway construction project. As stated in paragraph C, 12, f 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.

- i. 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*.

- j. 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 must provide a clear explanation (including all calculations made) in an attachment to each separate payroll.
- k. 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** the DBRA hours and the non-DBRA hours and use the weighted average method to determine the overtime premium.

13. Fringe Benefit Payments

- a. When hourly fringe benefits are listed on the Davis-Bacon wage rate decision, they may be paid in the following manner:
 - (1) Payments 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 health or dental insurance. 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.
 - (2) Payments to the employee in cash.
 - (3) A combination of the above methods.
- b. Example: If a required wage is \$15/hour and required fringe is \$5/hour, the employer may do any one of the following:
 - (1) Pay at least \$15.00 per hour to the employee, plus make payments to established health and welfare and pension programs in amounts totaling \$5/hour for health or other insurance or pension.
 - (2) Pay at least \$15.00 per hour to the employee, plus pay an additional \$5.00 per hour cash to the employee for fringe benefits.
 - (3) Pay at least \$15.00 per hour to the employee, plus an additional payment of \$2.50 per hour cash to the employee, plus a contribution of \$2.50 per hour to either health or welfare or pension programs. (This is a "mixed fringe" method.)

- c. In the above example, if payments to health and welfare, or pension programs, or to both programs, is greater than \$5/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:

Hours 1-40 (at published rates)

$$\$15.00 + \$5.00 = \$\mathbf{20.00} \text{ x hours}$$

Hours over 40 (at published rates)

$$\$15.00 + \$7.50 (\$15.00 \div 2) + \$5.00 = \$\mathbf{27.50} \text{ x hours}$$

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

$$\$14.00 + \$6.00 = \$\mathbf{20.00} \text{ x hours}$$

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

$$\$14.00 + \$7.50 (\$15.00 \div 2) + \$6.00 = \$\mathbf{27.50} \text{ x hours}$$

*29 CFR 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 costs 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 Standard 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 hourly rate would continue to be \$3.00 an hour.”

- d. 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).
 - e. 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.
 - f. 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.
- g. 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).

- h. Eligibility Standards for Participation in Fringe Benefit Plans, Funds, or Programs:
- (1) 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 benefits equal in monetary value. If the plan requires contributions to be made during the eligibility waiting period, credit may be taken for such contributions.
 - (2) 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.
 - (3) 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. In 2016, this issue was decided by the USDOL on a NDDOT project – the USDOL determined that payment of fringe benefits into union plans for nonunion workers who cannot fully participate in the union benefit plans does not satisfy the fringe requirement for DBRA. If this issue arises on a project, call CRD immediately.
- i. To convert the annual cost of a particular fringe benefit to an hourly cash equivalent, the following formula may be used:

$$\frac{\text{Annual cost of the fringe benefit}}{\text{Total number of working hours to which the cost is attributable}}$$

When determining total number of hours to which the cost is attribution, it is permissible to use 52 weeks per year x 40 hours per week = 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.

- j. Refer to paragraphs 15f11 through 15f19 of the USDOL *Field Operations Handbook - Chapter 15* for additional information regarding fringe benefit requirements.
- k. 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).
- l. Fringe benefits for electricians and line construction workers are different from power equipment operators and truck drivers, **as these fringes are based on a percentage of the basic wage. The NDDOT has consistently held that this is a percentage of the minimum wage and not the actual wage.**

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.

- m. Apprentices and trainees must also 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.
- n. NDDOT's OJT program package specifies that on-the-job trainees be paid full fringe benefits where applicable.
- o. **In LCPtracker, fringe benefits paid into plans are placed in total amounts paid per week into the fringe benefit area.**

14. Payroll Deductions

- a. Only deductions authorized by law may be made from an employee's weekly paycheck. Authorized payroll deductions include:
 - (1) Federal and state withholding income taxes and federal social security taxes.

- (2) 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 employee. Failure to do so may cause NDDOT to side with the employee should a wage dispute ensue. Upload documentation related to this deduction to LCP Tracker through the EDocument function. On LCPtracker, deductions to repay an advancement of wages may lead to a violation flag appearing on the Violations page. The repayment should be explained in the "Other Deductions Notes." If so, please check and dismiss the violation. If an employee complains about funds deducted from his or her paycheck for this purpose, ask the employer-contractor for proof of advancement and repayment schedule.
- (3) 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. Upload documentation related to this child support withholding or other court garnishment to LCP Tracker through the EDocument function. On LCPtracker, child support deductions may lead to a violation flag appearing on the Violations page. Child Support should be noted in the "Other Deduction Notes." If so, please check and dismiss the violation.
- (4) 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 principle 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:
- (a) The deduction is not otherwise prohibited by law.
- (b) 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 condition either for the obtaining of or for the continuation of employment; or
 - 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.

- (d) The deduction shall serve the convenience and interest of the employee.
- (5) Contributions made on behalf of the employee toward the purchase of United States Defense Stamps and Bonds when voluntarily authorized by the employee.
- (6) 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.
- (7) Deductions voluntarily authorized by the employee for the making of contributions to governmental or quasi-governmental agencies, such as the American Red Cross.
- (8) Deductions voluntarily authorized by the employee for the making of contributions to Community Chests, United Givers Funds, and similar charitable organizations.
- (9) 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.
- (10) Deductions not more than for the *reasonable cost* of board, lodging, or other facilities meeting the requirements of Section 3(m) of the FLSA. When such deductions are made, the additional records required under 29 CFR 516.25(a) must be kept.

NOTE: USDOL has indicated these instances are rare and do not apply to the highway construction industry.

Note: Recent rulings by the USDOL call into question whether a DB employer may pass the cost of hotel rooms or other temporary housing near project sites on to employees. If the housing is for the benefit of the employer (as opposed to the employee), the employer must pay the cost of the housing.

- (11) Deductions for the cost of safety equipment of nominal value purchased by the employee as his or her own property and:
 - (a) The equipment is not required by law to be furnished by the employer;
 - (b) The deduction does not violate the Fair Labor Standards Act and is not otherwise prohibited by law;
 - (c) The cost does not exceed the actual cost to the employer and does not include any direct or indirect monetary return to the employer; and

(d) 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 condition either for the obtaining of employment or its continuance; or
- Provided for in a bona fide collective bargaining agreement between the employer and representatives of its employees.

(12) Deductions for which the employer has applied and received permission to make from the Secretary, USDOL, Washington, D.C.

(13) In LCPtracker, deductions taken under the “Other” deductions area must be explained in the Notes section. If no text appears in the Notes section where an “Other” deduction is taken, LCPtracker will stop the payroll from being filed (i.e. a “hard stop”).

b. Deductions *specifically prohibited* include:

- (1) 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.
- (2) Deductions for the cost of lost or destroyed clothing and other items issued to the employees for use in performing their jobs.
- (3) 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.

c. 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*.

D. 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. For projects bid prior to October 13, 2017, payrolls may be filed either electronically through LCPtracker or via paper payrolls. For projects bid on October 13, 2017 or after, the payrolls must be filed electronically through LCPtracker.
2. Prime contractors will be contacted and asked to set up a Prime Approver Account on LCPtracker after award of a contract. Set up assistance is done through CRD. Prime contractors must act as prime approvers as part of the Automated Payroll Special Provision. If a prime contractor is struggling, refer them to Civil Rights for training.

