

APPENDIX E



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

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revised as of 12/18/09*

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 (DOL) 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. When are fringe benefits considered to be paid to a DOL approved plan, fund or program so that they may be used to meet the DBA prevailing wage requirement?

There are two ways in which fringe benefits may be structured so that they may be used to meet the fringe benefit obligation.

The first way is when the fringe benefit is a contribution amount paid by the employer to a trustee or a third person. This contribution amount must cover the employer's total obligation for the current period and be made 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 this fringe benefit would be vested contributions made by the employer to an employee's 403(b) or 401(k) plan account or contributions made by the employer to a health insurance plan. *29 C.F.R. §§ 5.17, 5.24-5.28*

The second way is that the fringe benefit is 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. **Additionally, to meet the DOL requirements, the contractor must 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.** 2002 U.S.DOL DBA Resource Book, DBA/DBRA Compliance Principles, Fringe Benefits at <http://www.wdol.gov/docs/WRB2002.pdf>.

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
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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
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Prevailing Wage	\$14.50

9. How can I use paid vacation days to offset the fringe rate?

You may use the amount contributed to a vacation plan for each employee as an offset for the fringe rate if the plan is structured in one of the two ways described in Question 2. If the plan is structured pursuant to the second way described in Question 2, **it is important to remember that, to meet the DOL requirements, the contractor must also 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.**

For example, an 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 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
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Prevailing Wage	\$16.00

10. 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 of the employee during the 30 day 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 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.