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A GUIDE TO THE U.S. DEPARTMENT OF LABOR'S 'NEW' DAVIS-BACON AND RELATED ACTS REGULATIONS

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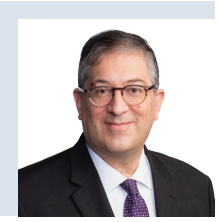
OVERVIEW

For the first time in 40 years, the Department of Labor (DOL) updated its interpretation and implementation of the Davis-Bacon and Related Acts in new final rules. DOL's new final rules concerning the prevailing wages and fringes contractors must pay their workers on federal and certain federally funded construction projects and published in the Federal Register on August 23, 2023 (88 Fed.Reg. 57526) are, in some respects, a throwback to 1982. In other respects, the new final rules attempt to create robust and new enforcement tools and procedures untethered to the plain language of the Great Depression-era Davis-Bacon Act or any subsequent Related Acts. Contractors and subcontractors on projects covered by the Davis-Bacon and Related Acts (and possibly also Inflation Reduction Act projects) should be aware of DOL's now final regulatory changes and take appropriate steps to ensure compliance once the new regulations take effect.

Our report will unpack these new regulations under four main headings:

- Changes to the ways in which prevailing wages will be calculated and how wage determinations will be prepared and updated by DOL;
- DOL's self-proclaimed expansion of its enforcement of the Davis-Bacon Act to all "development statutes";
- Changes to key definitions and terms employed or implicated by the Davis-Bacon and Related Acts; and
- Changes to DOL's enforcement tools to ensure contractor and subcontractor compliance.

MEET THE AUTHOR



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Michael J. Schrier represents federal contractors, grant recipients, and companies and institutions doing business with or having matters before the U.S. Government. He has extensive experience advising and litigating employment-related matters for federal contractors including the Davis-Bacon Act, Service Contract Act, federal contractor Paid Sick Leave, federal contractor minimum wage, and OFCCP matters. Michael represents clients in Contract Disputes Act, Miller Act, and breach of contract claims in federal and state trial and appellate courts and in bid protests before the U.S. Court of Federal Claims and U.S. Government Accountability Office. In addition, he advises government contractors, federal grant recipients, educational institutions, and foreign governments on Federal Acquisition Regulation compliance, facilities and security clearances, False Claims Act, Buy American Act, and debarment/suspension once the new regulations take effect.

PREVAILING WAGE AND PREPARATION OF WAGE DETERMINATIONS

The foundation of the Davis-Bacon and Related Acts is DOL's authority to create and publish prevailing wage determinations that are then either incorporated by federal agency contracting officers into federal construction contracts or otherwise applied to federally financed construction projects. The final regulations provide DOL with new discretion and authority in what data it may gather and review to create wage determinations and new powers to update existing wage determinations without conducting full wage surveys.

Return of the 30% Rule

One of the biggest changes in the new rules is how DOL will calculate prevailing wages. Unless the new regulations are challenged in court and stayed, after October 23, 2023, DOL will calculate the prevailing wage in each locality as follows:

- If 50% or more of the wage rates for a classification are the same in a locality, then that will be the prevailing wage;
- If no majority, then the wage rate earned by at least 30% of workers in a locality will be the prevailing wage; or
- If no wage rate is earned by at least 30% of workers, then DOL will use a weighted average.

The foregoing is effectively a reinstatement of the 30% rule that DOL used from 1935 until 1982. The impact of this change will likely be to phase out or significantly reduce the use of weighted averages and lead to increased wages across most trades.

Revisions to Wage Determinations Using Bureau of Labor Statistics Data

The new regulations also provide DOL with the authority to "revise" non-collective bargaining agreement-based wage determinations no more often than once every three years based on the U.S. Bureau of Labor Statistics Employment Cost Index. This change will effectively permit DOL to increase all prevailing wages and fringes based solely on a national index and without conducting a full wage survey to determine the actual prevailing wages in a particular locality.

Ending Separation of Metropolitan and Rural Wage Rates

Under the prior regulations, DOL would separate out wage data and not use metropolitan wage rates when computing prevailing wages for rural counties/areas and vice versa. The new regulations eliminate that separation and permit DOL to consider nearby urban wage rates when computing prevailing wages for surrounding or nearby rural counties. This change will certainly lead to significantly increased prevailing wages for rural jurisdictions adjacent to urban areas.