3. The Prime Contractor has the responsibility to assign all subcontractors for the project in LCPtracker. If a subcontractor is not in the system, but are registered, the Prime may input the subcontractor. If the subcontractor is not in LCPtracker and is not registered, the prime has the responsibility to get the subcontractor registered and to input the subcontractor into LCPtracker. Civil Rights will provide guidance to the prime contractor if requested. But it is the ultimate responsibility of the Prime (after assignment as Prime Approver) to set up subcontractors and to ensure compliance overall on LCPtracker.
4. 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.

NOTE: This does not preclude contractors from having to maintain payrolls for such work. Refer to paragraph B of this section for information concerning the application of DBRA to truck drivers and paragraph C, 12 of this section for information concerning the payment of overtime hours.

5. Under LCPtracker, each employee must be assigned a job classification or classifications from the wage decision for all hours worked. These classifications have been input into the system, and the contractor is limited to them, unless a conformance is filed. If using paper payrolls, 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. Laborers must be listed as *Laborer* and either *Group 1, 2, 3, or 4*.
 - b. 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 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*.
 - c. Line construction workers must be listed as either *Lineman, Cable Splicer, Line Equipment Operator, or Groundman*.
 - d. Power equipment operators must be listed as *Power Equipment Operator* and either *Group 1, 2, 3, 4, 5, or 6*.
 - e. 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*.
6. 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: In LCPtracker, the contractor will provide the last four digits of the social security numbers and the address of each worker. The form of entry of social security numbers is “xxx-xx-last 4 digits.”

- 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;
 - 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.
 - h. LCPtracker requires all of the above information before a payroll can be filed. If any of the above information is missing, the payroll will be “hard stopped” and the contractor will be prevented from filing payroll.
7. The contractor must ensure that all employees are included on the weekly certified payroll and that the employees are properly classified and properly paid.
8. Each weekly payroll submitted must be accompanied by a completed *Statement of Compliance* signed by the contractor, or his or her agent who pays or supervises the payment of the persons employed under the contract. LCPtracker contains an electronic signature feature which allows contractors to file the *Statement of Compliance* electronically. 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.
9. In construction season 2019, there should be no further use of paper payrolls beyond work on multiple year projects, or for other work on projects bid prior to October 13, 2017). When using LCPtracker, submittal is entirely electronic and no paper or emailed copy should be provided.
10. Payrolls and compliance statements are due within seven (7) calendar days after the regular payment date of the payroll period.

11. Prime contractors are responsible for the submission of weekly certified payrolls by all subcontractors. This includes ensuring timely electronic submittal and approval of weekly certified payrolls for completeness and accuracy. 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 Engineer. The responsibility to fix payroll issues in LCPtracker for all contractors lies with the prime contractor – specifically the Prime Approver for the project. The Project Engineer should give notice of issues to the Prime Approver and it is up to the Prime Approver to see that payroll is fixed. The Admin Notice function is ideal for accomplishing this task.
12. The subcontractor payrolls must be reviewed and electronically approved by the Prime Approver in a timely way. The approval of the payrolls will electronically make the payrolls available to the Project Engineer. **(The Project Engineer will not be able to see payrolls submitted by subcontractors to the prime contractor until the Prime Approver approves each payroll electronically.) If the Project Engineer knows that subcontractors have submitted payroll to the prime contractor, but cannot see them on the Certifications Page of LCPtracker, he or she should send a notice to the Prime Approver asking that payrolls be approved. Payrolls will be accepted by the Project Engineer in LCPtracker after review.**
13. 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. Payroll files will be kept as electronic records in LCPtracker until their disposal is requested by CRD. Closed file records can be viewed by checking the “include closed files” box on the Certifications page and choosing the appropriate project number.

E. CLASSIFICATIONS

1. ASSISTANT OPERATOR

A worker providing assistance to a Group 1-6 Equipment Operator, who is not actually operating the equipment in question, 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) OPERATORS - SKIDSTEERS

The operator of a skidsteer will be included in the Power Equipment Operator Group 5. This classification does not apply to labor support functions for fencing/traffic control tasks, excluding erosion control tasks.

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 1) 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, screwdrivers, 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 smoothes 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 course, 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 paragraph E, 3, f of this section 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 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:
 - Concrete Mixer Operator (one bag capacity) – Operates a portable concrete mixer.
- e. Concrete Finisher Tender:

- (1) A Concrete Finisher Tender is a Group 2 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 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.
- (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 E, 15 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 Flagger 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/suppspecs/standardspecs.aspx

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

www.workzonesafety.org

- d. Refer to paragraphs C, 12, e and f of this section, paragraph H of this section, and paragraph J of this section for additional information concerning Flaggers.

13. IRONWORKERS

There is no classification on the ND highway wage decision (ND 01) 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. Contract 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 E, 15 of this section.

15. LINE CONSTRUCTION AND ELECTRICIANS

- a. **Electric work done outside on highway road construction projects is covered by the Line Construction rates rather than Electrician rates.** 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.
- (6) This includes not only new installation work, but also the repair, maintenance, or dismantling of all above structures, lines, or equipment.
- (7) **If a worker touches wire or conduit, they will nearly always be a under line construction, and cannot be classified as a Laborer.**

b. The job classifications and duties performed in line construction are:

- i. **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 ductwork, raceway, pulling cables or wires, installing direct burial cable or wires, junction boxes, terminating cable or wire, setting poles, and assembling lights or signals.
- ii. **Cable Splicer** – In addition to the same duties as lineman, may be required to splice and terminate high voltage cable and multi-conductor cable when special procedures or kits are required to accomplish the task.
- iii. **Line Equipment Operator** – Operates any equipment needed to complete the project, including but not limited to: backhoe, front-end loader, trencher, and hole auger.
- iv. **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, and in support of, line construction work.

- v. **The Group 2 Laborer, Conduit Layer classification may not touch or handle electrical conduit or wire under the Century Code. This category may not be used for any type of electrical work/line construction.**

c. Apprentices in Line Construction: Apprentices in Line Construction must be classified and paid as Apprentice Linemen with a percentage of journeyman's pay that reflects the apprentice's progress level of training. LCPtracker has seven classifications of Apprentice Lineman, from 60% to 90%, with fringe based on this amount. While the scale remains the same throughout any given project (i.e. the full journeyman amount does not change), an Apprentice may move from one level to another within the scale during the term of a project. Example: If a journeyman's

rate is \$41.50, the percentages will always be based on this wage for a project, but a particular apprentice may move from 60% to 65% of that wage during the term of the project, if total hours warrant the move in levels.

- d. Electrical work may not be done by any Laborer classification under ND Century Code. The Group 2 Laborer, Conduit Layer may only handle low voltage data or telephone lines and may not install or handle electrical conduit.**

16. MECHANICS, GREASERS, 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 gas and 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 Surfacers 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. Laborer Group 1: *Cement Person or Sack Shaker (cement and mineral filler)*

The employee dumps bags of cement onto the conveyors.

