



COLORADO
Department of Transportation
Office of the Chief Engineer
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MEMORANDUM

TO: PROJECT PERSONNEL
FROM: JOSHUA LAIPPLY, CHIEF ENGINEER
DATE: SEPTEMBER 13, 2017
SUBJECT: TRAFFIC CONTROL INDUSTRY ADHERENCE TO REGULATIONS REGARDING EMPLOYEE PAY

CDOT has evaluated the regulations related to employee pay that apply to projects with Federal funding. This memo is intended to provide clarification regarding what CDOT deems to be acceptable applications of the regulations to ensure consistent understanding and practice. It is important to note that on occasion contract documents and/or requirements may be in conflict. In accordance with CDOT's Standard Specification for Road and Bridge Construction subsection 105.09 the order of precedence is as follows:

1. Specific Provisions
 - a. Project Special Provisions
 - b. Standard Special Provisions
2. Plans
 - a. Detailed plans
 - b. Standard plans
3. Supplemental Specifications
4. 2011 or 2017 Standard Specifications, whichever is applicable to the specific project.

General Information:

Regulation:

29 CFR (Subtitle A)(Part 5)(Subpart a)

§5.2(f) Definitions.

(f) The term *labor standards* as used in this part means the requirements of the Davis-Bacon and Related Acts, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes listed in §5.1, and the regulations in parts 1 and 3 of this subtitle and this part.



CDOT Acceptable Application of Regulation:

The regulation shall be applied as stated above.

Payroll Records:

Regulation:

29 CFR (Subtitle A)(Part 3)

§3.4(b) Submission of weekly statements and the preservation and inspection of weekly payroll records.

(b) Each contractor or subcontractor shall preserve his weekly payroll records for a period of three years from date of completion of the contract. The payroll records shall set out accurately and completely the name and address of each laborer and mechanic, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid. Such payroll records shall be made available at all times for inspection by the contracting officer or his authorized representative, and by authorized representatives of the Department of Labor.

Please note that payroll records must also be made available to CDOT auditors as well as the Federal Highway Administration.

CDOT Acceptable Application of Regulation:

The regulation shall be applied as stated above. CDOT project staff is responsible for regularly monitoring and accepting all payrolls to ensure that regulations are reasonably adhered to. All CDOT certified payrolls (originals and revisions) will include the correct use of the CDOT 4 digit classification codes with the corresponding classification titles. If revisions and back pay documentation is submitted, cancelled checks will be required along with the revised certified payrolls containing the correct CDOT codes and classifications.

All basic payroll records of a contractor may be requested during the life of the CDOT project to compare to the submitted certified payrolls. Additional documentation may be requested to verify payroll records. Examples of such documentation may include:

- Documentation that demonstrates employees have reviewed time worked and payscale applied for each week prior to payment.
- When GPS truck information is provided as the additional documentation, it must clearly define when the employee is driving the truck on the site of work. When the location of the vehicle is on the project site of work, it will be presumed the employee is working as a TCS/TCI.



Statement of Compliance:

Regulation:

29 CFR (Subtitle A)(Part 5)

§5.5 Contract provisions and related matters.

(B) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

- (1) That the payroll for the payroll period contains the information required to be provided under §5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under §5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;
- (2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;
- (3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the (write the name of the agency) or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

CDOT Acceptable Application of Regulation:

The statement of compliance signature on certified payrolls (CDOT Form 118 or Statement of Compliance section in electronic payroll system, LCPtracker) states the payroll contains



required information that is correct and complete and that each employee is paid the full weekly wages earned at not less than applicable wage rates and fringe benefits for the classification of work performed. The above regulation states that a contractor can be prosecuted when the certified payrolls are incorrect and if the contractor has disregarded its obligations to employees. Though not required under the regulation but usually included on a form "Statement of Compliance," the documents should include the title and contact information of the individual certifying the compliance.

Please note that though the term "helper" is listed above as it is directly quoted from the regulation, Colorado does not utilize "helpers."

Over-Time Pay of Other Acts:

Regulation:

29 CFR (Subtitle A)(Part 4)

§4.181 Overtime pay provisions of other Acts.