Permissible Adoption of State and Local Prevailing Wage Rates

In a sign of potential modernity and comity between the federal and state governments, the new regulations (29 C.F.R. §1.3(g) and (h)) explicitly permit DOL to adopt state or local prevailing wage rates as the federal prevailing wage rate. DOL has discretion to adopt prevailing wage rates set by state or local authorities if DOL determines that the state or local government methodology used is consistent with DOL's overall prevailing wage methodology. The new regulations also give DOL discretion to "consider" any state or local prevailing wages when setting the federal prevailing wage in any locality. The takeaway from this is that contractors may want to work more closely with their state and local governments to set realistic wage rates that more closely reflect local practices and then request that DOL defer to such locally established prevailing wages when setting the federal prevailing wage for that locality. Otherwise, DOL, when left to its own devices, will apply its own methodology for determining prevailing wages and may not have sufficient data or capture local wage nuances that state and local governments may recognize.

Conformance Process Changes

In another sign of modernity, DOL's new regulations pave the way to streamlining the conformance process. Under the prior rules, contractors were required to request conformances for each classification not listed on a wage determination. Under the new final rules, "a wage determination may contain wage and fringe benefit rates for classifications of laborers and mechanics for which conformance requests are regularly submitted." This change should reduce the administrative burden on contractors to repeatedly seek conformances for recurring job classifications.

EXPANSION OF DOL AUTHORITY OVER "DEVELOPMENT STATUTES"

DOL's new regulations attempt to grant to itself the power to unilaterally expand the reach of its new Davis-Bacon and Related Acts regulations, even where Congress has not expressly stated that such prevailing wages laws apply.

Development Statutes

DOL historically defined its "Related Acts" jurisdiction by reference to specific statutes identified in a long excel spreadsheet on the Wage and Hour Division's webpage. The new regulations take this several steps forward. First, DOL defines a "development statute" as "the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996." This by itself is not significant.

Perhaps the most potentially troubling aspect of the new definition of "development statute" is that it is intended to cover any congressionally enacted statute "that requires payment of prevailing wages under the Davis-Bacon labor standards to all laborers and mechanics employed in the development of a project and for which the Administrator determines that the statute's language and/or legislative history reflected clear congressional intent to apply a coverage standard different from the Davis-Bacon Act itself." In other words, this new definition essentially provides the Administrator with quasi-legislative authority in the absence of an express Congressional delegation of authority to determine which federal statutes "should" be covered by the new final regulations, even if Congress itself did not expressly say so.

The most serious and immediate likely example of DOL's exercise of this self-granted authority will be in the context of the Inflation Reduction Act (IRA). The IRA merely states that if an owner or developer wants the maximum tax credits under the statute,

> the taxpayer shall ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor . . . shall be paid wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31 of title 40, United States Code.

As worded, the IRA only requires that taxpayers pay prevailing rates, but the IRA expressly does not incorporate the Davis-Bacon Act or otherwise expressly create any Related Acts-type regulatory scheme. This is likely because Congress granted the Treasury Department—not DOL—enforcement authority over prevailing wage aspects of the IRA. Despite this, DOL published a web page regarding Davis-Bacon and Related Acts enforcement for IRA-covered projects months prior to adopting its new final rules and has otherwise given every indication that DOL intends to enforce its regulatory scheme

on taxpayers under the IRA. Based on the new definition of "development statute," it is reasonable to assume that DOL will attempt to unilaterally apply its new Davis-Bacon and Related Acts regulations to IRA-covered projects absent clear congressional intent or delegation of authority to do so. And, if DOL can do this based on its new definition of "development statute," then it remains to be seen how far DOL will attempt to push out Related Acts coverage over other existing or future statutes that do not expressly incorporate Davis-Bacon and Related Acts principles.

Contract

The existing Davis-Bacon Act regulations already included a definition of "contract." However, DOL's new regulations expand upon the definition to add: *"With the exception of work performed under a development statute*, the terms contract and subcontract do not include agreements with employers that meet the definition of a material supplier." (Emphasis added). As this new addition is phrased, DOL clearly intends to include material supplier contracts under development statutes (such as the IRA) as "contracts" subject to Davis-Bacon Act regulations.

Construction, Prosecution, Completion or Repair

The "old" regulations contained a definition of "construction, prosecution, completion or repair." DOL's new regulations, however, expand the definition to cover "all types of work done . . . [i]n the construction or development of a project under a development statute." This is yet another example of how DOL intends to expand Davis-Bacon Act coverage to IRA projects and construction projects under other statutes.