- e. 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: *Multilayer 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. PAINT MACHINE STRIPING OPERATORS

An individual who operates smaller self-propelled machines used to paint striping on highways and bridges will be classified as a Group 6

Equipment Operator “Paint Machine Striping Operator.” This includes the “Mini Mac” and the “Epoxy Skidsteer.”

20. 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.

21. 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 signpost 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.

22. TRUCK DRIVERS

- a. The driver of any single vehicle with a gross vehicle weight rating of 26,000 pounds or less, or any combination of vehicles with 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 with a gross vehicle weight rating of more than 26,000 pounds, 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 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 site of work of a federal-aid project, **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. 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) Pursuant to Section 104.02 of the *2008 Standard Specifications for Road and Bridge Construction, Volume 1*:
- *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.*
 - *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.*

e. 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:
- i. 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.
 - ii. Vehicle identification number or license plate number of the vehicle being driven.
 - iii. Truck number that will or is being used on scale tickets and haul sheets.
 - iv. Neither the hours worked nor the wages paid need be shown.
- (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:
 - a. Owner-operator's name;
 - b. Valid commercial driver's license;
 - c. Vehicle registration in the owner-operator's name;
 - d. Current vehicle license number;
 - e. Truck number that will or is being used on scale tickets and haul sheets; and
 - f. 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.
- f. 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:
 - b. Researching the open market for the rate required to rent the same piece of equipment by the hour;
 - c. Multiplying that figure by the total number of hours the owner-operator worked;
 - d. 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);
 - e. Adding the two figures together; and
 - f. Comparing the total to the lump sum amount.
- (3) If the total is substantially greater than the lump sum amount, the owner-operator would be due the difference.

23. 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 handheld and is not self-propelled, then the person using the water sprayer/vacuum (often used in horizontal boring) is a Group 4 Laborer.**

24. 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*.

25. 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. In operations other than pile driving, the welder should receive the rate prescribed to the craft for which welding is incidental, even where the crane operator is the only other skilled craft worker on the project. The welder might, for example, be paid as a concrete mason when welding is done incidental to concrete work – such as installation of a culvert.
- c. 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.

F. 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. **Executive Employees** - Title 29, Part 541, includes the following definitions:

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 merchandize to be bought, stocked, and sold; controlling the flow and distribution of materials or merchandize 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. However, the owner must be listed on the weekly certified payroll with only their name and the notation *owner*, applicable job classification, and daily total hours worked. **USDOL will generally recognize that owners of sole proprietorship businesses are exempt, if these owners are listed as “Inc.” or “LLC.” If a subcontractor indicates they are a sole proprietor, ask**

to for proof of federal tax ID or business license showing LLC status. This is adequate to establish a sole proprietorship exempt from Davis Bacon.

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 by DBRA. However, the mere fact that an employee is called a *working supervisor* or working foreman 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) Management employees are generally not placed in LCPtracker unless they are a working foreman. When the supervisor or working foreman performs manual labor more than 20 percent of the time, the proper job classification, hours, and wage rate information must be included on the weekly certified payroll. A working foreman is put onto certified payroll only for “working” hours and then categorized as an Operator (or other journey person) at the appropriate group and rate. If the working foreman is salaried, his salary must be reduced to an hourly rate each week and reported for working hours.**
- (4) Bona fide Owners – Bona fide owners own at least 20% of a contracting entity, and are involved in management of the company. Bona fide owners are exempt from Davis-Bacon coverage. However, the owner should be input into LCPtracker, with the “Business Owner” box checked. In this way, the system will not accept wage rates, pay details or other pay information for that individual.**

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 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 not have to appear on 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 (*more than 20 percent*) 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 by 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 payroll 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. Refer to paragraph C, 12 of this section 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."]

- (1) Bona fide owner-operators of trucks (also referred to as Independent Owner Operators or ITOs) are the only exception to the above rule and are not covered by DBRA. Owner-Operators may be placed on the payroll of the contractor to which they are contracted, with no hours or rates of pay. In LCPtracker, the ITO is input as an employee, but with the "owner-operator" box checked. If a worker appears as an "owner-operator" in LCPtracker, the system will accept no further information on classification, rate of pay or paycheck amount. While the contractor may input hours worked within the week, they are not required to do so.
- 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 ensuring that weekly certified payrolls are filed on LCPtracker 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:

- (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 or subcontractor's weekly certified payrolls showing the hours worked and the wages paid. Refer to paragraph E, 15, h of this section for additional information concerning equipment owner-operators.
- h. On LCPTTracker, the owner operator may be placed on the payroll of the contractor to which they are subcontracted, with the "owner operator" box checked, and no time or other data filled in.
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 exemptions from coverage under DBRA because 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.

G. 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 CRD. The CRD 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. Copies of weekly certified payrolls issued for the project or other projects located in the area showing the current rate of pay and fringe benefits, where appropriate, for the job classification in question, or

If the contractor belongs to a union, a copy of the current collective bargaining agreement showing the required rate of pay and any appropriate fringe benefit amounts for the job classification in question and the project area; and

- c. 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 - Rev. 08-2006)* form developed by the CRD.

2. An instructional package is available through the CRD to aid contractors in making a request. A letter explaining the process and including the following attachments is sent to the contractor:
 - 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 the CRD for providing the employee statements.

H. CHILD LABOR LAWS

1. There are federal and state child labor laws:

- a. Prohibited Employment - State Law

Under ND law, a worker must be at least 14 to be employed, and those 14-15 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, NDDOT has determined the following will apply to highway construction:
 - 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.

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.

I. 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.

J. 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.
5. Refer to paragraphs C, 12, e and f of this section, paragraph E, 7 of this section, and paragraph H of this section for additional information concerning *Flaggers*.

K. ON-SITE MONITORING BY PROJECT MANAGER-ENGINEER

1. Project Engineers are responsible for monitoring prime contractor and subcontractor compliance with the labor standards provisions through the use of proper inspection procedures. A distinction must be drawn between investigations, which are concerned with a specific allegation or allegations of wrongdoing, and inspections, which are checks on procedures and practices regarding labor matters without any allegations of improper actions.
2. Early and complete labor compliance inspections are essential to the development of a sound compliance pattern on all federal-aid highway construction projects. Projects where the contract is of short duration (six months or less) must be inspected at least once while the work is in progress. In the case of contracts extending over a longer period, the inspections must be made with such frequency as may be necessary to assure compliance.
3. Inspections must include:
 - a. A check to determine whether the proper Davis-Bacon wage rate decision and other required wage posters and notices are properly displayed on job-site bulletin boards;
 - b. Interviews with employees with reference to payroll data and classification information; and
 - c. Examinations of the weekly certified payrolls themselves.
4. Bulletin Boards
 - a. **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:**
 - (1) ***Equal Employment Opportunity is THE LAW, EEOC-P/E-1 (Rev. 11/09); ****
 - (2) ***Equal Employment Opportunity is THE LAW Mandatory Poster; Supplement, Mandatory Supp. To EEOC P/E-1 (Rev. 9/15); ****
 - (3) **Contractors EEO Policy Statement; ***
 - (4) **Contractor's letter appointing EEO Officer for Project:***
 - (5) ***Pay Transparency Nondiscrimination Provision, Version December 2016; ****
 - (6) ***Notice Federal Aid Project (False Statement Notice), FHWA-1022 (Rev. May 2015); ****
 - (7) ***Employee Rights under the Davis-Bacon Act", WH1321 (Rev. April 2009); ****
 - (8) ***Project Wage Rates; *****