(a) *Fair Labor Standards Act*. Although provision has not been made for insertion in Government contracts of stipulations requiring compliance with the overtime provisions of the Fair Labor Standards Act, contractors and subcontractors performing contracts subject to the McNamara-O'Hara Service Contract Act may be required to compensate their employees working on or in connection with such contracts for overtime work pursuant to the overtime pay standards of the Fair Labor Standards Act. This is true with respect to employees engaged in interstate or foreign commerce or in the production of goods for such commerce (including occupations and processes closely related and directly essential to such production) and employees employed in enterprises which are so engaged, subject to the definitions and exceptions provided in such Act. Such employees, except as otherwise specifically provided in such Act, must receive overtime compensation at a rate of not less than 1½ times their regular rate of pay for all hours worked in excess of the applicable standard in a workweek. See part 778 of this title. However, the Fair Labor Standards Act provides no overtime pay requirements for employees, not within such interstate commerce coverage of the Act, who are subject to its minimum wage provisions only by virtue of the provisions of section 6(e), as explained in §4.180.

(b) *Contract Work Hours and Safety Standards Act (CHWSSA)*. (1) The Contract Work Hours and Safety Standards Act (40 U.S.C. 327-332) applies generally to Government contracts, including service contracts in excess of \$100,000, which may require or involve the employment of laborers and mechanics. Guards, watchmen, and many other classes of service employees are laborers or mechanics within the meaning of such Act. However, employees rendering only professional services, seamen, and as a general rule those whose work is only clerical or supervisory or nonmanual in nature, are not deemed laborers or mechanics for purposes of the Act. The wages of every laborer and mechanic for performance of work on such contracts must include compensation at a rate not less than 1½ times the employees' basic rate of pay for all hours worked in any workweek in excess of 40. Exemptions are provided for certain transportation and communications contracts, contracts for the purchase



of supplies ordinarily available in the open market, and work, required to be done in accordance with the provisions of the Walsh-Healey Act.

(2) Regulations concerning this Act are contained in 29 CFR part 5 which permit overtime pay to be computed in the same manner as under the Fair Labor Standards Act (FLSA).

Please note that the Fair Labor Standards Act is enforced by the Department of Labor.

CDOT Acceptable Application of Regulation:

CHWSSA requires overtime pay for skilled classifications. FHWA, USDOL or CDOT may choose to investigate overtime hours on an active or recent project and may not consider site of work in accordance with Davis-Bacon and Related Acts as well as CHWSSA. The below elements may be applied during or as a result of an investigation:

- If an employee is paid above the minimum Davis-Bacon and Related Acts prevailing wage, USDOL will enforce overtime under CHWSSA and the Fair Labor Standards Act and would require overtime to be paid at 1 ½ times the higher rate/classification for all hours worked in excess of 40 during the workweek for any back pay owed. Total number of hours worked in a workweek is calculated based on total number of hours worked regardless of site of work.
- Liquidated damages may apply per CHWSSA (\$25 for each calendar day an employee is missed or errored) and may be assessed by CDOT. USDOL has issued direction that CDOT should be applying liquidated damages on investigations.
- Upon resolution of payroll issues, CDOT may still require, withhold and collect any applicable liquidated damages as per the direction of USDOL.
- Liquidated damages under FLSA would be under the purview of USDOL.

On and Off Duty (Also Referred to as Downtime, Waiting Time, Engaged To Wait):

Regulation:

29 CFR (Subtitle B)(Chapter V, Subchapter b, Part 785, Subpart c)

§785.14 General

Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves “scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged.” (*Skidmore v. Swift*, 323 U.S. 134 (1944)) Such questions “must be determined in accordance with common sense and the general



concept of work or employment.” (*Central Mo. Tel. Co. v. Conwell*, 170 F. 2d 641 (C.A. 8, 1948))

CDOT Acceptable Application of Regulation:

This is a general regulation paragraph and the description of how it is applied is found below.

Regulation:

29 CFR (Subtitle B)(Chapter V, Subchapter b, Part 785, Subpart c)

§785.15 On Duty.

