

# Section 7

## Labor Regulations

**Section 7 – Labor Regulations**

|     |  |     |
|-----|--|-----|
| 1.0 | Introduction.....  | 98  |
| 1.1 | Grantee Responsibilities .....                                     | 98  |
| 1.2 | OCD-DRU Responsibilities.....                                      | 98  |
| 1.3 | Applicable Statutes .....  | 98  |
| 2.0 | Summary of Applicable Laws .....                                   | 99  |
| 2.1 | Federal Fair Labor Standards Act.....                              | 99  |
| 2.2 | Section 110 of the HCDA of 1974.....                               | 99  |
| 2.3 | Davis-Bacon Act.....   | 99  |
| 2.4 | Copeland Anti-Kickback Act.....                                    | 100 |
| 2.5 | Contract Work Hours and Safety Standards Acts.....                 | 101 |
| 2.6 | State Law and Local Law and Regulations.....                       | 101 |
| 3.0 | Terminology and Associated Davis-Bacon Requirements .....          | 101 |
| 4.0 | Grantee Administration of Labor Standards Requirements.....        | 103 |
| 4.1 | Designate a Labor Compliance Officer .....                         | 103 |
| 4.2 | Determine the Effective Wage Decisions .....                       | 103 |
| 4.3 | Notification of Subcontractor Awards .....                         | 106 |
| 4.4 | Hold Preconstruction Conference .....                              | 106 |
| 4.5 | Provide Additional Classifications .....                           | 107 |
| 5.0 | Field Inspections .....  | 109 |
| 5.1 | Employee Interviews .....  | 109 |
| 6.0 | Helpers, Apprentices and Trainees .....                            | 111 |
| 6.1 | Helpers .....  | 111 |
| 6.2 | Apprentices .....  | 111 |
| 6.3 | Trainees.....  | 112 |
| 7.0 | Force Account Labor .....  | 112 |
| 7.1 | Use of Force Account Labor.....                                    | 112 |
| 7.2 | Prerequisites for the Use of Force Account Labor.....              | 112 |
| 7.3 | Labor and Equipment Requirements for Force Account Labor.....      | 112 |
| 7.4 | Material Cost for Force Account Labor Projects .....               | 113 |
| 8.0 | Section 3 of the HUD Act of 1968 Compliance .....                  | 113 |
| 9.0 | Payroll Terminology, Requirements, and Review Procedures .....     | 113 |
| 9.1 | Responsibility of Prime Contractor Regarding Subcontractors.....   | 114 |
| 9.2 | Weekly Payroll Submission Requirements and Payroll Numbering ..... | 114 |

|      |  |     |
|------|--|-----|
| 9.3  | Addresses and Social Security Numbers .....  | 114 |
| 9.4  | Signature on the Statement of Compliance:.....   | 115 |
| 9.5  | Prompt Submission of Payrolls.....   | 115 |
| 9.6  | Subcontractor Communication .....  | 115 |
| 9.7  | Concurrent Jobs .....  | 115 |
| 9.8  | Wage Rates and Proper Classification.....  | 115 |
| 9.9  | Employees Performing Work in More Than One Classification.....                           | 116 |
| 9.10 | Working Foreman Requirements.....  | 116 |
| 9.11 | Classifications .....  | 116 |
| 10.0 | What To Do When the Basic Hourly Rate is Less Than on Wage Decision.....                 | 116 |
| 10.1 | Fringe Benefits.....   | 117 |
| 10.2 | Deductions .....   | 119 |
| 10.3 | Payroll Certification of the Self-Employed Contractor Who Works Alone.....               | 120 |
| 10.4 | Liquidated Damages .....   | 121 |
| 11.0 | Corrective Actions Regarding Labor Standards Violations .....                            | 121 |
| 11.1 | Inadequate Payroll Information .....   | 121 |
| 11.2 | Handwritten Corrections On Face of Payroll By Reviewer Not Allowable.....                | 121 |
| 12.0 | Three Scenarios of Payroll Review .....  | 121 |
| 12.1 | Notice to Contractor when Restitution is involved.....                                   | 122 |
| 12.2 | The Use of Corrected Payrolls Where Restitution Is Not Due .....                         | 125 |
| 12.3 | No Error Detected.....   | 125 |
| 13.0 | Payroll Reporting Requirements.....  | 125 |
| 13.1 | Reporting Restitution under Davis-Bacon and CWHSSA.....                                  | 126 |
| 14.0 | Withholding Funds Based on Non-compliance with Labor Standards.....                      | 126 |
| 15.0 | Withholding Funds Based on Non-compliance with Disaster Recovery CDBG Requirements ..... | 127 |
| 16.0 | Unfound Workers .....  | 127 |
| 17.0 | Falsification .....  | 127 |
| 18.0 | Payroll Retention .....  | 127 |
| 19.0 | Finalizing Labor Compliance .....  | 128 |
| 20.0 | Processing Labor Complaints .....  | 128 |
| 21.0 | Resources.....   | 128 |

## **Section 7 - Labor Regulations**

### **1.0 Introduction**

Grantees implementing projects involving construction contracts are required to comply with applicable labor related laws and regulations. The responsibilities, applicable statutes, and steps to ensure compliance are included within this Section.

### **1.1 Grantee Responsibilities**

Each grantee is responsible for ensuring compliance with Labor Standards as detailed in this Section. The grantee's designated Labor Compliance Officer (LCO), often an administrative consultant, is normally delegated the tasks associated with compliance with labor standards; however, the grantee is ultimately responsible.

The grantee must establish and maintain an adequate labor standards file(s) as specified in Section 4 – Records Management.

Grantees are encouraged to contact the OCD-DRU Labor Specialist assigned to its program(s) or project(s) to discuss any questions regarding the applicability of labor standards, their interpretation, or the associated record keeping requirements.

### **1.2 OCD-DRU Responsibilities**

The OCD-DRU will establish labor standards procedures, provide technical assistance regarding labor questions, conduct compliance reviews, and specify corrective actions.

### **1.3 Applicable Statutes**

Communities implementing projects involving construction contracts in excess of \$2,000 must comply with the following laws and regulations:

1. Federal Fair Labor Standards Act
2. Davis- Bacon and Related Acts
3. Copeland Anti-Kickback Act
4. Contract Work Hours and Safety Standards Acts (CWHSSA)
5. Louisiana Labor Standards (to be verified/identified) and local law and regulations.

Exceptions to the Davis-Bacon and Related Acts and the Copeland Anti-Kickback Act:

1. Construction contracts at or below \$2,000. Note that arbitrarily separating a project into individual contracts below \$2,000 in order to circumvent the Davis-Bacon and Copeland Act requirements is not permitted;
2. Rehabilitation or construction of residential structures containing less than eight units;
3. Simple water and sewer line extensions without pumps, tanks, etc. may also be exempt;
4. Separate and distinct projects. Contact the OCD-DRU for guidance;

5. Contracts solely for demolition, when no federally-funded construction is anticipated on the site.

All construction contractors (including construction contracts paid with special assessments using Disaster Recovery CDBG funds) are required to comply with these Labor Standard Provisions.

HUD has published a Contractor’s guide to prevailing wage requirements for federally-assisted construction projects. Grantees may use this “Making Davis-Bacon Work” guidebook to obtain a better understanding of Davis-Bacon laws and regulations and to determine how to comply with these laws and regulations.

The guidebook is located at: <http://www.hud.gov/offices/adm/hudclips/guidebooks/HUD-LR-4812/4812-LR.pdf>

## **2.0 Summary of Applicable Laws**

### **2.1 Federal Fair Labor Standards Act**

The Fair Labor Standards Act (29 U.S.C. §201 et seq.) establishes standards for employment and employee pay by business organizations. The Fair Labor Standards Act (FLSA) has particular relevance to the construction industry.

A business in the construction industry must have two or more employees and have an annual gross sales volume of \$500,000 or more to be subject to the FLSA. Individual coverage applies to employees whose work regularly involves them in commerce between the states (“interstate commerce”). Any person who works on or otherwise handles goods that are moving in interstate commerce or who works on the expansion of existing facilities of commerce is individually subject to the protection of the FLSA and the current minimum wage and overtime pay requirements, regardless of the sales volume of the employer.

If an employer performs work on a federally financed project or a project in which the federal government has provided assistance in financing the project, a different and somewhat stricter set of labor standards applies. Typically this would require that employees performing on such contracts be paid a “prevailing wage rate”.

### **2.2 Section 110 of the HCDA of 1974**

Section 110 of the Housing and Community Development Act (HCDA) of 1974, as amended and as implemented in 24 CFR §570.603 extends coverage of Davis-Bacon and Related Acts to construction programs and projects financed by Disaster Recovery CDBG funds, including new construction.

### **2.3 Davis-Bacon Act**

Davis-Bacon Act (40 U.S.C. §3141, et seq., 276a to 276 a-7 as implemented in 29 CFR Part 5) provides that all laborers and mechanics employed by contractors or subcontractors in the

performance of construction work financed in whole or in part with grants received under this title (in this case the Disaster Recovery CDBG program) shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor.

