

APPENDIX E



DAVIS-BACON ACT (DBA) FRINGE BENEFITS Q&A

Allison Ma'luf, Esq. – CAPLAW

The prevailing wage rate in the wage determinations for each state often consists of: (i) a hourly wage rate plus (ii) a hourly fringe rate. A contractor or subcontractor of a Weatherization Assistance Program (WAP) subgrantee or a WAP subgrantee that uses its own employees to perform weatherization work may compensate an employee for the DBA fringe rate with: (1) bona fide fringe benefits; (2) cash in lieu of benefits (taxable income); (3) combination of (1) and (2); or (4) any wages paid in excess of the wage rate. Certain requirements must be followed to compensate employees with (1), an employer's bona fide fringe benefits and this Q&A specifically addresses questions associated with that option.

1. What type of benefits may be used to meet the fringe rate obligations?

The U.S. Department of Labor has determined that certain benefits common in the construction industry are considered to be fringe benefits that may be used to meet DBA fringe rate obligations. These benefits include health insurance, 401(k) contributions, pension, life insurance, disability insurance, sick leave, accident insurance, vacation pay, holiday pay, apprenticeship program pay, supplemental insurance (unemployment funds or AFLAC) or other bona fide fringe benefits specifically recognized by the DOL. *29 C.F.R. § 5.29*

2. How must fringe benefits be structured so that they may be used to meet the DBA prevailing wage requirement?

Fringe benefits that are structured as either (1) a funded fringe benefit or (2) an unfunded fringe benefit may be used to meet the fringe benefit obligation.

A funded fringe benefit is a contribution amount made by the employer which covers the employer's total future obligation and which is made to a trustee or a third person irrevocably pursuant to a fund, plan or program. The "third person" must not be affiliated with the contractor or subcontractor and the fund must be set up in such a way that neither the contractor nor subcontractor is able to recapture any of the contributions paid or in any way divert the funds for his/her own use or benefit. An example of a funded fringe benefit would be vested contributions made by the employer to an employee's 403(b) or 401(k) plan account. *29 C.F.R. §§ 5.17, 5.24-5.28*

If benefits are unfunded, they must meet certain requirements to be counted for DBA purposes. In particular, they must be given pursuant to a plan that (i) could be reasonably anticipated to provide benefits, (ii) represents a commitment that can be legally enforced (iii) is financially responsible and (iv) is communicated in writing to the labors and mechanics affected. A plan

that is “reasonably anticipated” to provide benefits must be able to withstand tests for actuarial soundness. An example of an unfunded fringe benefit would be if a contractor set aside contributions in a bank account set up pursuant to sound actuarial principles and which would be sufficient to meet future obligations under the plan.

3. What type of benefits may NOT be used to meet the DBA fringe rate obligation?

Benefits that the contractor or subcontractor is required to provide by federal, state or local laws, such as worker’s compensation insurance, social security, etc., may not be used to meet fringe benefit obligations. Additionally, discretionary bonuses or bonuses given pursuant to holidays may not be used to meet the fringe benefit rate. *29 C.F.R. § 5.29*

4. Do contributions to a benefit plan have to be made during a certain time frame for the benefit to be eligible to be a DBA fringe rate offset?

Yes. In order to qualify as an offset the employer’s contribution must be made not less often than quarterly. *Field Operations Handbook 15f10(a)*

5. Can averages be used to determine the contributions/payments upon which fringe range offsets for all employees are based?

No. The contributions/payments upon which a contractor bases a fringe offset must be made with respect to each individual laborer or mechanic. The amount contributed for each employee must be determined separately. *Field Operations Handbook 15f11(b)*

6. What period of time must be used to calculate the cash equivalent of the benefit that will be used to meet the DBA fringe rate?

The period of time to use is the period covered by the contribution. For example, if an employer contributes to a health benefits plan on a weekly basis, the total hours worked each week by each employee must be used to determine the hourly cash equivalent for which the employer is entitled to take credit for that employee.

7. How exactly is the cash equivalent of the benefit used to meet the DBA fringe rate to be calculated?

The offset is calculated by dividing the contribution amount for a certain time period by the total number of hours worked during that same time period. The number of hours worked includes both DBA and non-DBA time. Thus, if contributions are made weekly, cash equivalents would be computed weekly. If contributions are made bi-weekly, cash equivalents would be computed bi-weekly. If contributions are made monthly, cash equivalents would be computed monthly.

For example, the contractor contributes \$80 biweekly to a health benefits plan for the employee. During that two week period, the employee performs 60 hours of DBA work and 20 hours of non-DBA work. The cash equivalent is calculated by dividing \$80 by 80 hours which equals a cash equivalent of \$1.00 per hour.

8. What happens when the fringe benefits do not meet the entire DBA fringe rate obligation?

When the benefits do not meet the entire DBA fringe rate obligation, the contractor must pay the difference to the employee in cash. However, if the contractor's regular rate of pay is greater than the DBA wage rate requirement then the contractor may use the excess from the regular rate of pay to help meet the DBA fringe rate obligation.