- (9) "Job Safety and Health IT'S THE LAW", OSHA 3165-04R 2015; ***
- (10) Emergency Phone Numbers;**
- (11) "Your Rights Under USERRA", USERRA Poster 2017; ***
- (12) Employee Rights Under the Fair Labor Standards Act, WHD-1088 - Rev. 07/2016); ***
- (13) "Employee Rights And Responsibilities Under The Family And Medical Leave Act" (FMLA), WHD1420 Rev 04/16; ***
- (14) Employee Polygraph Protection Act" (EPPA), WH1462 Rev 07/16;***
- (15) Project specific notices (e.g. NPDES Notice of Intent Under EPA Construction General Permit (CGP)).**

***Contained on Poster Boards (DOT 3350 -3 of 3 - Rev. 07-2017) provided by NDDOT, or their equivalents.**

****Davis-Bacon wage rate decision incorporated into the contract.**

- b. 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.
- c. 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:
 - (1) The subcontractor's home office is located in North Dakota.
 - (2) 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.
 - (3) The bulletin board contains all of the required notices and posters.
 - (4) 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.
 - (5) The subcontractor's employees know where the bulletin board is located.
- d. The Assistant District Engineer of the District in which the subcontractor's home office is located must 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 assistant district engineer must initiate the supplemental review whenever the subcontractor begins work on a project in his or her district, or whenever another assistant district engineer requests a supplemental review be conducted. The supplemental review must then be shared with the other seven assistant district engineers.

- e. 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 assistant district engineer of the district in which the project is located.
- f. Whenever the subcontractor performs any work on the federal-aid highway construction project, a copy of the supplemental review or a copy of each acknowledgement of receipt MUST be attached to the *Monthly EEO Project Inspection Report (SFN 9425 - Rev. 06-2012)* for the month in which the subcontractor worked. Refer to paragraph B of Section I for information concerning the *Monthly EEO Project Inspection Report*.
- g. 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 must 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 project site must be re-evaluated at that time.

5. Labor Compliance Job-site Interviews

Please note: The LCPtracker Onsite Module is now fully operational for all projects. It is anticipated that all labor interviews in the construction season of 2020 will be done electronically. Please see the LCPtracker Procedural Manual for Engineers and Support Staff, available online, for procedures and updates.

- a. Systematic spot interviews with the contractor's project employees must be conducted by Project Engineers or their staffs. 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.
- b. Each prime contractor with a project in a district's jurisdiction must have labor compliance job-site interviews* conducted on a portion of their project workforce at least once annually. For those prime contractors with more than one project in a district, daily monitoring will be required but it will not be necessary to conduct job-site interviews. Only one project per contractor need be selected for interviews.

*Not required for contracts and subcontracts under \$10,000 where work on the project is sporadic and of short duration (three weeks or less).

- c. If a contractor has a history of labor compliance problems, however, the assistant district engineer will be so informed and instructed to conduct interviews on all of the contractor's projects located within the district.
- d. Every subcontractor, regardless of the number of subcontracts they hold in the district, must have job-site interviews conducted on at least one project annually.
- e. No interviews should be conducted with bona fide owner-operators of trucks or with haulers and suppliers of petroleum products.
- f. Generally, projects must be selected and interviews scheduled for the time when the contractor is at peak activity for the project.
- g. All statements and questions on the form must be answered fully, and detailed information and/or explanations provided where necessary. *All statements made by an employee, whether orally or in writing, must be treated as confidential so as to avoid disclosure of the employee's identity to the contractor without the employee's written consent.*
- h. Particular attention must be paid to determine whether there are any subcontractors not submitting weekly certified payrolls. Interviews with operators of equipment not clearly identified as belonging to the prime contractor, or an approved subcontractor, will disclose this problem. In such interviews, the names of the subcontractors must always be requested and recorded.
- i. All follow-up data normally can and must be obtained on the same day the employee interview data is gathered. The only exception would be verification of the certified payroll for the week of the interviews.
- j. When conducting the interviews, a good cross-section of the contractor's project employees should be selected. Selection criteria should include race, sex, job classification, and age. One minority, one nonminority, and one female in each trade, job classification, or occupation should be interviewed. *A minimum of five (5) interviews should be conducted if at all possible.* Contractors must allow their employees to be interviewed.
- k. **The ADE should be informed and consulted any time there is an irregularity or issue of concern under the DBRA or certified payroll.** It is also important to remember that all of the employee's responses must be treated as confidential. The employee's identity must not be revealed to the contractor unless the employee has given his or her written permission.
- l. **The completed interview forms should be input saved in LCPTracker.**

6. Weekly Certified Payrolls

- a. Projects bid prior to October 13, 2017 may use either the paper method, or may submit electronically. Those bid on October 13, 2017 and after must use LCPTracker to file electronically.
- b. Under the paper method, the Project Engineer or his or her staff must inspect the prime contractor's and all subcontractors' weekly certified payrolls to determine:
 - (1) Whether the wages being paid, including applicable fringe benefits, are at rates not less than the Davis-Bacon wage rate decision contained in the contract;
 - (2) Whether the work being performed by the employees, including apprentices and trainees, conforms to the job classifications included in the Davis-Bacon wage rate decision contained in the contract;
 - (3) Whether the job classifications are correct;
 - (4) Whether there is evidence of any disproportionate employment of laborers and apprentices or trainees to journeyworkers so as to indicate avoidance of the Davis-Bacon wage rate decision and other labor standards provisions of the contract; and

NOTE: Several laborers and only one journeyworker electrician on a weekly certified payroll submitted by an electrical contractor would normally indicate that laborers are performing journeyworker electrician's work. The allowable ratio of apprentices and trainees to journeyworkers is generally considered to be one apprentice or trainee to every three to five journeyworkers.