Construction contracts in excess of \$2,000 awarded by recipients under the OCD-DRU Disaster Recovery CDBG program shall include a provision for compliance with Davis-Bacon and associated Department of Labor regulations. The principal requirements are:

1. The grantee must include a copy of the current prevailing wage rate decision in each Invitation for Bids (IFB), Request for Proposal (RFP) and Purchase Order (PO) when applicable.
2. The grantee may only award contracts to eligible contractors and subcontractors who have accepted the wage rate decision and have signed a certification to pay wages on that basis, and who will comply with other labor standards.
3. Contractors must pay laborers the wage rate determined by the Department of Labor (DOL) to be the prevailing rate in that labor market.
4. Contractors must submit weekly payrolls.
5. Grantees are required to report all suspected, reported or confirmed violations to the OCD-DRU which may investigate these alleged violations.

Three special classes of employees may be utilized on projects subject to Davis-Bacon Wage Rates and be compensated at less than the Davis-Bacon prevailing wages. These classes are:

1. Apprentices - provided they are individually registered in a bona fide apprenticeship program in which the contractor participates, and which is approved by the DOL. Apprentices must also satisfy other conditions as specified in the Labor Standards Contract Provisions.
2. Trainees - provided they are in a DOL-approved training program and they satisfy other conditions as specified in the Labor Standards Contract Provisions.
3. Volunteers - the use of Volunteers on a Disaster Recovery CDBG project must meet the criteria found in 24 CFR Part 70. Please contact the OCD-DRU for further guidance if volunteers are going to be utilized.

When any of these employee classes appear on the Contractor's weekly payrolls, it is the Contractor's responsibility to provide the documentation necessary to permit the grantee to determine that there is compliance with the Davis-Bacon wage rate determination.

## **2.4 Copeland Anti-Kickback Act**

The Copeland Anti-Kickback Act (18 U.S.C. §874 as implemented in 29 CFR Part 3) makes it a criminal offense for any person to induce, by any manner whatsoever, any person employed in the construction, reconstruction, completion, or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give

up any part of the compensation to which he/she is entitled under his/her contract of employment. The Act also provides for the submission of weekly certified payroll reports (CPRs) by all contractors and subcontractors. All contracts for construction, reconstruction or repair (over \$2,000) must include the following prohibition:

“No contractor or subcontractor shall induce, by any means, any person employed in such publicly-funded construction, reconstruction or repair to give up any part of the compensation to which he is otherwise entitled except for authorized payroll deductions.”

Recipients should conduct confidential interviews with employees to assure compliance with the terms of this law, and the contractor is required to maintain payroll records, and to submit weekly certified payrolls documenting compliance.

## **2.5 Contract Work Hours and Safety Standards Act**

Contract Work Hours and Safety Standards Act (40 U.S.C. §327 et seq.) and FLSA provide that no contract work, which may require or permit any laborer or mechanic, in any workweek in which he is employed on such work, to work in excess of 40 hours in such workweek, unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his basic rate pay for all hours worked in such workweek, whichever is greater. In the event of violations, the contractor or subcontract shall be liable to any affected employee for his unpaid wages as well as to the United States for liquidated damages.

All construction contracts in excess of \$2,000 and other contracts in excess of \$2,500 involving the employment of mechanics or laborers must comply with the following provisions of this law:

1. Contractors shall compute the wages of each laborer and mechanic on the basis of a standard workweek of 40 hours.
2. Work in excess of this standard is permitted, provided that compensation for the amount in excess of the standard is calculated at a rate not less than 1 ½ times the basic rate of pay.
3. Contractors may not require any laborer or mechanic to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous to his/her health or safety as determined under construction safety or health standards promulgated by the Department of Labor.

## **2.6 State Law and Local Law and Regulations**

State requirements regarding use of apprentices and trainees, licensing, procurement requirements, and wage standards must be researched and complied with. Local code and regulations will also apply.

## **3.0 Terminology and Associated Davis-Bacon Requirements**

1. **Prevailing Wages** - Total minimum compensation, including both the base rate and fringe benefit amount, as required under Davis-Bacon for a given classification of worker

as determined by the U.S. Department of Labor in a document called a wage decision. See Subsection 4.2 for a further discussion on wage decisions.

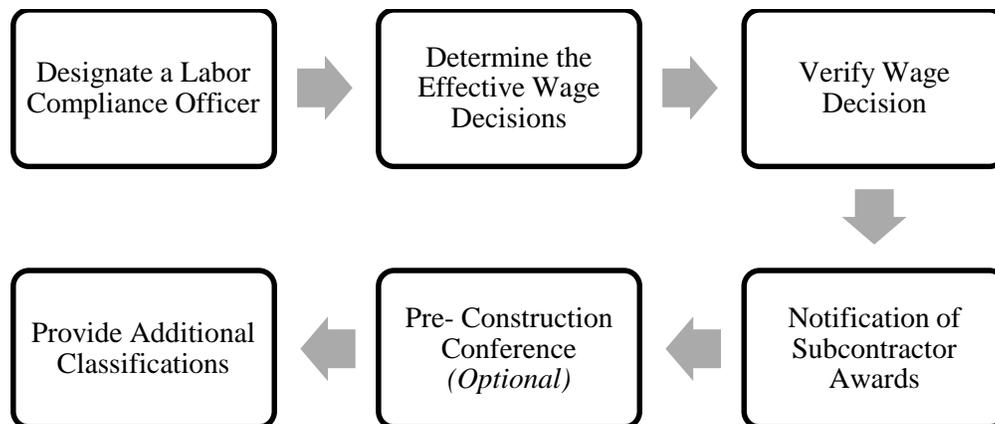
2. **Laborers and Mechanics** - Those workers whose duties are manual or physical as distinguished from managerial. Generally, mechanics perform the work of a recognized trade, such as an electrician, whereas laborers perform tasks such as cleaning and shoveling that is not normally thought of as a recognized trade. On a wage decision a classification that is not “laborer” is automatically considered as a “mechanic” classification.
3. **Contractor’s Guide to Davis-Bacon** - The HUD guide book, “A Contractor’s Guide to Prevailing Wage Requirements for Federally Assisted Projects,” is a recommended (but not a required) publication which the grantee may wish to distribute to contractors. The preconstruction conference is an ideal time for such a distribution. The guide is recommended reading for grant recipients as well as construction contractors and those who prepare contractor payrolls. It provides a brief explanation of issues associated with labor standards and Davis-Bacon in particular. The guide may be downloaded from HUD’s website at [www.hud.gov](http://www.hud.gov). Once at the HUD website, type in “Contractor’s Guide to Davis-Bacon” in the search box. The search results should include the desired publication.
4. **Site of Work** - The site of work as related to Davis-Bacon is limited to the physical place or places where construction called for in the contract will remain when work has been completed and to adjacent or nearby property used by the contractor which can reasonably be included because of proximity.
5. **Cleaning** - Cleaning performed during construction is subject to prevailing wage provisions. If a specific wage rate for cleaning is not in the wage decision, cleaners must be paid the rate for unskilled laborers.
6. **Demolition** - Demolition work, which is not related to construction, is not subject to the prevailing wage requirements. However, where demolition is performed to allow construction of a new building, the demolition would require prevailing wages.
7. **Family Members (as it relates to contractor payrolls)** - There are no exceptions to labor requirements on the basis of family relationships. Relatives who are performing work for the contractor must be paid the required wage for the classification of job performed and must be included on payrolls.
8. **Supply and Installation** - The manufacture or furnishing of materials, articles, supplies, or equipment is not subject to prevailing wages unless conducted in connection with and at the site of the construction or in a temporary plant set up specifically to supply the needs of a particular construction project. For construction work involving installation of equipment, if the cost of installation is 13 percent or less of the total cost of the DR-CDBG financed equipment, this is considered to be an incidental cost and the installation is not subject to Davis Bacon wage rates (HUD Office of Labor Relations notice dated November 15, 1988).
9. **Precutting and Prefabrication** - Precutting or prefabrication of parts to be used in the construction does not require prevailing wages unless conducted in connection with and at the site of construction or in a temporary plant set up specifically to supply only the needs of a particular Davis-Bacon-covered construction project.

10. **Items to be Posted at the Job Site** - The applicable wage decision(s) for the project or the Project Wage Rate Sheet(s) must be posted at the worksite or prominent places readily accessible to all employees for the duration of construction. The Project Wage Rate Sheet, if used, should serve to simplify the contents of the wage decision. A copy of this form, along with instructions, is provided as Exhibit 7-1.
11. **Debarment** - An Action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor that is excluded is "debarred."

Additionally, the grantee must see that the posters "Your Rights Under the Fair Labor Standards Act," "Notice to All Employees," and "Equal Opportunity is the Law" are posted at the job site. To verify posting, Exhibit 7-2, may be used. Sample posters are available as Exhibit 7-3 or may be downloaded from the internet at [www.dol.gov/osbp/sbrefa/poster/main.htm](http://www.dol.gov/osbp/sbrefa/poster/main.htm).

#### 4.0 Grantee Administration of Labor Standards Requirements

The grantee should take the following steps to ensure compliance with required labor standards:



##### 4.1 Designate a Labor Compliance Officer

The grantee is to designate an appropriate staff person to act as labor officer to insure compliance to all requirements and to be the primary contact person for the OCD-DRU. The form used to designate the grantee's Labor Compliance Officer is provided in Exhibit 7-4, and is to be retained in the grantee's files.

##### 4.2 Determine the Effective Wage Decisions

A wage decision is a document listing a minimum wage rate and fringe benefit for each classification of laborers or mechanics which DOL has determined to be prevailing in a given area for a particular type of construction (see Exhibit 7-5).