For example, an employee works as an electrician in a county where the DBA wage rate is \$12.00 an hour and the fringe benefits rate is \$2.50 an hour. The employee is paid a regular wage rate of \$12.00 an hour and receives medical insurance from the contractor in the amount \$200 per month (\$2,400 per year). The employee works 40 hours a week (2080 hours a year (40 hours x 52 weeks)). The cash equivalent for the benefits received is \$1.15 per hour (\$2400 divided by 2080 hours). The contractor thus must pay the employee \$1.35 in cash as follows:

| | |
|------------------------------|---------|
| Regular Rate & DBA wage rate | \$12.00 |
| Medical insurance benefit | \$ 1.15 |
| Additional cash due | \$ 1.35 |
| <hr/> | |
| Prevailing Wage | \$14.50 |

However, using the prior example, if the contractor's regular rate of pay is increased to \$13.35 an hour and the cash equivalent for benefits remains the same at \$1.15 per hour then the contractor may use the excess from the regular rate of pay, the \$1.35 an hour, to help meet the DBA fringe rate obligation as follows:

| | |
|-------------------------------|---------|
| DBA wage rate | \$12.00 |
| Medical insurance benefit | \$ 1.15 |
| Offset from regular wage rate | \$ 1.35 |
| <hr/> | |
| Prevailing Wage | \$14.50 |

9. If I offer to pay vacation days pursuant to a funded plan that meets the requirements described in Question 2, how can I use these paid vacation days to offset the fringe rate?

You may use the amount contributed to the funded vacation plan for each employee as an offset for the fringe rate. For example, an employee is an electrician in a county where the DBA wage rate is \$1.00 an hour and the fringe rate is \$2.00 an hour. The employee is paid a regular wage rate of \$14.00 an hour and receives paid vacation days from the contractor in the amount of \$200 per month (\$2,400). The employee works 40 hours a week (2080 hours a year (40 hours x 52 weeks)). The cash equivalent for the benefits received is \$1.15 per hour (\$2,400 divided by 2080 hours). The contractor must pay the employee \$0.85 in cash to completely meet his fringe rate obligation, as follows:

| | |
|------------------------------|---------|
| Regular Rate & DBA wage rate | \$14.00 |
| Vacation days benefit | \$ 1.15 |
| Additional cash due | \$ 0.85 |
| <hr/> | |
| Prevailing Wage | \$16.00 |

10. What if I offer to pay vacation days pursuant to an unfunded plan that meets the requirements described in Question 2, can I also use those paid vacation days to offset the fringe rate? If so, how?

Yes, you may use the amount contributed to the unfunded vacation plan for each employee as an offset for the fringe rate and would calculate the offset in the same way as you calculated it for the funded plan.

11. What if I offer paid vacation days to my employees whenever I can afford to do so and not pursuant to any sort of funded or unfunded plans, can I use these days to offset my fringe rate obligation?

Yes, but you may only do so after the covered worker has used the paid vacation day so that the fringe offset would only apply in the week within which the vacation day was used. For example, using the same facts as above, the employee is an electrician in a county where the DBA wage rate is \$14.00 an hour and the fringe rate is \$2.00 an hour. The employee uses a paid vacation day on Monday. The employee is paid a regular rate of \$14.00 a hour and the employer pays the covered work for the vacation day by paying him \$14.00 an hour for an eight hour work day. The cash equivalent for the used paid vacation day received is \$3.50 a hour ($\$112.00 \div \text{four 8-hour days (32 hrs)} = \3.50). Thus, the employer meets his fringe rate obligation for that week by offsetting the fringe rate with the used paid vacation day, as follows:

| | |
|------------------------------|---------------------------------------------|
| Regular rate & DBA wage rate | \$14.00 |
| Used paid vacation day | \$ 3.50 (offsets \$2.00 a hour fringe rate) |

Because the employer is only required to pay the prevailing wage rate which is \$16.00 a hour, the employer may choose to pay the employee less than the regular rate for the week so that the employee does not receive more than the prevailing wage rate for that week's pay. Thus, the employer would pay the employee \$12.50 as a regular rate for the week and use the \$3.50 used paid vacation day to not only offset the fringe rate but also add to the wage rate so that the employee still receives the prevailing wage rate of \$16.00 a hour.

12. Can an offset still be received for the DBA fringe rate obligation if the benefits plan offered has eligibility requirements? For example, a contractor requires a 30 day waiting period before an employee may participate in a benefits plan.

Depends. If the contractor is making contributions to the benefit plan on behalf for the employee during the 30 day period waiting period, then the contractor may use a cash equivalent of those benefits to meet the DBA fringe rate obligation. However, if the contractor is not making contributions on behalf of the employee during the 30-day waiting period, the contractor may NOT use as a cash equivalent of those benefits to meet the DBA fringe rate obligation during the 30 day waiting period. Once the employer begins to make contributions on behalf of the employee to the benefit plan, the employer may at that time use a cash equivalent of those benefits to meet the DBA fringe rate obligation.

What are permitted deductions?

The Copeland Anti-Kickback Act (CAK) prohibits “kickbacks” of wages and back wages. **MUST NOT** buy down DBA obligations with deductions.

The CAK requires WAP providers and contractors on covered projects to submit weekly a “Statement of Compliance” (i.e. certifying that the contractor has paid the required wages)

Permitted deductions include:

Deductions for social security or federal or state income tax withholding

Deductions for bona fide prepayment of wages.

Deductions for court ordered payments.

Deductions for purchase of U.S. savings bonds when voluntarily authorized by the employee

Deductions to repay loans or to purchase shares in a credit union.

Deductions voluntarily authorized for contributions to organizations such as the Red Cross, United Way, or similar charitable organizations.

Deductions for contributions to fringe benefit plans, provided that the deduction is not prohibited by law, that it is either voluntarily consented to by the employee in writing in advance of the time the work is done or provided for in a collective bargaining agreement, that no profit or other benefit is obtained by the contractor, and that the deduction serves the convenience of the employee.

Other than the permitted deductions, the Act does **NOT** permit deductions from wages without the approval of the Secretary of Labor.