- (5) Whether there are any individuals employed whose job classifications are not listed on the Davis-Bacon wage rate decision contained in the contract. If so, it will be necessary for the contractor to submit a request for job classification and wage rate determination for the project as described in paragraph G of this section.

c. Under LCPTracker, the Project Engineer or his or her staff must electronically inspect and accept payrolls. This should be done on a weekly basis, but in no event should it be done less than every 30 days. It is not necessary to check whether the wages paid, including applicable fringe benefits, are at rates not less than the Davis-Bacon wage rate decision contained in the contract: LCPTracker checks this automatically. It is also not necessary to check math – that is also checked automatically. The following must be checked:

- 1. Whether any flagged violations have merit;**
- 2. Whether the work being performed by the employees, including apprentices and trainees, conforms to the job classifications included in the Davis-Bacon wage rate decision – i.e. are employees properly classified;**
- 3. Whether any employees appear “missing” or have been misclassified.**
- 4. Whether there is evidence of any disproportionate employment of laborers and apprentices or trainees to journeyworkers so as to indicate avoidance of the Davis-Bacon wage rate decision and other labor standards provisions of the contract; and**
- 5. Whether fringe benefits paid into bona fide plans are being paid appropriately. To do this, one employee of each broad job classification (operators, truckers, laborers, and other trades) should be “audited.”**

- d. Minor payroll issues or discrepancies (improper job classifications, basic hourly rates, overtime rates, fringe benefits, etc.) should be handled by Project Engineer at the project level. If it is not possible to bring the issue to settlement within a reasonable length of time (thirty calendar days), the matter must be referred to the Assistant District Engineer.
- e. When there is reason to believe violations exist that are not readily adjustable, are of a serious nature, or may be willful or criminal in nature, the Project Engineer must report such findings, including sufficient data concerning the nature and extent of the violations, to the Assistant District Engineer. The ADE must notify the CRD immediately. CRD will determine who should investigate and resolve the matter.
- f. Additional information concerning payroll monitoring requirements is included in the *Construction Records Manual* issued by the Construction Services Division, which is available online at:

www.dot.nd.gov/manuals/construction/constr-records/constructionmanual.htm

L. FEDERAL AND STATE DEPARTMENT OF LABOR PERSONNEL

Wage and Hour Division
U.S. Department of Labor

North Dakota Dept. of Labor
State Capitol, 13th floor

Room 323
220 East Rosser Avenue
Bismarck, ND 58501-3869
Phone: 701-250-4320

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

Government Contracts Enforcement Division
U.S. Department of Labor
Suite 800
525 South Griffin Street
Dallas, TX 75202
Phone: 972-850-2648 or 872-850-2647

M. REFERENCE SOURCES

The following were used in the development of this section 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 (10-25-10)* 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

N. REPORTING THE NEED FOR INVESTIGATIONS

1. As a result of regular project inspections, an employee's or other interested person's complaint, or a routine check of weekly certified payrolls, indicators or *red flags* may surface that signal the presence of violations that are of a serious nature, or ones that are not readily adjustable. The district, city, county, or consultant project manager-engineer must bring to the attention of the assistant district engineer the need for investigative assistance or a complete investigation whenever:
 - a. Complaints alleging intentional violations are received that the district, city, county, or consultant project manager-engineer feels may have some validity. Some of the sources of such complaints will be employees, their representatives (unions), competing contractors, or other interested persons. *Complaints must be treated confidentially.*

- b. There are habitual and persistent violations of other requirements of the contract so as to indicate a general carelessness on the part of the contractor with respect to his or her contractual responsibilities.
 - c. There is a delay by a contractor in furnishing the required weekly certified payrolls and a satisfactory explanation is not forthcoming, or other suspicious circumstances exist.
 - d. Discrepancies, other than routine errors, are discovered. The discovery of falsifications in the time and payroll records, or reasonable cause to believe such a situation exists, calls for especially prompt and vigorous action.
2. In all such cases, the assistant district engineer must notify the CRD immediately. The CRD will determine a possible course of action.
 3. When anyone on the project observes a violation, they should not wait for a complaint to be filed. The assistant district engineer or the district, city, county, or consultant project engineer must be alerted to the situation immediately so they can work with the contractor and the CRD to get the matter resolved before it becomes a major problem. The situation will be much easier to settle while it is still fresh in everyone's mind rather than months later. In addition, the uncovering of a violation in the early stages will save time on the part of NDDOT and will avoid large back pay obligations on the part of the contractor.
 4. If you need technical assistance on a Davis Bacon question, call the Labor Compliance Administrator (701-328-2605). If, however, a problem exists on the project, or there is a complaint (formal or informal), report to the ADE prior to calling CRD and refer to the following Section (O "Investigating Complaints and Violations").

O. INVESTIGATING COMPLAINTS AND VIOLATIONS

1. If a Davis-Bacon wage issue cannot be handled informally, the employee may file a *Davis-Bacon Complaint Form*, SFN 60557 (1-2014). (Attached as Exhibit IV-C.) This Form may be used for complaints concerning unpaid wages, improper job classifications, improper wage rates, overtime rates, fringe benefit payments, payroll requirements, improper deductions, etc. The employee should be directed to the CRD, and referred to the appropriate form online, if he or she has access.
2. The Davis-Bacon Complaint Form consists of two pages – a main complaint form and a supplemental complaint form for truckers. If a complainant is trucking or hauling for on a federally assisted project, they should fill out the supplemental section for truckers. Otherwise, the complainant should fill out only the main complaint form (first page). The Davis-Bacon Complaint Form should be printed out and signed by the complainant and mailed (or faxed/emailed) to the CRD together with documentation, if any. CRD will coordinate the investigation, if required.
3. An investigation will be necessary if the alleged violations are not readily adjustable, are of a serious nature, or may be willful or criminal in character. The assistant district engineer **MUST** notify the CRD **IMMEDIATELY** and the CRD will determine who should investigate

and resolve the matter. If a full-scale investigation is warranted, the CRD will conduct the investigation.

4. Upon notification that a wage claim has been received, the CRD will instruct the assistant district engineer or the district, city, county, or consultant project engineer to withhold a portion (an amount sufficient to cover the claim) or all of the prime contractor's progress payments until the claim has been resolved.
5. When any situation involves a subcontractor, all actions concerning the matter must go through the prime contractor. Even if the subcontractor contacts the Project Engineer on the issue of a Davis-Bacon complaint or investigation, they should be informed politely but firmly that all matters should go through the prime contractor and the conversation should end.
6. The assistant district engineer may be asked to investigate and resolve the wage claim or complaint. If this is the case, the assistant district engineer must keep the CRD informed of the progress being made in resolving the matter. If it is not possible to effect a settlement within a reasonable length of time (thirty calendar days), the matter must be referred to the CRD for advice, guidance, and/or resolution.
7. Investigations are much more thorough than inspections in that they are designed either to dispel allegations of wrongdoing or to assemble concrete evidence upon which administrative or other action can be taken. Because of the seriousness of investigations, much more attention must be paid to details; and evidence must be obtained to substantiate all of the investigator's findings. In other words, if the contractor maintains that payment has been made, the investigating engineer should ask to see cancelled checks or proof of automatic deposit that cannot be altered or faked. All facts must be substantiated – if withholding is being done pursuant to a court order, ask to see an official copy of the order.
8. A case file must be established at the start of the investigation. All documentary material pertaining to the investigation, such as wage claims or complaints, if any; employee statements; employment and payroll records; and all other papers relevant to the investigation must be placed in the case file.
9. The employee or complainant must provide documentation wherever possible (timecards, check stubs, etc.). In some instances, the claim or complaint will be in sufficient detail so that a personal interview with the employee or complainant won't be necessary. If this is the case, an explanation to that effect must be included in the file. If a personal interview is warranted, it must be conducted in such a manner so as not to compromise the employee's or complainant's identity. In some cases, it may be desirable to conduct the interview by phone.
10. Depending on the nature or extent of the claim or complaint, any or all of the following investigatory steps may or must be taken:
 - a. An examination of the contract must be made to determine whether the Davis-Bacon wage rate decision and the required labor standards provisions were inserted into the prime contract and all subcontracts. In addition, the following information must be noted for the case file:
 - (1) Contract number;