DOL does not wish for contract estimators to have to take into consideration the constantly changing rates when preparing bids. DOL allows the wage decision in effect ten days before the bid opening date to be effective for the duration of the construction if the contract is awarded

within 90 days of the bid opening date. Such a wage decision is said to be “locked-in” and is also called the “effective” wage decision. If more than 90 days transpires between the bid opening and contract award, the wage decision in effect on the date of the contract award becomes the “effective” wage decision.

#### **4.2.1 Construction Categories**

Federal wage determinations are issued for four construction categories: Building, Residential, Heavy, and Highway, by location and include special characteristics.

In determining which rate category to choose, it is important to understand the differences in order to avoid paying wages from the wrong category. It is possible that more than one wage determination may apply. Use of the wrong category may leave the grantee responsible for restitution and penalties. The construction categories are described in the following table.

| <b>Category</b>    | <b>Description</b>  |
|--------------------|---|
| Building           | Construction of sheltered enclosures with walk-in access for housing persons, machinery, equipment or supplies. This includes all construction within and including the exterior walls, both above and below grade.               |
| Residential        | Projects involving the construction, alteration or repair of single-family houses or apartment buildings no more than four stories tall. (Remember the exemption for residential structures containing not less than eight units. |
| Heavy Construction | All construction not properly classified as Highway, Residential, or Building. Water and sewer line construction will typically be categorized as Heavy construction.   |
| Highway            | Projects for the construction, alteration, or repair of roads.  |

#### **4.2.2 The Process of Updating Wage Decisions**

DOL gathers information on a year-round basis regarding wage decisions and will often issue an update of a particular wage decision. An update of a wage decision is referred to as a “modification” or “mod.” Less frequently DOL will issue an entire new series of wage decisions, called supersedeas decisions, having a new wage decision number based on a new series year.

*Example:* Supersedeas decisions labeled as year 2003 were issued for Louisiana projects on June 13, 2003. Thereafter, for Louisiana, modifications to the 2003 series were issued on various dates until February 9, 2007, when the 2007 series of supersedeas decisions were issued. Regardless of whether a wage decision is updated by modification or by supersedeas decision, it is important to incorporate the proper decision(s) into bid and contract documents.

### **4.2.3 Ten Day Responsibility**

It is the grantee's responsibility to ensure that the wage decision(s) that is in effect ten days before the bid opening date was part of the original bid package or becomes part of the original bid package by addendum, which must be sent to all who obtained a bid package. The bidders are thus given the opportunity to change their bids prior to bid opening, based on the updated wage decision(s).

The grantee may search the DOL website at [www.wdol.gov](http://www.wdol.gov) to determine if there have been any updates. The website should be examined no more than 10 days before the bid opening date.

If there has been an update, the grantee must obtain (normally download) the updated wage decision and send a copy by addendum to all who obtained a bid package. It is important to remember that Louisiana law requires that any addenda to a bid package be received at least 72 hours prior to the bid opening.

If, after the bid opening, the award of the contract is delayed by more than ninety days, the grantee must determine if any wage decision updates have been made by searching the DOL website.

If there has been a wage decision update, the low bidder must agree, in writing, to abide by the wage decision in effect on the date of the contract award. The wage decision in effect on the contract award date must become part of the construction contract.

State law requires contracts to be awarded within 45 days of bid opening, unless an extension is agreed upon in writing by both parties.

The Davis-Bacon requirement to “lock-in” a particular wage decision for the duration of construction calls for contracts to be awarded within 90 days of bid opening.

### **4.2.4 Calling Requirement when using the Small Purchase Method**

On rare occasions the prime contractor may be procured utilizing the “Small Purchase” method, provided the low bid is expected to be under \$150,000 and the contract award is less than \$150,000. See Section 6 - Procurement Methods and Contractual Requirements for additional information regarding the Small Purchase Method.

Note that the Small Purchase method does not have a bid opening date. Consequently, a special procedure to ensure compliance with Davis-Bacon has been developed by the OCD-DRU for the Small Purchase method:

1. A bid tabulation date must be established in advance.
2. Bidders must be informed of the day on which bids will be tabulated and of the possibility of a wage decision update.
3. A ten day search must be made ten days before the bid tabulation date.
4. If there is a wage decision update, all bidders must be notified in a timely manner and documentation of notification must be maintained in project records.

5. Notification when the Small Purchase method is used may be done by addendum, telephone call, in person, e-mail, fax, or U.S. Mail.
6. The wage decision authorized at the ten day search will remain effective for the duration of the construction project provided that the contract is awarded within ninety days of the bid tabulation date.
7. The effective wage decision(s) must also become part of the construction contract when the Small Purchase method of procurement is used.

#### **4.2.5 Document Wage Decision**

Prior to the award of a construction contract to any prime contractor, the grantee must obtain verification of the wage decision choice. The fact that an inquiry was made at an earlier date is not sufficient as verification of the wage decision choice. The Disaster Recovery CDBG program requires that the wage decision verification be obtained after the bid opening and before the award of the construction contract. The grantee remains responsible to ensure the proper wage decision choice(s) and may bear liability arising out of an incorrect wage decision choice(s).

The grantee must ensure that the wage decision in effect at the date of the contract award is made a part of the contract between the low-bidder and the grantee. The OCD-DRU recommends that the wage decision verification be documented using the Exhibit 7-6. The Verification of Wage Decision Form, the Wage Decision, and evidence that the effective Wage Decision was utilized must be maintained within the project file.

#### **4.2.6 Failure to Include or Use of Incorrect Wage Decision**

Failure to include the effective wage decision in bid documents or contracts will not relieve grantees or contractors from potential liabilities or enforcement actions. In cases of an incorrect decision or failure to include a decision, the grantee must either terminate and re-solicit the contract with the valid decision or ensure that all parties sign a supplemental agreement to the contract which makes the effective wage decision retroactive to the beginning of construction.

If a supplemental agreement is made, there are two ways to structure the agreement:

1. The contractor, even if not at fault, may agree to include the proper wage decision retroactively with no additional compensation—especially if the wage rate changes are minor.
2. The contractor will require that a change order be made to compensate for an increase in wages due to the observance of the effective wage decision. Such a change order would be an eligible Disaster Recovery CDBG cost but would be subject to available grant funds. If grant funds are not available, local funding may be necessary.

### **4.3 Notification of Subcontractor Awards**

The grantee's Labor Compliance Officer should be notified by the prime contractor of contract awards to any subcontractor prior to the subcontractor beginning work on the project. This

allows the grantee's Labor Compliance Officer to be knowledgeable of the time frame in which to expect the submission of subcontractor payrolls.

#### **4.4 Hold Preconstruction Conference**

The OCD-DRU recommends, but does not require, that the grantee hold a preconstruction conference with the prime contractor and all available subcontractors prior to the start of construction, at which time they would be advised of their responsibilities and obligations concerning labor standards. If the grantee should opt to not have a preconstruction conference, then the grantee must utilize some method of its own choosing to advise contractors of their responsibilities and obligations concerning labor standards and other items normally covered at the preconstruction conference. The time of preconstruction conference is normally ideal to initiate the additional classification process as discussed in the following paragraphs.

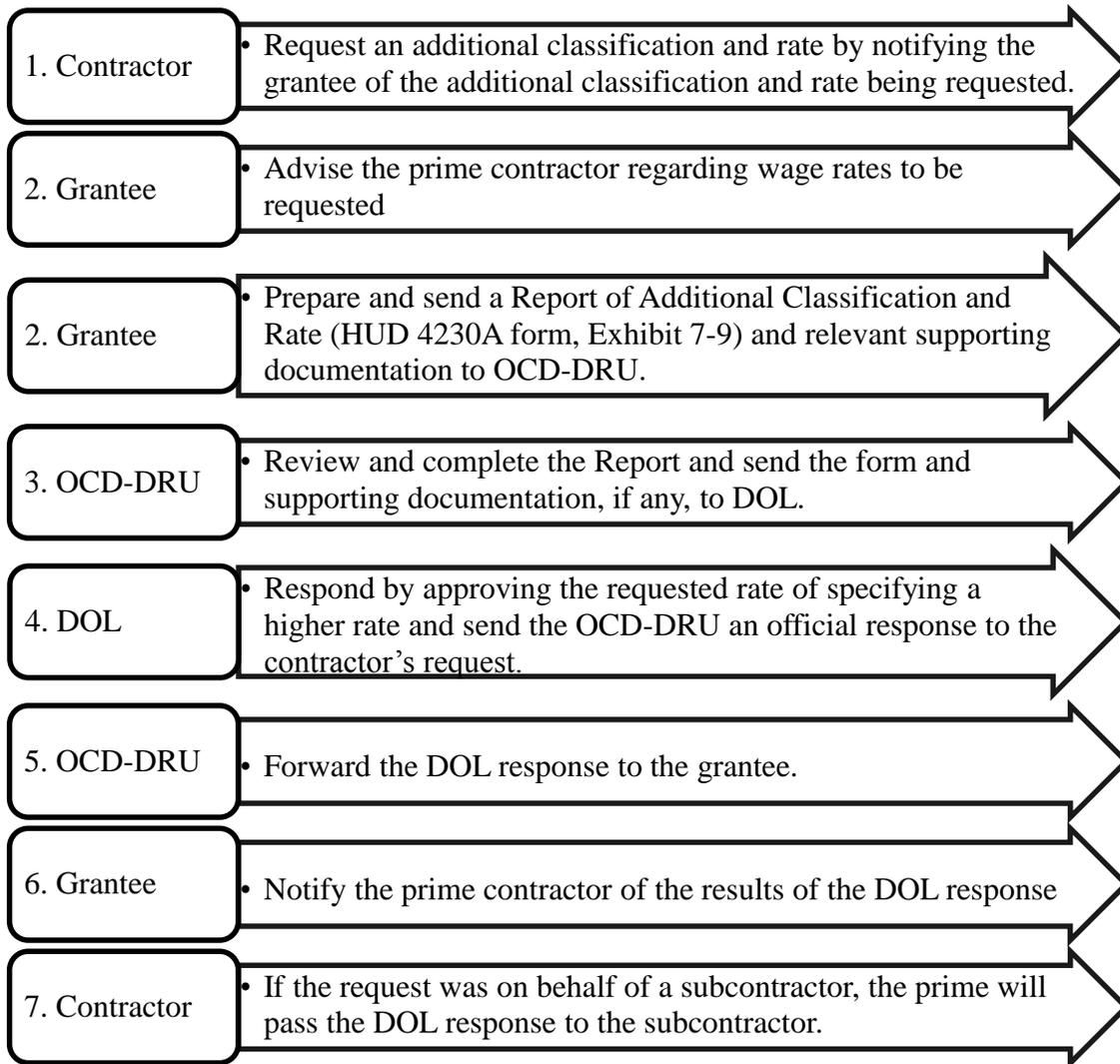
#### **4.5 Provide Additional Classifications**

