

FHA Multifamily and Davis-Bacon Wage Rates

FHA-financed new construction and rehabilitation projects should be assigned only Residential wage rates under the Davis-Bacon Act.

BACKGROUND

The method of applying wage rates under the Davis-Bacon Acts of 1931 is critical to the viability of Federal Housing Administration (FHA) financing for new construction or substantial rehabilitation of multifamily and residential healthcare properties.

Importance of FHA Multifamily construction lending and development

The FHA Multifamily program has been vital to supporting affordable and workforce rental housing. The historical strength of FHA mortgage insurance programs rests in the capability of borrowers to obtain a seamless construction-to-permanent loan financing – a feature unique in the multifamily finance market. Competitive pricing for the loan is possible due to the safety of a Government National Mortgage Association (Ginnie Mae) security backed by an FHA-insured mortgage loan. Significantly, these programs have maintained strong credit performance.

The Davis-Bacon Act and applicability to FHA-financed projects

The Davis-Bacon Act requires the payment of wages that *prevail in the locality on projects of a character similar to the work that will be performed on direct federal contracts*. The National Housing Act (§ 212) requires Davis-Bacon compliance on multifamily projects assisted with FHA mortgage insurance under Sections 221, 232 and 241.

Administration of the Davis-Bacon Act

The Wage and Hour Division (WHD) of the Department of Labor (DOL) prescribes standards and procedures for federal agencies that administer programs subject to Davis-Bacon requirements. HUD's Office of Field Policy and Management/Davis-Bacon and Labor Standards Division (DBLS) administers and enforces Davis-Bacon requirements at HUD.

The “split-wage” problem

Split-wage decisions continue to make many FHA-financed multifamily projects more expensive and more cumbersome to manage.

Under All Agency Memoranda (AAMs) issued by WHD, there are four different categories of wage rate that may apply under David-Bacon: Building, Residential, Highway, and Heavy.

Historically, FHA multifamily projects were generally assigned only Residential wage rates, consistent with the inherently residential nature of those projects. However, over time, WHD

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increasingly assigned other wage rate types to some items of construction, e.g., Building, Highway, or Heavy (“split-wages”). where those items of construction were deemed to be “substantial.”

The standard for when items of work are “substantial” and should be assigned non-Residential wage rates was raised in 2019 to a construction cost of \$2.5 million or 20 percent of the project cost. To apply this standard, the WHD has directed HUD to “bucket” multiple items of work of similar character to determine whether that work is sufficiently “substantial” to warrant a non-Residential wage rate. This threshold should be raised again.

The resulting split-wage determinations for residential housing projects have created significant administrative burden and complexity. For example, a split-wage decision may require a developer to pay workers different wages to perform identical work, depending upon where on the project they perform that work. Moreover, disparate components of work on a residential project often cannot be neatly separated from one another, and the differences between wage rates across categories can be substantial. In some cases, the resulting administrative burden and disruption can make a project infeasible after a developer has expended significant amounts of time, effort, and funds. Resolving Davis-Bacon split wage issues also can delay the start of construction.

DAVIS-BACON RULEMAKING

In August of 2023, WHD issued a final rule “Updating the Davis-Bacon and Related Acts Regulations.” Despite intense advocacy from MBA and the larger real estate coalition, few changes were made to their March 2022 proposal.

Among other provisions, the Rule reaffirms current WHD policy and practice on multiple wage rate (“split-wage”) determinations and the effective dates for wage rate revisions under for FHA-insured projects, i.e., a revised wage rate determination is effective if it is issued prior to the earlier of initial endorsement or beginning of construction. The proposal also addresses the process for establishing prevailing wage rates.

MBA worked with the larger real estate coalition and submitted joint comments to WHD, expressing concern that the proposal fails to address the shortcomings with the DBRA regulations. Instead the groups made the following recommendations.

RECOMMENDATIONS

Residential-only wage rates for FHA-financed multifamily projects

MBA recommends that all FHA-financed projects for new construction or substantial rehabilitation of multifamily and residential healthcare properties be assigned only residential wage rates for Davis-Bacon purposes, consistent with the inherently residential character of the projects and the housing mission of FHA and HUD.

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Additional Davis-Bacon recommendations

- For FHA-assisted projects, WHD should increase the threshold for when items of work are sufficiently “substantial” to warrant consideration of separate wage rates from \$2.5 million to \$15 million (or at a minimum to \$5 million or a level that accurately reflects the combined impacts of inflation and rising construction costs).
- For FHA-assisted projects, WHD should revise the proposed regulation to effectively fix the wage rates as those in effect on the date an application for a firm commitment is submitted.
- WHD should modify Davis-Bacon construction classifications to also permit FHA-assisted structures of more than four stories to be considered Residential construction, consistent with advances in the construction of multifamily structures that have occurred since 1985, as reflected in the International Building Code.
- WHD should engage directly in a deeper examination of the process of determining prevailing wages with the objective of either broadening participation, utilizing other data sources such as other BLS data, or even looking to private payroll processing providers.
- To prevent avoidable costs and delays arising from periodic updates to Davis-Bacon wage rates WHD should revise its procedures to effectively lock-in Davis-Bacon wage decisions for FHA-insured projects at a time sufficiently early in the application process to avoid the need for the developer, lender or HUD to revise and repeat previously completed process steps (e.g., 45 days prior to the date an application for firm commitment is submitted).
- As an interim measure, DOL should work with HUD to implement a streamlined hardship-based waiver process to address situations where the timing of the effective date of a wage decision modification on any project would be likely to cause an unreasonable need to modify and repeat previously completed process steps.

FINAL RULE

The final rule, published on August 14, 2023, rejected all of these recommendations. DOL declined to address the issue of split wages, nor the issue around when those wages are determined. The final rule did not update the definition of residential housing to include those over 4 stories, despite that being out of date with advances in the construction of multifamily structures that have occurred since 1985. Lastly, the final rule returns to the three-step wage determination system that was used from 1938-1983, despite the fact that it is well documented that this process gives more weight to a small number of respondents, and results in inflated wages.

A side by side analysis of our recommendations and the final rule can be found [here](#). MBA will continue to work with HUD, DOL, and Congress to address both the split wage and timing concerns.

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