- (2) Date of award;
 - (3) Description of work of the prime contractor and each subcontractor;
 - (4) Applicable Davis-Bacon wage rate decision; and
 - (5) The name and address of the prime contractor and each subcontractor.
- b. A visit to the project site must be made to ensure the applicable Davis-Bacon wage rate decision is properly posted on the bulletin board.
 - c. An examination of the weekly certified payrolls of the prime contractor and each subcontractor must be made for completeness and accuracy.
 - d. The number of employees in each job classification must be checked to determine if there exists a disproportionate number of laborers and apprentices or trainees to journeyworkers. For example, existence of any of the following circumstances may indicate a disproportionate ratio, depending on the status and type of project:
 - (1) Several laborers and only one journeyworker electrician on a weekly certified payroll submitted by an electrical contractor would normally indicate that laborers are performing journeyworker electrician's work.
 - (2) A greater number of apprentices or trainees than journeyworkers generally indicates that the ratio of apprentices or trainees to journeyworkers is being disregarded, apprentices or trainees are performing the work of journeyworkers, all of the apprentices or trainees are not properly registered in approved programs, or the contractor is not conforming to approved apprenticeship or on-the-job training standards.

NOTE: The allowable ratio of apprentices or trainees is generally considered to be one apprentice or trainee to every three to five journeyworkers.
 - e. A careful review of project logs, diaries, progress reports, project files, etc., must be made. They may provide valuable information that can be used in comparing the kinds of work performed during a certain period with the job classifications listed on the certified payrolls for the corresponding period. For instance, if pile-driving work was being done during a particular month and weekly certified payrolls for that month fail to show any pile drivers, it may be that the contractor is in violation of the labor standards provisions.
 - f. The contractor must be required to present the canceled checks (front and back) of a randomly selected weekly certified payroll for verification of actual payment made to the employees.
 - g. A sufficient number of checks of timecards, books, sheets, or other work or personnel records of a representative number of employees in each job classification must be made against the payroll records in order to disclose any

possible discrepancies, or to give reasonable assurance that none exist. Pertinent excerpts or copies of such records must be included in the case file.

- h. The records of individual employees must also be included in the check whenever there appears to be any doubt or question concerning an individual as a result of the weekly certified payroll examinations, employee interviews, or for other pertinent reason.
- i. Conducting employee interviews is essential to carrying out a successful investigation. A sufficient number of employees must be interviewed to serve as a check against the contractor's records and the substance of the violations alleged. Oral interviews must be conducted with a number of employees in various job classifications on the project, and where appropriate, must include former employees.
- j. If possible, former employees must be interviewed in person. If this proves to be inconvenient, a carefully prepared questionnaire, to which short answers may be given, must be mailed. However, every attempt must be made to conduct personal interviews, with the mail method being used only as a last resort.
- k. Information obtained from individuals involved in a labor compliance investigation is exempt from disclosure under the Freedom of Information Act, Subsection (b), (7), (D). Such information may also be protected under the Privacy Act of 1974, Subsections (k), (2); (k), (5); and (k), (7) [5 USC 552a].
- l. Interviews conducted at the job site or the *site of the work* must be arranged so as to cause the least inconvenience to both the contractor and the employee and to provide for a necessary degree of privacy. No employee should ever be interviewed in the presence of other employees or owner/managers. Care should be taken not to disclose the identity of complainants or interviewees. If the elements of fear and intimidation are present, the interview must be conducted at the employee's residence or some other mutually agreeable place. Interviews conducted elsewhere must be scheduled during the employee's non-work hours and at his or her convenience. Care must be taken in scheduling the interviews to allow for adequate time, and the schedule must be rigidly adhered to.
- m. Each employee should be informed that the information given is confidential to the fullest extent of the law, and that his or her identity will not be disclosed to the employer without the employee's written permission insofar as the law permits. (See *Department of Labor Prevailing Wage Resource Book*, p.12; 29 CFR 5.6(a)(5).)
- n. In some situations, interviews with prior employees may be appropriate, but only with prior permission of CRD.
- o. An early step in most investigations will be an interview with the complainant. The interview must be conducted in such a manner so as not to compromise the complainant's identity. To avoid such compromise, it may be necessary to conduct the interview at a place other than the job site or by phone. In some cases, the complaint will be in sufficient detail so that a personal interview with

the complainant will not be necessary. If this is the case, an explanation to that effect must be included in the case file.

- p. Employee statements that merely confirm information in the contractor's records and do not indicate a violation where none has been otherwise alleged need not be recorded. However, notes of the interviews with names, dates, places where they were held, and comments such as *no additional information obtained* must be made for the case file.
- q. To preserve confidentiality, any statements recorded must be put on a separate sheet or sheets of paper. Repetitive statements by various employees concerning the same facts may be recorded once; however, a comment listing the names of the additional employees must be included for the case file. Signed statements must be obtained from employees when the information given is needed to prove a violation. For example, signed statements must always be taken when:
 - (1) Information concerning conditions of employment when such information is missing from, or possibly falsified in, the contractor's records;
 - (2) Intimidation, or other *kickback* activity involving employees being forced to relinquish part of their compensation, is involved;
 - (3) Pertinent information concerning an actual or potential controversy with the contractor involved, as to the occurrence of a given violation, is disclosed; and
 - (4) Information concerning possible violations not previously known to the investigator, or other information which may become material to the overall investigation, is obtained.
- r. Written employee statements must be prepared by the investigator and must contain:
 - (1) The contractor's name and address;
 - (2) The project number and location;
 - (3) The employee's name and address;
 - (4) His or her status as a present or former employee;
 - (5) The place and date of the interview;
 - (6) The employee's job classification and a brief description of the exact duties performed, including equipment operated, tools used and the frequency of their use, and the place where the work is performed;
 - (7) The period of employment, starting and quitting times, daily and weekly hours worked, and the manner in which the working time is recorded and by whom;

- (8) The rate of pay and wages received;
 - (9) Any information the employee is able to furnish concerning the matters involved in the allegation or allegations and any intimidation involved with *kickback* activity; and
 - (10) Any further essential information concerning the accuracy or adequacy of the contractor's records.
- s. The information given by the employee for the statement must be paraphrased in a concise and clear manner while clearly reflecting the intent of the employee. It must be written in the first person form as though the employee prepared the statement. A final line must be added stating that the employee has read the foregoing statement and that it accurately reflects his or her intent. The statement must be signed by the employee and witnessed by the investigator. Any changes made to the statement must be initialed by the employee. If the statement is longer than one page, each and every page must be signed or initialed by the employee.
- t. The investigator must always keep in mind that it is his or her function to ascertain and report the facts concerning a given investigation, not to take sides with either the contractor or the employee involved. The investigator must not give to the employees, or allow them access to, the contractor's records that are made available to the investigator. For example, employees must not be shown copies of the hours worked and wages paid with regard to them, but rather must be questioned regarding the wages paid and hours worked. The answers can then be compared with the contractor's records. The investigator may inform employees as to how the wages and overtime are computed but must not express an opinion as to whether wages are due, or encourage lawsuits by an employee or group of employees with regard to the subject matter of the investigation.
11. At the conclusion of the investigation, within 90 (ninety) days of the filing of the complaint, in most cases, a final report must be prepared and recommendations for corrective action made to the CRD. The report must consist of a narrative summary of the facts disclosed by the investigation. Answers to the following questions must appear in the report: Who? What? Where? When? Why? And how? In addition, the following specific items must be noted in the report:
- a. The contract number and location.
 - b. The name and address of the prime contractor and, where appropriate, subcontractor(s) involved.
 - c. A brief statement concerning the circumstances that brought about the investigation.
 - d. A statement concerning the extent of the investigation. For example: Who the investigator talked with, what records were examined, and any other action taken by the investigator.