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. (See: *Skidmore v. Swift*, 323 U.S. 134, 137 (1944); *Wright v. Carrigg*, 275 F. 2d 448, 14 W.H. Cases (C.A. 4, 1960); *Mitchell v. Wigger*, 39 Labor Cases, para. 66,278, 14 W.H. Cases 534 (D.N.M. 1960); *Mitchell v. Nicholson*, 179 F. Supp. 292, 14 W.H. Cases 487 (W.D.N.C. 1959))

Regulation:

29 CFR (Subtitle B)(Chapter V, Subchapter b, Part 785, Subpart c)

§785.16 Off Duty.

(b) *Truck drivers; specific examples.* A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. (*Skidmore v. Swift*, 323 U.S. 134, 137 (1944); *Walling v. Dunbar Transfer & Storage*, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Gifford v. Chapman*, 6 W.H. Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla., 1947); *Thompson v. Daugherty*, 40 Supp. 279 (D. Md. 1941))



CDOT Acceptable Application of Regulations:

Employees must be paid appropriate Davis-Bacon and Related Acts wages when they are engaged to wait. Although there may be periods of inactivity, the employee is unable to use the time effectively for their own purposes. If waiting is an integral part of the job, then the employee must be paid Davis-Bacon and Related Acts appropriate wages while they are engaged to wait.

- An employee who is working in only one classification on a given day (eg, laborer) and is engaged to wait must be paid at that Davis Bacon wage classification during the down time (that is to say, they cannot be paid at a flagger rate on this day for the down time).
- An employee who is working in multiple classifications on a specific day (eg, truck driver and laborer) and is engaged to wait may be paid at the lower Davis Bacon wage rate for that down time (paid as a laborer in this scenario above). Even if this employee may perform as a flagger on other days, if they are not performing as a flagger on this day, they may not be paid as a flagger during the down time.

Regulation:

29 CFR (Subtitle B)(Chapter V, Subchapter b, Part 785, Subpart c)

§785.16 Off Duty.

(a)General. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

CDOT Acceptable Application of Regulation:

An employee is deemed to be completely relieved from duty (off-duty) if the amount of time is long enough to enable them to use the time effectively for their own purposes and they are not required to work. It is CDOT's practice that this period of time should be no less than 90 minutes. Employees must be told in advance that they may leave the job and must be provided a specific hour that work will commence again. The exception is if equipment breaks down. If equipment breaks down, employees will either be released for the remainder of the day or given a return time. If an employee is asked to return (also referred to as "show up time") to the job site at a specific time and work does not commence, the employee must be compensated a minimum of two additional hours at the employee's classification and prevailing wage rate.



If a work day is cancelled and an employee is sent home directly (or to another job), documentation from the contractor may be requested with the employee's signature and contractor's reasoning regarding why the day was cancelled (or some other form of documentation may be accepted by the Region Civil Rights Office). If the employee is required to stay on the project for more than 15 minutes to wait and see if the work day is cancelled (this includes if an employee is required to take down equipment on the project site for a cancelled day or other case-by-case scenario), Davis Bacon and Related Acts wages will be required for a minimum of two hours of pay in the typical classification that the employee works in.

Site of work:

Regulation:

FHWA1273 (IV)(1)

The following provisions are from the U.S. Department of Labor regulations in 29 CFR 5.5 "Contract provisions and related matters" with minor revisions to conform to the FHWA-1273 format and FHWA program requirements.

1. Minimum wages

a. All laborers and mechanics employed or working upon the site of the work, will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)),

CDOT Acceptable Application of Regulation:

The regulation shall be applied as stated above.

Traffic Control Supervisors:

CDOT Acceptable Application of Regulations regarding Traffic Control Supervisors:

Traffic Control Supervisors are not addressed specifically in the regulations identified above; however, in coordination with the Department of Labor, CDOT allows two approaches for compensating Traffic Control Supervisors in accordance with the Davis-Bacon and Related Acts. Traffic Control companies may elect to pay the employee by delineating the hours worked in each classification. Acceptable classifications for delineation include Pickup and Pilot Car Driver, Traffic Control Flagger, and Traffic Control Laborer (excludes flagging). Hours must be shown separately on the payroll record with sufficient documentation or the company may elect to pay the Traffic Control Supervisor for all hours at Pickup and Pilot Car Driver which is the highest wage classification listed above. Sufficient documentation for delineating classifications may entail GPS truck information, daily work diaries, detailed work hour statements (or timesheet) signed by the employee confirming the hours worked in each classification. The USDOL default practice regarding investigations is for the rates of pay used to be a weighted average of all employee's classifications worked on the project. If an



employee works in multiple classifications on a project that is under investigation, CDOT has the authority to follow USDOL's processes and practices for investigations. If an employee is paid above the minimum Davis-Bacon and Related Acts prevailing wage, the USDOL (and CDOT) will require the higher rate be paid for any back wages owed.