A wage decision will state the minimum hourly pay and fringe benefits that must be paid to specific classes of workers such as carpenters, electricians, and backhoe operators. If it is found that a class of laborers or mechanics not listed in the wage decision will be employed on the project, the contractor must request an additional classification.

The prime contractor will make a request if it determines its own need for an additional classification or if a subcontractor needs the additional classification. The contractor (or sub) would be immediately allowed to pay the worker(s), at a minimum, the requested rate(s) for the classification until a response from DOL is received.

*Example:* A prime contractor installing sewer lines may find that a boring machine operator is needed by one of its subcontractors, but such a classification is not on the wage decision. Since payrolls must reflect proper classifications for actual work performed, the prime contractor for the sewer project would be required to request and obtain an additional classification of a boring machine operator.

Steps to obtain an additional classification include:



If the DOL response indicates a rejection of the request and specifies a higher rate, then the higher rate must be paid to all workers at the particular classification retroactive to the first day of work (“Restitution”).

Restitution is to be paid at the contractor's expense. Grantees as well as contractors should be aware that the time that may elapse between the request and DOL's response may be approximately 60 days.

#### 4.5.1 Additional Classifications Prior to Hiring or Mobilization

After a contract is awarded, a construction contractor will often know immediately whether additional classification(s) will be needed. In order to expedite the process, it is permissible for a contractor to request additional classifications before mobilization or hiring of workers. The preconstruction conference often provides an ideal time for contractors to request additional

classifications and to provide information helpful to the grantee in the completion of the Report of Additional Classification and Rate (HUD 4230A). (See Exhibit 7-9).

#### **4.5.2 Metal Building Erector as an Additional Classification**

Building wage decisions which cover the State of Louisiana do not have the classification of “Metal Building Erector.” This classification is often needed in the construction of fire stations because the “Ironworker” classification, which was designed for work at much higher elevations and in more dangerous conditions, is more expensive than the lower wages paid for a Metal Building Erector.

In such cases, Metal Building Erector may be requested as an additional classification. The bid documents for fire stations may call attention to bidders regarding the availability of the additional classification of “Metal Building Erector.” The rates normally requested for Metal Building Erector are more than the Laborer rate and less than the Ironworker rate.

### **5.0 Field Inspections**

The grantee should understand that the enforcement of labor standards is as important as other requirements of the contract specifications and that failure to comply with the provisions of the labor standards must be corrected by the contractors and subcontractors. Failure to comply may result in the imposition of serious sanctions and penalties.

Periodic field inspections by the project administrator at the job site should be completed to establish compliance with labor requirements, identify violations and for the following purposes:

1. Insure that the wage decision is posted in a prominent place.
2. To insure that a poster is conspicuously displayed which informs employees of their rights.
3. To conduct employee interviews in order to determine that the wages they are receiving are the same as reported on the weekly payroll report.

### **5.1 Employee Interviews**

During the course of construction, the grantee must conduct interviews of workers to determine payroll accuracy and compliance with Davis-Bacon. Interviews should be recorded on the Employee Interview form (Exhibit 7-10).

#### **5.1.1 Minimum Interview Requirements**

Employees of the following contractors must be interviewed:

1. All prime contractors
2. Subcontractors whose contract award is \$100,000 or more
3. Any subcontractor where there are a large number of payroll problems

One interview session will sometimes be sufficient to meet minimum interview requirements for the above listed contractors. When an interview session is conducted,

interviews of the employees of other subcontractors, not listed above must be conducted if they are on the jobsite on the day of the trip.

The OCD-DRU has determined that interviews must be conducted for at least 50% of the laborers and at least one worker of each of the remaining classifications present on the jobsite on the day of the interviews. Additional interviews that exceed minimum requirements that the grantee deems necessary to ensure compliance with Davis-Bacon are also required.

*Example:* A job has three prime contractors and at least four subcontractors. Three of the four subcontracts are for less than \$100,000. The possibility exists that a fence contractor may become a fifth sub as the project nears completion. The fence subcontract will be less than \$100,000. Employees of all three primes must be interviewed. Employees of the subcontractor whose contract is \$100,000 or greater must be interviewed. If all four of these contractors are not present on the day an interview is scheduled, an additional trip(s) must be made to obtain the necessary interviews. Additionally, those subcontractors present on the jobsite on any day on which interviews are done for the four required contractors must be interviewed.

If a subcontractor having a subcontract for less than \$100,000 is not present on the day of an interview, that subcontractor will not have to be interviewed—unless there are payroll problems. If awarded a subcontract for less than \$100,000, the future fence subcontractor will not have to be interviewed—unless there are payroll problems.

### **5.1.2 Place of Interview**

The following guidelines should be followed when deciding on the place to conduct the interview:

1. Care must be taken to arrange the session at a time convenient to the employer and employees.
2. Workers currently employed may be interviewed during working hours on the job provided that the interview can be properly and privately conducted on the premises.
3. Interviews may also be conducted at other public places.
4. Employees and former employees may also be interviewed by mail.
5. An interview request by mail should include a cover letter explaining the purpose of the employee interview and ask the employee to complete items 3 through 12 on the Record of Employee Interview.
6. The remaining items on the Record of Employee Interview form should be completed by the grantee with items 1 and 2 to be completed before initial mailing and items 13 through 17 completed after the employee returns the document by mail.
7. In off-site interviews or interviews by mail the amount of interviews required must be similar to the estimated amount that would have been obtained during an on-site session.

### **5.1.3 Initiating the Person to Person Interview**

The interviewer must confirm his/her identity to the worker. He/she must explain that the project is being constructed with federal assistance, which requires that workers be properly paid, and that the purpose of the interview is to determine whether the required wages are being paid. If a worker does not want to give particular information, the interviewer should not insist.

### **5.1.4 Using the Interview Information**

After completing the interviews, the information obtained should be compared to the wage decision and payrolls to determine if the workers are classified and being compensated correctly. If necessary, corrective action should be initiated.

## **6.0 Helpers, Apprentices and Trainees**

### **6.1 Helpers**

“Helpers” as a classification listed on a payroll may not be used on Disaster Recovery CDBG projects since such a classification is not found on any of the Louisiana wage decisions. The use of helpers who use tools in assisting mechanics and who are paid below the minimum rates for mechanics is not proper, since an apprentice or trainee is the person who is to perform this type of work.

If a person listed as a helper on a payroll were to be found working with the tools of a trade, Davis-Bacon would require such a person to be classified as a mechanic and be paid the amount of a mechanic’s wages for the associated classification listed on the wage decision retroactive to the first day of work. If a person listed as a helper on a payroll were to be found doing the work of a laborer, Davis-Bacon would require such a worker to be classified as a laborer and paid at least the minimum for the classification of “laborer.”

### **6.2 Apprentices**

Apprentices will be permitted to work at less than the prevailing wage for their craft when they are employed and individually registered in a bona fide apprentice program registered with the U.S. Department of Labor, Bureau of Apprenticeship and Training. If a worker is an apprentice, the contractor must submit a copy of his/her apprenticeship papers with the first payroll on which that worker appears.

Any worker listed on a payroll at an apprentice wage rate that is not a trainee as defined in the following paragraph or is not registered as an apprentice shall be paid the wage rate determined by the Secretary of Labor for the classification of work actually performed.

The wage rate paid to apprentices shall not be less than the specified rate in the registered program for the apprentice's level of progress expressed as a percentage of the journeyman's rate contained in the applicable wage decision.

### **6.3 Trainees**

Trainees will be permitted to work at less than the predetermined rate for their craft if they are employed and individually registered in a program that has received prior approval through formal certification by DOL. A copy of a trainee's papers must be submitted by the contractor with the first payroll on which the trainee appears.

