

Preliminary Injunction of Offsite Trucking Analysis & Determination



Introduction

Early in November of 2024, the Colorado Department of Transportation (CDOT) learned about a preliminary injunction impacting offsite delivery work that had been filed in the Northern District of Texas. This guidance is in response to the preliminary injunction, and additional guidance (from CDOT) shall be provided upon final determination from the US Department of Labor (DOL). The preliminary injunction affected the following two primary provisions of the Davis-Bacon and Related Acts (DBRA) final rule:

- (1) The provision within 29 CFR 5.2 codifying a distinction between material suppliers and contractors/subcontractors
- (2) The provision within 29 CFR 5.2 requiring contractors and subcontractors to pay prevailing wages to delivery truck drivers they employ for onsite time that is more than de minimis

CDOT sought guidance from the US DOL in regard to the implications of this injunction for truck drivers on CDOT projects. CDOT received the following information which outlined the details of how offsite delivery work would impact certified payroll compliance on projects.

Timeframe

This determination is in effect starting 1/1/25 and will remain in effect until further notice.

Clarification

The two provisions (above) were met with more clarification as outlined below, and the US DOL delineated that they may not be implemented or enforced at this time. The US DOL provided the following additional guidance:

Because provisions (1) and (2) incorporated several aspects of the Department's long-standing sub-regulatory guidance regarding the coverage of truck drivers and truck drivers' assistants, the US DOL also provides the following enforcement guidance with respect to the application of coverage to truck drivers and truck drivers' assistants, regardless of whether they work for contractors, subcontractors, or material suppliers, while the injunction remains in force:

- (1) **DBRA coverage should not be enforced for any time on the site of the work that truck drivers and truck drivers' assistants spend engaged in "offsite delivery work,"** which means the delivery of materials, articles, supplies, or equipment from a location that is not part of the site of the work, which may include pickup of the same in addition to, but not exclusive of, delivery, and which may also include activities essential or incidental to such delivery and pickup, such as loading, unloading, or waiting for materials to be loaded or unloaded.

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- (2) If a truck driver or truck driver’s assistant, in addition to performing offsite delivery work, performs other construction work on the site of the work (“non-delivery construction work”), such as installation or repair work, **the worker’s time spent in the non-delivery construction work is covered by Davis-Bacon to the same extent as it would be for any other worker**, and the applicable wage rate is the rate for the appropriate classification of the non-delivery construction work being performed.
- (3) Transportation described in 29 CFR 5.2, **“construction, prosecution, completion, or repair,” paragraphs (2)(iv)(A), (B), (C), and (E), remains covered.**

The reader will see that the guidance listed above results in a change of offsite trucking implementation for certified payroll that US DOL (and ultimately CDOT) accordingly applied.

Frequently Asked Questions

1. What does this mean in terms of de minimis tracking for offsite delivery truckers that are engaged in delivery work to the project site from an offsite location?

While the injunction is in place, US DOL will not be enforcing payment of prevailing wages for onsite time engaged in “offsite delivery work” as defined in the guidance, so US DOL (and therefore CDOT) would similarly not require a record of time spent in such work. However, because delivery truck drivers do still need to be paid for onsite time spent doing any “non-delivery construction work” or the types of transportation specified in 29 CFR 5.2, “construction, prosecution, completion, or repair,” paragraphs (2)(iv)(A), (B), (C), and (E), the contractor is required to keep records and submit certified payrolls for any time engaged in those covered activities.

Bottom line: No de minimis tracking and no reporting of certified payroll (prevailing wage) for time spent on the site of work for all truckers with offsite delivery work. Those truck drivers that engage in work (“construction, prosecution, completion, or repair”) on the site of work are required to keep records and submit certified payrolls and pay prevailing wages.

2. What if a trucker was both a material supplier and subcontractor (prior to the final rule codification)?

The guidance applies to all truck drivers regardless of their employer. While the preliminary injunction is in place, the US DOL (and therefore CDOT) will not be enforcing payment of prevailing wages for onsite delivery time when the delivery is made from an offsite location, but will still be enforcing prevailing wages for time spent performing construction onsite, as well as for the types of transportation specified in 29 CFR 5.2, “construction, prosecution, completion, or repair,” paragraphs (2)(iv)(A), (B), (C), and (E).