The CDOT 2011/2017 Standard Specifications states that Traffic Control Supervisors are required to attend all project scheduling meetings. While attending those meetings, the Traffic Control Supervisor shall be paid the Pickup and Pilot Car Driver which is the highest wage classification (as identified above) as that is the level of knowledge and experience required for that individual to participate in the meeting in a meaningful way regarding the safety, scheduling and other related issues that may require resolution.

Deductions:

Regulation:

23 CFR (Chapter I)(Subchapter G)(Part 633)(Appendix B)(Subpart B) (VI)

1. *General.* All mechanics and laborers employed or working upon the site of the work will be paid unconditionally and not less than once a week, and without subsequent deduction or rebate on any account, except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3), the full amounts due at time of payment computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part thereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics; and the wage determination decision shall be posted by the contractor at the site of the work in a prominent place where it can be easily seen by the workers. For the purpose of this clause, contributions made or costs reasonably anticipated under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of section VI, paragraph 3b, hereof.

CDOT Acceptable Application of Regulation:

The regulation shall be applied as stated above. CDOT and USDOL do not consider charging employees for Personal Protective Equipment (PPE) to be an acceptable deduction.

Suspension and Debarment:

Regulation:

29 CFR (Subtitle A)(Part 5)

§5.12 Debarment proceedings.

(a)(1) Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable



statutes listed in §5.1 other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts or subcontracts subject to any of the statutes listed in §5.1.

(2) In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible person or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of the statutes listed in §5.1.

(b)(1) In addition to cases under which debarment action is initiated pursuant to §5.11, whenever as a result of an investigation conducted by the Federal agency or the Department of Labor, and where the Administrator finds reasonable cause to believe that a contractor or subcontractor has committed willful or aggravated violations of the labor standards provisions of any of the statutes listed in §5.1 (other than the Davis-Bacon Act), or has committed violations of the Davis-Bacon Act which constitute a disregard of its obligations to employees or subcontractors under section 3(a) thereof, the Administrator shall notify by registered or certified mail to the last known address, the contractor or subcontractor and its responsible officers, if any (and any firms in which the contractor or subcontractor are known to have a substantial interest), of the finding. The Administrator shall afford such contractor or subcontractor and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under paragraph (a)(1) of this section or section 3(a) of the Davis-Bacon Act. The Administrator shall furnish to those notified a summary of the investigative findings. If the contractor or subcontractor or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request shall be made by letter postmarked within 30 days of the date of the letter from the Administrator, and shall set forth any findings which are in dispute and the reasons therefor, including any affirmative defenses to be raised. Upon receipt of such request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the letter from the Administrator and the response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute. In considering debarment under any of the statutes listed in §5.1 other than the Davis-Bacon Act, the Administrative Law Judge shall issue an order concerning whether the contractor or subcontractor is to be debarred in accordance with paragraph (a)(1) of this section. In considering debarment under the Davis-Bacon Act, the Administrative Law Judge shall issue a recommendation as to whether the contractor or subcontractor should be debarred under section 3(a) of the Act.

(2) Hearings under this section shall be conducted in accordance with 29 CFR part 6. If no hearing is requested within 30 days of receipt of the letter from the Administrator, the



Administrator's findings shall be final, except with respect to recommendations regarding debarment under the Davis-Bacon Act, as set forth in paragraph (a)(2) of this section.

CDOT Acceptable Application of Regulation:

FHWA, USDOL and/or CDOT may choose to suspend or debar a contractor. CDOT may also request debarring a contractor through FHWA or USDOL directly. The violations might include falsifying certified payrolls, repeated/serious violations, misclassifications, and other rules and regulations that were included in this letter.