- e. A statement of facts concerning what the investigation disclosed. For example: Were the allegations proven? If so, how? Were they dispelled? If so, how?
 - f. Conclusions of the investigator as to willfulness, negligence, or other factors involved in the matter.
 - g. Recommendations of the investigator as to further action required, with reasons for the recommendations and facts supporting them; or if the matter was resolved, how was such resolution accomplished?
12. **A Final Conference should be scheduled with the prime contractor when the investigation is completed. At this Conference, the contractor is informed generally as to investigation findings and indicated the factual basis of these findings. Detail specifically what must be done in order to eliminate the violations. The ADE and CRD should be willing to consider additional evidence, if any, offered at this conference. The Contractor should be informed of the possibility of liquidated damages under DBRA.**
 13. **If there is agreement to pay at this stage, appropriate supplementary payroll must be issued.** The contractor must submit a copy of the supplementary payroll and canceled check (front and back) to NDDOT as proof that restitution was made. If no agreement can be reached, the file must be forwarded by CRD to the appropriate WHD Regional Office pursuant to 29 CFR 5.7 for review, possible collection of back wages and possible debarment consideration.
 14. **In refusal to pay cases, the contracting agency (NDDOT) is required to withhold contract funds to cover the back wages due.** If funds remaining on the contract under which the violation occurred are insufficient to cover the back wages due, the contracting agency can withhold funds from other contracts subject to the Davis-Bacon Act held by the same prime contractor. This is optional and is referred to as “cross-withholding.” *USDOL Prevailing Wage Resource Book, DBRA Investigations, p.19.*
 15. The USDOL Wage and Hour Division will send a “Due Process” letter to the contractor and will go forward if the contractor refuses to pay back wages. The WHD will also advise the contractor of hearing and appeal rights. Only the WHD may debar the contractor. See 29 CFR 5.11 and 5.12.
 16. When the wage claim or complaint has been resolved and all of the necessary follow-up documentation has been received, in most cases within 6 months, the *Labor Compliance Report (SFN 13082 - Rev. 08-2006)* must be completed and forwarded to the CRD. The report lists the nature of the complaint or problem (improper job classification, overtime, incorrect wages or fringe benefits, kickback, etc.); the outcome; and the amount of wages found due, if applicable. A copy of the supplementary payroll and canceled check (front and back) must be attached to the report when applicable.
 17. The CRD will instruct the assistant district engineer or the district, city, county, or consultant project manager-engineer to release any progress payments being withheld from the prime contractor.

The following may be obtained from the CRD, phone: 701-328-2605,

Email: civilrights@nd.gov and Web site: www.dot.nd.gov/dotnet/forms/forms.aspx (choose *Category* in the *View forms by:* drop-down box)

- *Classification & Wage Rate Request – Employee Information (SFN 50043 - Rev. 08-2006)*
www.dot.nd.gov/forms/sfn50043.pdf
- *Labor Compliance and EEO Contractor Compliance Job-site Interview (SFN 9426 - Rev. 02-2012)*
www.dot.nd.gov/forms/sfn09426.pdf
- *Poster Boards (DOT 3350 -1 of 3 (Rev. 05-2010), 2 of 3 (Rev. 02-2013), and 3 of 3 (Rev. 07-2017))**
- *Davis-Bacon Complaint Form (SFN 60557 – 1-2014)*
www.dot.nd.gov/forms/sfn60557.pdf

***NOT** available on the Web site.

EXHIBIT IV-A: LABOR COMPLIANCE JOB-SITE INTERVIEW-USE ONLY ON CITY/COUNTY PROJECTS WITHOUT ACCESS TO ONSITE MODULE

North Dakota Department of Transportation, CRD

SFN 9426 (Rev. 12-2015)

To access SFN 9426, click on the following:

www.dot.nd.gov/forms/sfn09426.pdf

Please Note: From January 1, 2020, the paper Job Site Interview Form should be used rarely, if ever¹. All interviews should be completed on the Onsite Module of LCPtracker. Call Gail Brown, (701) 328-2605, with questions.

EXHIBIT IV-B: DAVIS-BACON COMPLAINT FORM

North Dakota Department of Transportation, CRD SFN 60557 (1-2014). To access SFN 60557, click on the following: www.dot.nd.gov/forms/sfn60557.pdf

DAVIS BACON WAGE COMPLAINT

North Dakota Department of Transportation, Civil Rights Division
SFN 60557 (01-2014)

Contact Information

Name				
Address		City	State	ZIP Code
E-mail Address (Optional)	Home Telephone Number		Cell Phone Number	

Project Information

Project Number (if available)	PCN	Prime Contractor		
Project Location (Highway or Street)		City	State	ZIP Code

Employer Information

Name				
Address		City	State	ZIP Code
Are you still employed by this employer? <input type="checkbox"/> Yes <input type="checkbox"/> No			If no, last date worked	
Was your termination <input type="checkbox"/> Voluntary <input type="checkbox"/> Involuntary				

Wage/Work Performed

Position/Job Classification				
List work Performed				
Tools/Equipment Used or Operated				
Date Worked on Project		Hourly Rate of Pay		
From	To	REG	OT	
Note: It is important that you provide records of hours worked, through a time sheet, pay stub, etc.				

Complaint

Nature of Complaint <input type="checkbox"/> Wage Rate <input type="checkbox"/> Overtime <input type="checkbox"/> Fringes <input type="checkbox"/> Unpaid Hours				
Please Describe Complaint (Add sheets, if necessary)				

Complainant's Signature	Date
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Please Answer the following Supplemental Page if you are a truck Driver.
If you have questions, call NDDOT Civil Rights Division at 701-328-2576 or 701-328-2605.