Every trainee must be paid at not less than the rate specified in the approved program for his/her level of progress or a percentage of the associated mechanics rate as listed on the wage decision. The contractor or subcontractor may be required to furnish written evidence of the certification of his/her program, the registration of the trainees, and the ratios and wage rates prescribed in that program to USDOL, HUD, the OCD-DRU, and/or the grantee.

### **7.0 Force Account Labor**

Force Account Labor refers to the use of laborers or mechanics who are employed by the grantee which serves as a contractor for the Disaster Recovery CDBG construction project. In such cases, the grantee/contractor does not have to pay the Davis-Bacon wage rates but can, instead, pay the rates normally paid to employees on staff. The amounts paid to workers on force account projects are allowable costs of the Disaster Recovery CDBG program.

#### **7.1 Use of Force Account Labor**

Exhibit 7-11 explains required record keeping for force account work. If the grantee wishes to use force account, prior approval must be obtained from the OCD-DRU. The following paragraphs briefly discuss Force Account Labor.

#### **7.2 Prerequisites for the Use of Force Account Labor**

In order to use force account labor, three criteria must be met:

1. There should be reasonable evidence that construction will cost substantially less than if it were done under contract or that competitive bids cannot be obtained from competent contractors;
2. The grantee must have the equipment, supervisory skills, a substantial portion of the required work force, and record keeping system; and
3. The legal counsel for the governing body must make a finding that the project is permissible in accordance with Louisiana laws and does not constitute a major project nor include construction of a building.

#### **7.3 Labor and Equipment Requirements for Force Account Labor**

The grantee may hire some employees to work on the specific project to complement existing employees. The cost of equipment, including the cost of maintenance, operations, and minor field repairs is allowed.

*Example:* The cost to replace a radiator that was punctured accidentally would be an allowable Disaster Recovery CDBG cost. However, the cost to replace the engine of a diesel bulldozer on

a short term street project would not be an allowable Disaster Recovery CDBG cost. Equipment may NOT be purchased with Disaster Recovery CDBG funds.

The equipment cost to be allocated to the Disaster Recovery CDBG project can be determined by use-allowance or depreciation value. Such allocations of cost must be approved by the OCD-DRU. In rare instances, such as the breakdown of a primary piece of equipment during a street project, the cost of renting a replacement piece of equipment may be allowed with special written approval from the OCD-DRU.

#### **7.4 Material Cost for Force Account Labor Projects**

The costs of materials, including transportation and storage, are eligible costs under the Disaster Recovery CDBG program. When the cost exceeds \$20,000, the purchase of materials must be by competitive bid (See Section 6 - Procurement Methods and Contractual Requirements).

### **8.0 Section 3 of the HUD Act of 1968 Compliance**

Requirements of Section 3 of the HUD Act of 1968 are discussed in Section 8: Civil Rights. As part of those requirements, a construction contractor(s) must provide information on new employees and may optionally provide information on existing employees.

Exhibit 7-12 has been included to use for the reporting of all new hires by the prime contractor and all subcontractors for verification of compliance with the requirements under Section 3 of the Housing and Urban Development Act of 1968. This form is required and must be submitted with the first payroll on which the new employee appears.

Exhibit 7-13 has been included for the purpose of monitoring the existing workforce of the prime contractor and all subcontractors. This form is optional but if used must be submitted with the first payroll on which the employee appears.

*Example:* Joe Brown has been continuously working for XYZ, Inc., for 5 years on street projects all over south Louisiana. On the third week of a Disaster Recovery CDBG project XYZ transfers Joe Brown to the Disaster Recovery CDBG project. Joe will be considered an existing employee, and if the optional “existing employee information” form is used, it will be sent for review along with payroll number 3.

### **9.0 Payroll Terminology, Requirements, and Review Procedures**

A sample Payroll Report and comments regarding payrolls are provided in Exhibit 7-14. The DOL Certified Payroll Form (WH-347: DBRA) along with instructions may be also be found at:

<http://www.dol.gov/whd/forms/>

A payroll review flowchart is provided as Exhibit 7-15.

## **9.1 Responsibility of Prime Contractor Regarding Subcontractors**

The prime contractor on a project is responsible for proper payment to all laborers and mechanics employed by the prime, employed under a subcontract to the prime, or employed under any lower tier subcontract. The construction contract between the grantee and the prime contractor must require all subcontracts to contain clauses imposing the Federal Labor Standards Provisions. The Federal Labor Standard Provisions (HUD-4010) is provided as Exhibit 6-2j. If the required provisions are not included in a subcontract, the prime contractor remains responsible for underpayments and Liquidated Damages of subcontractors.

When labor standards violations occur, whether at the contract or subcontract level, the grantee will require corrections via the prime contractor. It is the prime contractor's responsibility to ensure corrective action by the applicable subcontractor.

## **9.2 Weekly Payroll Submission Requirements and Payroll Numbering**

It is the weekly responsibility of each contractor, subcontractor, and any lower tier subcontractor to submit to the grantee numbered weekly payrolls from the time work begins on the project until the work is completed. Contractors may use the payroll form, DOL publication WH-347, which is designated as Exhibit 7-14. The signature page of WH 347, where a contractor certifies wages and fringes, if any, is commonly called and still recognized by the OCD-DRU as the Statement of Compliance, although the document is no longer officially designated with the title of "Statement of Compliance." The Statement of Compliance must be a component of each weekly payroll and must be signed by the contractor. A contractor may use his own payroll form or other computer-generated form if all required items of Exhibit 7-14 are included, but the wording of the Statement of Compliance must be verbatim.

If no work is performed on the project during a given workweek, payrolls do not have to be submitted; however, the grantee should be informed by phone or e-mail that no work was done. Once work resumes, use the next consecutive number. Example: Work was done during weeks 1, 2, 3, and 7—the payroll number for week number #7 would be Payroll #4.

Payrolls of subcontractors are to be submitted via the prime contractor. The prime contractor will review the sub's payrolls and may require corrections. The prime forwards the sub's payroll(s) to the grantee. Payrolls may be collected by the project engineer for submission to the grantee; however, this does not relieve the prime contractor of responsibility for review of payrolls.

## **9.3 Addresses and Social Security Numbers**

The first and last name of each worker and last four digits of each worker's social security number are to be listed on each payroll. This procedure will, in nearly all cases, allow unique identification of each worker. In the interest of protecting the worker's privacy, the address and full social security number is not a required element of payrolls. However, the office or place of record keeping of each contractor must retain the full name, address, and social security number of each worker to provide to an authorized person requesting the information.

#### **9.4 Signature on the Statement of Compliance:**

The Statement of Compliance, which is now the certification portion of payroll form WH347, must be signed by an owner, officer, or designated employee of the contractor for each weekly payroll. In cases where a designated employee signs, the contractor must submit written authorization signed by an officer of the company.

#### **9.5 Prompt Submission of Payrolls**

The grantee should require that all payrolls from the prime contractor and any lower tier subcontractor be submitted by the prime contractor to the grantee within seven working days after the payroll ending date. Payrolls must be examined promptly by the grantee so that any problems discovered can be corrected early, while contractors are still on the job. Particular attention should be given to payroll review during early stages of construction to ensure that the prime contractor understands and is fulfilling his/her responsibilities concerning payrolls. If acceptable payrolls are not submitted in a timely manner, the grantee may withhold contractor payment until acceptable payrolls are submitted.

#### **9.6 Subcontractor Communication**

The grantee's contractual relationship is between the grantee and the prime construction contractor. Furthermore, a contract with a subcontractor is between the prime contractor and the subcontractor. Therefore, a direct relationship between the grantee and subcontractor does not exist. Even though a direct contractual relationship does not exist, the OCD-DRU recognizes the following conditions under which the grantee may communicate directly with a lower tier subcontractor regarding labor standards deficiencies: (a) the prime contractor agrees; (b) the subcontractor is cooperative; (c) the issues are not complex; and (d) the prime contractor receives a copy of important documentation or is informed of conclusions that result from the communication.

#### **9.7 Concurrent Jobs**

The payrolls must show only the regular and overtime hours worked on a Disaster Recovery CDBG project. If an employee performs work at job sites other than the project for which the payroll is prepared, those "other job" hours should not be reported on the payroll. However, the gross pay from all job sites must be shown on the payroll.

#### **9.8 Wage Rates and Proper Classification**

Payrolls must be checked against the applicable wage decision(s), engineer's inspection reports (if available), employee interview forms (if available), and actual work done or in progress to determine if prevailing wage requirements regarding rates and proper worker classifications were met. The proper calculation of straight time rates and "time and a half" rates for overtime hours must be checked as well as mathematical accuracy of calculations pertaining to wages and deductions.

### **9.9 Employees Performing Work in More Than One Classification**

A person employed as a laborer or mechanic and performing work in more than one job classification must be paid at least the required rate for the actual hours spent in each classification. Payrolls may be kept according to the hours spent in each classification. Such payrolls, called “split” payrolls, may be used to apportion hours worked at more than one classification in a workday according to the hours worked in each classification.

An alternate measure, useful in avoiding the extra work involved in split payroll reporting, is to pay the worker the rate for the highest paid of the multiple classifications for which work was performed in a given workday. Example: Joe, a backhoe operator, gets off of his backhoe to try to find a buried water line. He uses a shovel most of the morning—which is the work of a laborer—and finally finds the water line. Later, Joe mounts the backhoe and digs a trench for a sewer line, carefully avoiding the water line previously located. The employer may list Joe as a backhoe operator if Joe is paid the backhoe rate, which is the higher of the two possible rates.