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Bottom line: This lack of enforcement for reporting certified payroll, de minimis tracking, and paying prevailing wage applies to all truck drivers, regardless of whomever the employer is -- a material supplier, a contractor, or a subcontractor as long as the material is coming from an offsite location. Similarly, those truck drivers that engage in work (“construction, prosecution, completion, or repair”) on the site of work are required to keep records and submit certified payrolls and pay prevailing wages.

3. Is it a correct statement that this lack of enforcement for reporting certified payroll, de minimis tracking, and paying prevailing wage does not apply to truckers who are onsite only-- they would be required to submit certified payroll, correct?

Correct. The injunction does not apply to the types of transportation specified in 29 CFR 5.2, “construction, prosecution, completion, or repair” paragraphs (2)(iv)(A), (B), (C), and (E). Paragraph 2(iv)(A) refers to transportation that takes place entirely within the site of the work.

Bottom line: Onsite truck drivers that engage in work (“construction, prosecution, completion, or repair”) on the site of work are required to keep records and submit certified payrolls and pay prevailing wages. Truck drivers that are hauling material from one onsite location to another onsite location are considered to be engaged in work and will be required to submit certified payrolls and pay prevailing wages.

4. What if a truck driver is only hauling material from an onsite location to an offsite location?

The US DOL will still be enforcing coverage for onsite time in this circumstance. As the guidance notes, “offsite delivery work,” for which the US DOL (and therefore CDOT) is not enforcing coverage due to the injunction, can include “pickup of [materials] in addition to, **but not exclusive of**, delivery.” Thus, if a truck driver is engaged in hauling material from an onsite location to an offsite location, but not in delivery from an offsite location to an onsite location, the US DOL will still be enforcing coverage for onsite time spent in the hauling activity.

Bottom line: Hauling solely from an onsite location to an offsite location requires the reporting of certified payroll, de minimis tracking, and paying prevailing wage applies to all truck drivers.

Hauling offsite to onsite -- see answers listed above -- the requirements for reporting certified payroll, de minimis tracking, and paying prevailing wage are not applicable.

5. If a truck driver or truck driver’s assistant, in addition to performing offsite delivery work, performs other construction work on the site of the work (“non-delivery construction work”), such as installation or repair work, the worker’s time spent in the non-delivery

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construction work is covered by Davis-Bacon to the same extent as it would be for any other worker, and the applicable wage rate is the rate for the appropriate classification of the non-delivery construction work being performed. The FOH 15e16(c) states the following, "For enforcement purposes, if such an employee spends more than 20 percent of his/her time in a workweek engaged in such activities on the site, he/she is DBRA covered for all time spent on the site during that workweek." Is the 20% of time in a workweek still applicable for a material supplier who is also performing warranty and/or repair work? Is this item not related to this section of the FOH for material supplier?

No. The recent rulemaking eliminated the "20% rule," although the FOH has not yet been updated to reflect that. While the injunction is in place, the US DOL will not be enforcing prevailing wage requirements for any "offsite delivery work," regardless of whether drivers/driver assistants spend at least 20% of their time doing onsite construction work. The US DOL (and therefore CDOT) will, however, enforce prevailing wages for any time the drivers spend onsite doing the non-delivery construction work itself.

Bottom line: In addition to performing offsite delivery work, any construction work that is performed ("construction, prosecution, completion, or repair") on the site of work shall be paid at the prevailing wage for that appropriate classification. There is no 20% threshold as was formerly outlined in the DOL FOH Chapter 15e16.

6. Does this guidance apply to contracts that include the final DBRA rule that codified the supplier definition and prior to the DBRA final rule that included the trucker/supplier guidance from the FOH Chapter 15e16?

Yes, this guidance applies to all active CDOT contracts, including those let prior to 2024 (updated specification from DBRA final rule).

7. Is de minimis tracking allowed for truck drivers that engage in hauling from an onsite location to another onsite location?

No, de minimis tracking is not permissible for hauling from an onsite location to another onsite location. Certified payroll reporting and paying of prevailing wage is required for all time spent hauling on the site of work.

8. Is a CDOT Form 205 required to be submitted for a trucker that is a subcontractor and is a CDOT Form 1425 required to be submitted for a trucker that is a supplier (with a written, executed agreement in excess of \$10,000)?

Yes, a CDOT Form 205 and CDOT Form 1425 is required to be submitted and approved in B2GNow prior to the firm starting work on the contract. The 205 and 1425 requirements have not changed as a result of the preliminary injunction.