EXHIBIT IV-C: CONFORMANCE DOCUMENTS

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:

6. The work to be performed by the classification requested is not performed by a classification in the wage determination; and
7. The classification is utilized in the area by the construction industry; and
8. 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 **MUST** be made prior to commencement of work on the contract. For necessary forms and procedures, contact:

Ramona Bernard, Director, CRD
North Dakota Department of Transportation
608 East Boulevard Avenue
Bismarck, ND 58505-0700
Telephone: 701-328-2576

Email: rbernard@nd.gov
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:

https://app_gsagov_prod_rdcgwaajp7wr.s3.amazonaws.com/SF1444-13c.pdf

REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND RATE					AUTHORIZED FOR LOCAL REPRODUCTION
			CHECK APPROPRIATE BOX <input type="checkbox"/> SERVICE CONTRACT <input type="checkbox"/> CONSTRUCTION CONTRACT		OMB Number: 9000-0089 Expiration Date: 7/31/2014
<small>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 (MVP), Office of Acquisition Policy, GSA, Washington, DC 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0089), Washington, DC 20503.</small>					
INSTRUCTIONS: THE CONTRACTOR SHALL COMPLETE ITEMS 3 THROUGH 16, KEEP A PENDING COPY, 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) <small>(Use reverse or attach additional sheets, if necessary)</small>			b. WAGE RATE(S)		c. FRINGE BENEFITS PAYMENTS
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.					
<small>(Send copies 1, 2, and 3 to Department of Labor)</small>					
SIGNATURE OF CONTRACTING OFFICER OR REPRESENTATIVE		TITLE AND COMMERCIAL TELEPHONE NO.	DATE SUBMITTED		
PREVIOUS EDITION IS USABLE					
STANDARD FORM 1444 (REV. 12-2001) <small>Prescribed by GSA-FAR (48 CFR) 53.222(f)</small>					

Figure 1 - SFN 1444 – Request for Additional Classification

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 it 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 the bottom of the form and forwards it, with the contractor's supporting documentation, to the DOL address listed in Block 1.

CLASSIFICATION AND WAGE RATE REQUEST – EMPLOYEE INFORMATION

North Dakota Department of Transportation, CRD

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 the *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 \$
<input type="checkbox"/> I agree with the hourly rate and fringe benefits for _____ as proposed above. <div style="text-align: center;">Job Classification</div>	
<input type="checkbox"/> I disagree with the hourly rate and fringe benefits for _____ as proposed above. <div style="text-align: center;">Job Classification</div>	
I propose the rate of \$ _____ and fringe benefits in the amount of \$ _____. My reasons are as follows:	
Name (Please Print)	Date
Signature	
<hr/> TO BE FILLED OUT BY CONTRACTOR:	
<input type="checkbox"/> Employees are unknown at this time.	
<input type="checkbox"/> Individual has left employment and cannot be reached.	

EXHIBIT IV-D: U.S. DEPARTMENT OF LABOR FIELD OPERATIONS HANDBOOK - CHAPTER 15

To access the *Field Operations Handbook - Chapter 15*, click on the following:
www.dol.gov/whd/FOH/FOH_Ch15.pdf

Rev. 660	FIELD OPERATIONS HANDBOOK – 10/25/2010
Chapter 15	
DAVIS-BACON AND RELATED ACTS AND CONTRACT WORK HOURS AND SAFETY STANDARDS ACT	
Table of Contents	
15a	GENERAL AND STATUTORY PROVISIONS - DBRA/CWHSSA
15a00	Purpose and use of FOH Chapter 15
15a01	The Davis Bacon Act
15a02	The Related Acts
15a03	The Contract Work Hours and Safety Standards Act
15a04	The Copeland "Anti-Kickback" Act
15a05	The Miller Act
15b	DAVIS-BACON AND RELATED ACTS (DBRA)
15b00	Coverage - General
15b01	Geographical scope
15b02	Statute of limitations
15b03	Definition of public building or public work
15b04	Site of the work - definition
15b05	Construction, prosecution, completion, or repair
15b06	"Force account" construction work
15b07	Lease arrangements
15b08	Post exchange contracts
15c	EXCLUSIONS FROM COVERAGE UNDER DBRA
15c00	Exceptions to coverage
15c01	Waivers
15d	INTERPRETATIONS - APPLICATION OF DBRA TO TYPES OF WORK AND CONTRACTS
15d00	ARRA-American Recovery and Reinvestment Act of 2009
15d01	Carpet laying and installation of draperies
15d02	Clean-up work
15d03	Demolition work in relation to construction
15d04	Disaster relief contracts
15d05	Drilling work in various situations
15d06	Landscape contracting
15d07	Military housing privatization contracts
15d08	Painting and decorating
15d09	Public utility installation
15d10	Sewer repair service
15d11	Shipbuilding, alteration, repair, and maintenance
15d12	Steam and sandblast cleaning
15d13	Supply and installation contracts

Figure 2 - Field Operations Handbook, Chapter 15, page 1

EXHIBIT IV-E: SPECIAL PROVISION FOR MANDATORY AUTOMATED FILING OF PAYROLL

CONTRACT SPECIAL PROVISION MANDATORY USE OF AUTOMATED CERTIFIED PAYROLL

All contractors on NDDOT federal-aid projects, including city/county projects, must file weekly Certified Payrolls, as required under Davis-Bacon and Related Acts (DBRA). The NDDOT requires the use of LCPtracker, a paperless online system for entering and filing these certified payrolls. Certified payrolls in paper form will no longer be accepted, and all contractors must file their payroll electronically.

After award, the Prime Contractor (Prime) must:

1. Designate an individual as Prime Approver for the project. The Prime Approver will oversee DBRA payroll for all subcontractors of all tiers on the project. A contractor may inform the NDDOT Civil Rights Division (CRD) that the same individual will be Prime Approver on all projects. CRD will set up the Prime Approver Account for the project. Thereafter, the Prime Approver will have the responsibility to use the Account to approve all payroll on the project. Until payroll is approved by the Prime Approver, it cannot be viewed by the NDDOT and it is not deemed submitted to the NDDOT.
2. The prime contractor has the responsibility to assign subcontractors within the LCPtracker system to the project and to ensure that all subcontractors are aware of the necessity to file payrolls electronically and are set up within the system. Any subcontractor not on Approved Subcontractor List or the Qualified Contractor List must register and be placed on one of these lists before entry of the subcontractor into LCPtracker. These lists may be found at <https://www.dot.nd.gov/pacer/qualified.htm> and <https://www.dot.nd.gov/pacer/registered.htm>. Only Prime Approvers or the CRD may enter subcontractors into LCPtracker.
3. The prime contractor has the responsibility to see that all required payrolls are filed by subcontractors of all tiers. If payroll is rejected or project staff otherwise requests a correction of payroll by any subcontractor on the project, the prime contractor has a responsibility to see that corrected payroll is submitted.
4. For further information on certified payroll, go to the NDDOT Labor Compliance/LCPtracker page at <https://www.dot.nd.gov/divisions/civilrights/laborcompliance.htm>. On this page, contractors will find a Getting Started on LCPtracker Guide and a Prime Approver Guide. Recorded trainings are also available on this page for both contractors and prime approvers. Contractors can obtain an LCPtracker user name and password by calling the NDDOT Civil Rights Division at (701) 328-2605 or (701) 328-2576.

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EXHIBIT IV-F: LCPTRACKER PROCEDURE MANUAL OR ENGINEERS AND STAFF:

<https://www.dot.nd.gov/divisions/civilrights/docs/NDDOT-LCPtracker-Procedure-Manual-for-Engineers.pdf>



**LCPtracker
Procedure Manual
for NDDOT Staff:
Wage Administrator,
Project Engineers, ADEs
and Support Staff
November 6, 2019**



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