### **9.10 Working Foreman Requirements**

A working foreman who devotes at least 20% of his time to laborer or mechanic duties is covered under Davis-Bacon requirements and must be classified according to work performed. Such a classification, for example, an electrician, must come from the applicable wage decision. The “working foreman” if paid a flat salary with “salary” designated on the payroll, must be making prevailing wages for his classification. The amount of the salary must be stated on each payroll. If there is a considerable amount of overtime being worked on a particular project having a salaried working foreman, additional research may be necessary to determine that amounts paid meet Davis-Bacon and CWHSSA requirements.

### **9.11 Classifications**

Only the exact classifications appearing on the federal wage decision or additional classifications requested are to be used on payrolls. Generic classifications are not specific enough to allow the reviewer to determine if Davis-Bacon requirements were met. Example: “Operator” is a generic classification; however, “Backhoe” is on the wage decision and would be a proper classification.

## **10.0 What To Do When the Basic Hourly Rate is Less Than on Wage Decision**

Total compensation (called prevailing wages as indicated on wage decision(s)) is required. There is some leeway given regarding the breakdown of total compensation between the two components of basic hourly rate and the hourly fringe benefit.

When calculating overtime pay where total compensation is adequate there is one notable restriction: if the basic hourly rate on the payroll is less than the basic hourly rate on the wage decision then the higher basic hourly rate on the wage decision must be used in the calculation of minimum overtime pay.

## **10.1 Fringe Benefits**

If the wage decision calls for fringe benefits to be paid on behalf of any employee who worked on the project, such payment does not normally have to be verified by contact with the receiving institution. However, if problems are suspected, verification of the payment of fringe benefits should be pursued by the grantee.

Fringe benefits do not appear on the worker's checks but are amounts paid to a receiving institution on behalf of the worker. Sometimes fringe benefits are confused with deductions. For instance, health insurance provided entirely by the employer would be a fringe benefit, whereas health insurance chosen by the employee and paid for by amounts subtracted from the employee's gross wages would be a deduction.

Fringe benefits that are common to the construction industry may be credited toward meeting Davis-Bacon requirements if they are paid to the employee as cash on the payroll or into an approved fund, plan, or program on the employee's behalf.

When this section or the Statement of Compliance mentions the payment of fringes "in cash", actual payment in paper currency is not the meaning of the phrase but rather the compensation as dispersed on a payroll check is normally considered as payment "in cash."

If a wage decision contains fringe benefits for a classification used on the construction project, box 4a or 4b of the Payroll Form/Statement of Compliance (See Exhibit 7-14) must be marked to indicate the method of fringe benefit payment (i.e. in cash or to an approved plan). If there were no classifications used on the project that required fringe benefits, the boxes should be left blank. Box 4c is used to denote exceptions to box 4a or 4b. For example, if all of the employees are paid fringe benefits in cash except one who gets payment of fringes into an approved plan, box 4b would have been marked for payment of fringes in cash with box 4c also marked indicating and explaining the exception.

Fringe benefit pay requirements are calculated at a per-hour-worked rate and are not calculated at a "time and a half" rate. However, when fringes are paid in cash the payroll reviewer must be able to differentiate the basic hourly rate from the fringe benefit rate in order to calculate overtime properly. This total hourly compensation (basic hourly rate plus hourly fringe benefits) should be separated into the two components (a) in column 6 of the WH 347 Payroll form (b) in the "Comments" section on the Statement of Compliance or (c) by supplementary signed statement from the employer. If the separate components cannot be identified the entire monetary compensation per hour must be multiplied times 150% to calculate required overtime minimum rates. The payroll reviewer is not at liberty to guess or try to mathematically calculate the amount of the fringe component—the fringe component must be clearly stated by the contractor.

The following is an example where the basic hourly rate and the fringe benefit per hour is properly identified:

|  |                  |
|--|------------------|
| Basic Hourly Rate on Wage Decision           | \$10.00 per hour |
| Fringe Benefits Requirement on Wage Decision | \$1.00 per hour  |
| Work Week                                    | 52 hours         |

$$\begin{array}{rclclcl} \text{Regular Pay} & + & \text{Overtime Pay} & + & \text{Fringe Benefits} & = & \text{Gross Pay} \\ 40 \times \$10 & + & 12 \times (\$10 \times 1.5) & + & 52 \times \$1 & = & \$632 \end{array}$$

Flexibility is allowed in the allocation of how fringe benefits are paid. Using the above example, the contractor has flexible payment options such as:

- Pay all of the \$632 in cash;
- Pay \$580 in cash and \$52 in fringes; or
- Pay more or less than \$580 in cash and more or less than \$52 in fringes with the total paid to be \$632.

The following is an example where the basic hourly rate and fringe benefit per hour is NOT properly identified:

If a total compensation rate of \$11.00 were identified with the components of the \$11.00 not identified then the proper overtime calculation required by the Disaster Recovery CDBG program for the previous example would be:

$$\begin{array}{rclclcl} \text{Regular Pay} & + & \text{Overtime Pay} & = & \text{Gross Pay} \\ 40 \times \$11 & + & 12 \times (\$11 \times 1.5) & = & \$638 \end{array}$$

So, we see two different results. One result, \$632, was due to calculation based on the proper separation of the basic hourly rate and fringes and the other result, \$638, occurred based on calculations without proper separation of basic hourly rate and fringes.

The basic procedure to follow under the Disaster Recovery CDBG program depends on which condition occurs.

1. Condition One: If the payroll differentiates properly, then overtime at 150% of the basic rate must be paid while overtime at 150% is not required for fringes. Fringes are paid only at 100% for each hour worked regardless of whether an hour was an overtime hour or a straight time hour.
2. Condition Two: If the payroll does not differentiate what portion of the compensation is the basic rate and what portion is the fringe benefit, then the overtime compensation must be calculated at 150% of the sum of the base rate plus fringe.

It is the responsibility of the contractor to provide payroll that properly differentiate the basic hourly rate from the fringe benefit amount. If proper differentiation is not initially provided the payroll review person may obtain a supplementary statement or corrected payroll from the contractor which indicates the breakdown between basic hourly rate and fringes for each person. The supplementary statement must be signed by an authorized person and clearly identify which payrolls are associated with the supplementary statement.

### **10.1.1 Fringe Benefit Verification**

Fringe benefits may be paid in cash and such payment(s) can be determined by examining the face of the payroll:

1. When fringe benefits are paid in cash, box 4-b of the Statement of Compliance must be checked. Fringe benefits that are paid to an approved plan are not usually posted on the face of the payroll.
2. When fringe benefits are paid to an approved plan, box 4-a of the Statement of Compliance must be checked. The fact that box 4-a is marked on the Statement of Compliance is acceptable to indicate that fringe benefits, equal to the amount stated on the wage decision, were paid. Most of the time additional verification will not be necessary.
3. If the basic hourly rate is less than required on the wage decision with the obvious claim that fringes are making up the balance due in order to meet the total Davis-Bacon requirements, verification of the payment of fringe benefits may be considered. In some cases, where problems are suspected, verification of the payment of fringe benefits may be necessary.

An approved plan will have an institution(s) that receives fringe payments on some type of regular basis. Fringe benefit payments into an approved plan may be on a weekly, monthly, or quarterly basis but not semi-annually or annually. The applicable contractor will be the source of contact information for the receiving institution. Verification should include the following: (a) institution's name(s), (b) phone number(s), (c) date(s) contacted, (e) results of the inquiry, (f) person(s) contacted at the institution, and (g) the name of the person who made verification for the grantee. Verification may be by phone, written correspondence, computer printout, or fax from a receiving institution, computer printout or fax from a union, or a copy of cancelled check(s) from the contractor written to a receiving institution.

A computer printout from the contractor is also acceptable as supporting evidence of payment of fringe benefits.

## **10.2 Deductions**

A deduction is an amount subtracted from a worker's gross wages. Deductions must be reviewed to determine if they are permissible.

Permissible deductions by law include:

1. Court ordered deductions;
2. FICA; and
3. Federal or state income taxes.

Deductions not required by law, such as union dues, 401K deductions, loan payback amounts or uniforms, may be made only with the permission of the employee. The employee must sign a statement that authorizes deductions. Exhibit 7-14 should be used.

### **10.3 Payroll Certification of the Self-Employed Contractor Who Works Alone**

*Example:* A self-employed laborer or mechanic (or group of working partners) who has no other employees working on the job is not authorized to sign his/her own payroll and Statement of Compliance. Instead, such a person, often called a “working subcontractor,” must be listed on the prime’s (responsible employer’s) payroll. For instance, Joe’s Backhoe Service has one backhoe and no other workers other than the owner. Joe cannot sign his own payroll while on a Disaster Recovery CDBG project. In contrast, if Joe hires at least one employee to help on that project, he could certify his own wages as well as the employee’s wages.

The minimum information needed on the responsible employer’s payroll regarding the working subcontractor includes:

1. Name
2. Address
3. Classification(s)
4. Hours worked
5. Estimated hourly pay
6. Estimated gross pay

Deduction amounts for social security and federal taxes of the working subcontractor are not the responsibility of the prime contractor, and such amounts may be unknown to the prime contractor; therefore, deduction listings are not required. The Statement of Compliance should indicate box 4-c for the working subcontractor as an exception to the way fringe benefits may have been paid for regular employees.

The explanation for box 4c may read something like, “Working sub, Lump sum contract, Fringes and deductions not applicable.”

Sometimes it may be confusing for a prime contractor to list on his payroll a working subcontractor in addition to his regular employees. In such case, the prime contractor may prepare a separate weekly payroll listing only one person, the working subcontractor, using the WH 347 payroll form. (See Exhibit 7-14).

Whatever method of compensation is utilized, such as piece work or a weekly contract draw for performance, the amount of estimated weekly compensation divided by the actual hours of work performed for that week must result in an “effective” hourly wage rate that is not less than the prevailing hourly rate for the type of work involved.

### **10.3.1 Truck Owner-Operators Exception**

Truck “owner-operators” must be reported on the prime’s (responsible employer’s) weekly payrolls but unlike other classifications, do not need to show the hours worked or rates—only the notation “owner-operator.” The truck driver having an owner-operator exception is not to be confused with a truck driver working on-site for a prime contractor that does not fall under the exception.

### **10.4 Liquidated Damages**

“Liquidated Damages” is a predetermined amount that is paid as a penalty for failure to meet a specified requirement. Liquidated Damages, relative to the review of payrolls in the Disaster Recovery CDBG Program, will mean the penalty amount calculated for overtime violations under the CWHSSA. The pre-determined penalty is \$10 per worker, per day for overtime violation(s).

Please note that penalty amounts paid for overtime violations to a specified government entity as Liquidated Damages are separate and distinct from wage restitution paid to workers. Liquidated Damages are paid to a federal agency, namely HUD for Disaster Recovery CDBG projects, in addition to any restitution paid to worker(s).

## **11.0 Corrective Actions Regarding Labor Standards Violations**

### **11.1 Inadequate Payroll Information**

The payroll format, Exhibit 7-14, contains the necessary information for payroll reporting and is a copy of WH-347 from the Wage and Hour Division of DOL. Alternate forms may be used by contractors but must contain the necessary information as on WH-347. If a contractor’s alternate form is not sufficient, the contractor will need to provide the necessary information on an acceptable form or provide a supplementary statement.

Payrolls that are incomplete, such as those which lack classifications or rates of pay, will trigger the need for the contractor to provide a corrected payroll and Statement of Compliance that lists the required information.

### **11.2 Handwritten Corrections On Face of Payroll By Reviewer Not Allowable**

The grantee, in reviewing a payroll, is not allowed to make corrections on the face of a payroll or on the Statement of Compliance. The reason is that such documents are designed to be sufficient as evidence in a legal proceeding, and corrections by multiple sources often do not allow the reader certainty as to who made the corrections. If the grantee wishes to provide written clarification of a minor payroll item, a note with the reviewer’s name and date may be attached.

## **12.0 Three Scenarios of Payroll Review**

Three scenarios regarding payroll review and corrective actions are identified in Exhibit 7-15, OCD-DRU Payroll Review Flowchart. The three scenarios are as follows:

Scenario One: Error that involves restitution.

Scenario Two: Error that does not involve restitution.

Scenario Three: Error not detected.

Each scenario triggers a unique set of events. Review Exhibit 7-15, OCD-DRU Payroll Review Flowchart for an overview of the processes involved.

### **12.1 Notice to Contractor when Restitution is Involved**

Scenario One deals with payroll error that involves restitution due to underpayment of wages. Underpayment may result from Davis-Bacon violation(s), CWHSSA overtime violation(s), or both. The grantee must promptly notify the prime contractor in writing that payment of back wages is required. This notice should identify the name of the prime contractor and the applicable subcontractor, the underpaid workers, the correct job classification and wage rate, dates of underpayment, and the amount of underpayment owed. The contractor must be notified of the need to make restitution by using a Certified Correction Payroll (as discussed below).

If overtime violations under CWHSSA exist, the notice to the contractor should also identify a calculation of Liquidated Damages and inform the contractor of two choices regarding Liquidated Damages—pay or request a waiver.

#### **12.1.1 Certified Correction Payroll**

Under Scenario One a payroll that reflects restitution paid under Davis-Bacon and/or CWHSSA is called a “Certified Correction Payroll.” Such a payroll will always be prepared by the employer and the Statement of Compliance will be signed by the authorized signatory. The signature on the Statement of Compliance designates the payroll a “certified” correction payroll. A Certified Correction Payroll will only list those workers to whom restitution is paid. A Certified Correction Payroll may cover multiple weeks and must specify the weeks covered. The monetary amounts listed, wages and deductions, reflect restitution amounts paid and should not indicate amounts paid and listed on past payrolls. Optionally, a Certified Correction Payroll may also cover one week at a time.

Payroll problems that require the employer to prepare a Certified Correction Payroll may include the following:

1. Wage rates on the payrolls do not meet Davis-Bacon requirements.
2. Wage rates on the payrolls do not meet CWHSSA requirements.
3. Worker classifications are wrong, incomplete, or not in accordance with the applicable wage decision resulting in restitution due.
4. Calculations are in error and result in underpayment of wages.

A Certified Correction Payroll will record the difference between amount paid and the required amount which should have been paid. The deficiency would be multiplied by the applicable number of hours worked at the lower-than-allowable rate. Example: If a worker was paid \$10.00 per hour and should have been paid \$11.00 per hour for 100 hours during three different

non-overtime weeks, the amount of restitution payment as recorded on the Certified Correction Payroll would be  $\$1 \times 100 = \$100$ .

The contractor may submit a Certified Correction Payroll for each applicable workweek or for multiple workweeks. A Certified Correction Payroll, if prepared for multiple weeks, should indicate the weeks. Example: Weeks 2 through 8 and 11. In contrast, a Certified Correction Payroll, if prepared for one week at a time, must be numbered the same as the original payroll for that workweek but must indicate the appropriate revision number. Example: “Payroll #2—Revision #1,” “Payroll 3, Revision 1,” and so forth.

In most cases the Statement of Compliance, as part of the Certified Correction Payroll, will be sufficient to demonstrate that restitution was made. Cancelled checks, employee initials, or an employee statement are no longer routinely required as additional proof of payment of restitution. If problems are suspected, additional proof may be required by the OCD-DRU or other reviewing agency.

### **12.1.2 The Use of Corrected Payrolls to Demonstrate Restitution**

Some contractors may wish to provide corrected payrolls with a newly signed Statement of Compliance. A corrected payroll differs from a Certified Correction Payroll in the following ways:

1. A corrected payroll is always for one weekly period whereas a Certified Correction Payroll may cover multiple weekly periods.
2. A corrected payroll lists all workers who worked on a project during a weekly period whereas a Certified Correction Payroll lists only workers to whom restitution was paid.
3. A corrected payroll lists the original disbursements and disbursements made for the payment of restitution whereas the Certified Correction Payroll will list only the disbursements made for the payment of restitution.

If a contractor wishes to provide a corrected payroll to demonstrate restitution rather than a Certified Correction Payroll, such a provision is acceptable; however, a Statement of Compliance having a later signature and date must accompany the corrected payroll. The corrected payrolls should be numbered so as to be associated with the original payrolls, such as “Payroll 2, Revision 1.”

### **12.1.3 Calculation of Liquidated Damages**

We continue with Scenario One assuming that there was restitution due that involved not only Davis-Bacon but also overtime violation(s) under CWHSSA. Overtime rates must be paid at 150% of the basic hourly rate. This is commonly referred to as “time and a half.” Under CWHSSA, Liquidated Damages are computed at the rate of \$10 per worker for each calendar day the worker was required or permitted to work in excess of forty (40) hours in a week without payment of overtime rates.

For instance, if workers worked six days a week for twelve hours per day and were paid straight time for 72 hours, there would be three days of violations. Overtime pay should have started on day four and continued on day five and day six. The Liquidated Damages calculation would be

\$30 per worker. Liquidated Damages would be calculated in addition to the payment of wage restitution.

#### **12.1.4 Steps in Calculation, Assessment, Payment or Appeal of Liquidated Damages**

The grantee calculates restitution due and Liquidated Damages due and notifies the contractor by traceable correspondence (e-mail, fax, or letter). The contractor, having received notification, must make restitution via a Certified Correction Payroll (or a corrected payroll with certification) and must agree to one of the following two choices regarding Liquidated Damages: pay or request a waiver. The contractor is to notify the grantee of the choice by traceable correspondence.

If payment is the contractor's choice, the contractor must use a wire transfer to make payment. Please contact the Labor Compliance Officer at the OCD-DRU for instructions regarding a wire transfer. Such procedures involve filling out a special deposit-slip form, which is sent to HUD to enable a receiving account to be established. The contractor will be notified when the wire transfer can be received by an active account at HUD and will, in fact, be sent a form that is equivalent to a deposit slip. The contractor will use a financial institution to conduct the wire transfer. After the wire transfer and proper notification/documentation of such payment to all parties concerned, the contractor's responsibility for payment of Liquidated Damages will have been met. The financial institution will charge the contractor a fee for making the wire transfer. The wire-transfer procedure is a very cumbersome process involving a multitude of steps before final resolution.

The other choice is to request a waiver. This option is most efficient as well as recommended by the OCD-DRU if the mistake in the payroll was unintentional. If requesting a waiver is the contractor's choice, the contractor is to send the grantee written communication explaining the reasons why a waiver is requested.

HUD will grant a waiver for two reasons:

1. The error was unintentional although due care was exercised.
2. A mathematical mistake was made.

The grantee will forward the letter to the OCD-DRU, who will send the letter to HUD in New Orleans. Following HUD's response the OCD-DRU will communicate HUD's response to the grantee by traceable correspondence. The grantee is to communicate the response to the contractor(s) by traceable correspondence.

If HUD approves the request for the waiver of the payment of liquidated damages, then labor standards requirements regarding liquidated damages will have been met. If HUD does not approve the request for the waiver, call the Labor Compliance Officer at the OCD-DRU for further instructions. The contractor will have 60 days to appeal the notice from HUD.

## **12.2 The Use of Corrected Payrolls Where Restitution Is Not Due**

Under Scenario Two as shown in Exhibit 7-15, restitution will not be due but some type of correction not involving restitution is necessary. A corrected payroll may be used to reclassify workers, correct math errors, clarify monetary amounts, revise improper dating, etc. Each corrected payroll is for one week only. The weekly numbering of the corrected payroll should be for the same weekly number as the original incorrect payroll. Example: “Payroll 4, Revision 1.” The contractor may line through the mistakes and provide the corrections in handwriting or use software or other means to produce a corrected payroll. A new signature and date on a Statement of Compliance must be provided. One way to provide a new signature is by attaching a copy the original Statement of Compliance with a new signature and date above the original signature. Optionally, the contractor may wish to prepare a new Statement of Compliance, signed and dated, for any week having a corrected payroll.

### **12.2.1 Supplementary Statements**

A supplementary statement from the contractor may be obtained to clarify not only major issues involving restitution but also minor issues that do not involve restitution. Situations where a supplemental statement would be acceptable include: (a) the payroll on which an employee appears does not have the last four digits of the Social Security number and (b) an incorrect employee name. The supplementary statement should be dated, signed by the authorized payroll signatory, and also identify the associated payroll number(s). A Statement of Compliance does not accompany a supplementary statement.

## **12.3 No Error Detected**

Scenario Three is identified as the scenario under which no error is detected.

## **13.0 Payroll Reporting Requirements**

See Exhibit 7-15, for a visual diagram illustrating the three scenarios of payroll review and the reporting requirements triggered by each scenario.

A Labor Standards Enforcement Report could be considered an interim report normally completed during a project whereas a Final Wage Compliance Report is completed at the conclusion of a project. Exhibit 7-8 is required when restitution cumulatively reaches \$1,000 or more for any contractor or subcontractor. Instructions for completing the form are included in Exhibit 7-8. It is possible that one Disaster Recovery CDBG project could trigger multiple Labor Standards Enforcement Reports.

The Labor Standards Enforcement Report is to be completed and sent to the OCD-DRU when most or all of the corrective action has been completed. For instance, if a contractor made restitution and chose to pay Liquidated Damages, the grantee could wait until receipt of evidence of restitution, contractor’s letter agreeing to pay Liquidated Damages, and payment of the Liquidated Damages before sending the OCD-DRU the enforcement report. In such a case, the letter from the contractor agreeing to pay Liquidated Damages, evidence of the wire transfer, and the Labor Standards Enforcement Report would be sent together to the OCD-DRU.

The Labor Standards Enforcement Report should be sent before close-out documents are submitted, especially if a waiver of payment of Liquidated Damages is requested, as HUD may take up to a month to respond.

Finally, under all three scenarios as the flow chart indicates, the last item regarding labor standards, the Final Wage Compliance Report (within Exhibit 13-1h), must be sent to the OCD-DRU. The Final Wage Compliance Report is to be sent to the OCD-DRU along with other close-out documents.

### **13.1 Reporting Restitution under Davis-Bacon and CWHSSA**

In reporting restitution on the Labor Standards Enforcement Report or the Final Wage Compliance Report it is important to correctly classify restitution. The Davis-Bacon component of restitution will involve an underpayment rate for each hour worked at the deficient rate. The CWHSSA component of restitution will involve the payment of one-half of the hourly deficiency for each overtime hour worked.

*Example:* A laborer worked 48 hours in one work-week. He was paid \$10.00 per hour for 48 hours. The wage decision calls for \$11.00 per hour with no fringe benefits. Most payroll clerks would immediately know that \$52.00 of restitution is due; however, some may not realize the proper classification of each of the components of restitution.

The proper classification would be \$48.00 under Davis-Bacon and \$4.00 under CWHSSA.

|             |   |        |   |         |   |       |             |
|-------------|---|--------|---|---------|---|-------|-------------|
| Davis-Bacon |   |        |   | CWHSSA  |   |       | Restitution |
| 48 hours    | X | \$1.00 | + | 8 hours | x | \$.50 | = \$52      |

### **14.0 Withholding Funds Based on Non-compliance with Labor Standards**

If violations regarding restitution have not been corrected within thirty calendar days from the date of the first notice of underpayment, the grantee may withhold funds due the prime contractor. Only an amount considered necessary to ensure payment of underpaid wages (and Liquidated Damages, if applicable) may be withheld in order to meet Labor Standards requirements.

If it is necessary to estimate the withholding amount, prompt action must be taken to determine an exact amount and disburse any applicable excess to the prime contractor according to invoices presented for payment. The following steps should be taken:

1. The grantee must notify the prime contractor of the withholding and provide the second notice of underpayment.
2. The grantee must, again, specify the identity of underpaid workers, correct job classifications and wage rates, dates when underpayments occurred, and the amounts of underpayments owed.
3. If restitution is not made within 30 days of the second notice of underpayment, or if there is disagreement regarding the finding of wages owed, the OCD-DRU must be notified.

4. If the OCD-DRU determines it appropriate, the grantee will be notified.
5. The grantee must disburse wages owed from the withheld funds to the respective workers to whom they are due.
6. The grantee should contact the OCD-DRU for information on the proper procedure for disbursement of funds.

### **15.0 Withholding Funds Based on Non-compliance with Disaster Recovery CDBG Requirements**

If a Labor Standards violation(s) does occur that results in the grantee not being in compliance with the approved Disaster Recovery CDBG program, the OCD-DRU may suspend payment on the next “Request for Payment.” For example, if the grantee fails to ensure the timely submission of contractor payrolls by the prime contractor (and any lower-tier subcontractor), then the grantee may be considered as being non-compliant with Disaster Recovery CDBG program requirements.

### **16.0 Unfound Workers**

If all affected workers cannot be located and restitution made, either by the contractor directly or through use of withheld funds, enough funds must be reserved in the special account to pay those workers the wages owed. Efforts should continue to be made to locate workers; however, if they have not been located by the time the close-out of the project occurs, the grantee must return the withheld funds to the OCD-DRU. A check, made payable to the Louisiana Division of Administration, Office of Community Development, Disaster Recovery Unit and Exhibit 7-8 (Sample Labor Standards Enforcement Report) covering the remaining withheld funds must be submitted to the OCD-DRU before the project will be closed.

### **17.0 Falsification**

If intentional falsification by a contractor is suspected, the grantee’s Labor Compliance Officer must not return the payroll to the contractor for correction and submittal. The OCD-DRU must be informed of the suspected falsification.

### **18.0 Payroll Retention**

Payroll records must be retained by the grantee for a period of five years from the date of the letter indicating “Final Close” of the Disaster Recovery CDBG program relative to the construction project. The payroll records must be available at all times during the retention period for inspection by representatives of the OCD-DRU, HUD, and DOL.

## **19.0 Finalizing Labor Compliance**

The Final Wage Compliance Report (within Exhibit 13-1 Project Completion Report), must be approved by the OCD-DRU Labor Compliance Officer before the project can be conditionally closed out. If there are unresolved labor compliance problems at that time, the OCD-DRU Labor Compliance Officer will assist the grantee in determining how to correct such problems.

## **20.0 Processing Labor Complaints**

All complaints received by OCD-DRU from worker(s) on a D-CDBG funded project will be referred by OCD-DRU's Labor Compliance Officer (LCO) to the Department of Labor's Wage and Hour Division, New Orleans, LA (DOL). The LCO will keep a record of each complaint received and will follow-up with DOL on the resolution of each.

## **21.0 Resources**

| <b>Exhibit</b> | <b>Description</b>   |
|----------------|--|
| Exhibit 7-1    | Sample Project Wage Sheet  |
| Exhibit 7-2    | Sample Verification of Project Wage Rate Sheet and Project Sign        |
| Exhibit 7-3    | Sample Required Construction Site Posters                              |
| Exhibit 7-4    | Sample Appointment of Labor Compliance                                 |
| Exhibit 7-5    | Wage Decision Example  |
| Exhibit 7-6    | Verification of Wage Decision  |
| Exhibit 7-7    | Sample Payroll Deduction Authorization Form                            |
| Exhibit 7-8    | Sample Labor Standards Enforcement Report                              |
| Exhibit 7-9    | Report of Additional Classification                                    |
| Exhibit 7-10   | Record of Employees Interview Form                                     |
| Exhibit 7-11   | Force Account Record Keeping   |
| Exhibit 7-12   | Sample Contractor's/Subcontractor's New Employee Information Form      |
| Exhibit 7-13   | Sample Contractor's/Subcontractor's Existing Employee Information Form |
| Exhibit 7-14   | Payroll Form and Statement of Compliance                               |
| Exhibit 7-15   | OCD-DRU Payroll Review Flowchart                                       |
| Exhibit 13-1i  | Final Wage Compliance Report   |