APPLICABLE ONLY FOR "NEW" CONTRACTS ENTERED INTO AFTER THE EFFECTIVE DATE

While the overall effective date of the new regulations is set as October 23, 2023, in several places in the narrative surrounding the new final rule DOL explains that the enforcement tools created or reinforced by the final rule and listed below "will generally only apply to contracts that are awarded after the effective date of this final rule." This is one of the few reasonable passages from the final rule and contractors should be sure to remind DOL of this if and when DOL investigators attempt to apply the new final rules to legacy construction contracts (to which these new rules do not apply).

DAVIS-BACON'S NEW AND UPDATED LEXICON

At the center of DOL's new final regulations is a slew of definitional changes and additions. Many of these are designed to address adverse court decisions DOL would like to "regulate around" or cement the current state of Administrative Review Board decisions in binding regulations. Either way, many of these definitional changes can lead to profound compliance and enforcement challenges for contractors.

"Building or Work"

By its plain language, the Davis-Bacon Act only applies to "public buildings and public works." There are two changes of note to the existing regulatory definition of "building or work" in the new final rules. First, the list of the kinds of projects to be covered by the regulations is expanded to expressly include "solar panels, wind turbines, broadband installation, [and] installation of electric car chargers." While generally relevant given the new industries and technologies that have arisen since the last regulatory rewrite in 1983, these specific revisions were likely intended to dovetail with the Inflation Reduction Act, even though that statute does not expressly incorporate the Davis-Bacon Act itself. Second, DOL expanded the definition of "building or work" to expressly include "a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work." This appears to be an effort by DOL to clarify the line between construction and maintenance, albeit one that will likely generate lots of litigation in the future.

"Construction, Prosecution, Completion or Repair"

There are at least two significant changes to this regulatory definition, not already discussed above.

First, the definition is expanded to include "covered transportation" which is further defined to include (a) transportation that takes place entirely at the "site of the work;" (b) transportation between a "secondary construction site" and a "primary construction site"; and (c) any transportation activities performed by laborers and mechanics—whether on or off the site of the work—under a development statute. Each of these are attempts by DOL to expand the reach of the Davis-Bacon Act to ever greater situations involving transportation and not directly construction or repair, as the plain language of the statute would suggest. More importantly, by these definitions, virtually all onsite and offsite transportation incidental to a development statute will be subject to the new Davis-Bacon Act regulations. This greatly expands the reach of the Davis-Bacon Act and owners/developers of IRA projects should be particularly vigilant as to how DOL interprets and applies these new sweeping definitions.

Second, the definition of "construction, prosecution, completion or repair" is further expanded to include demolition and/or removal activities—particularly where "subsequent construction covered [by these regulations] is contemplated at the site of demolition or removal." With these new definitions, DOL is laying down a marker that it intends to subject most or nearly all demolition activities to the Davis-Bacon Act and leave little room to argue otherwise.

"Contractor"

The new final rules create a new definition of the term "contractor." There are two items of note here. First, the new regulation expressly includes "any surety that is completing performance for a defaulted contractor pursuant to a performance bond." This is presumably intended to make crystal clear that sureties completing work fully step into the shoes of a contractor and take on full Davis-Bacon Act responsibilities.

Second, "the term 'contractor' does not include an entity that is a material supplier, except if the entity is performing work under a development statute." Once again, DOL is expanding the scope and reach of Davis-Bacon Act regulations for "development statutes" such as the IRA.

"Material Supplier"

While historically defined only in the DOL's Field Operations Handbook (see, e.g., FOH 15e16), the new regulations create a new regulatory definition of the term "material supplier." DOL has chosen a multifactor test, each element of which must be met in order to qualify as a material supplier and not a subcontractor: (1) the only obligation on the project is the delivery of materials, supplies, or equipment; and (2) the facilities that manufacture the materials, supplies, or equipment is not located on the site of the work or a secondary construction site and was established before opening of bids or is not dedicated to working on the specific construction contract or project. To be clear, the new regulations state that if a company that otherwise qualifies as a material supplier "also engages in other construction, prosecution, completion or repair work at the site of the work," then that company is not a material supplier and is, instead, a contractor or subcontractor. The purpose of this new definition appears to create clear and unyielding bright-line rules as to which companies may avoid Davis-Bacon Act compliance requirements as "material suppliers" and set a default that all companies performing work at the site of the work are presumed to be contractors or subcontractors unless they meet this stringent test.

LITIGATION OUTLOOK

The new regulations were published in the Federal Register on August 23, 2023, and have a stated effective date of October 23, 2023. 88 Fed.Reg. 57526. It is very likely, based on the reasons stated throughout this report, that large swaths of the new regulations will be challenged in court before (and after) the October 23 effective date.

In fact, DOL signaled that it is expecting significant legal challenges when it included express "severability" provisions in the regulations. See 29 C.F.R. §§1.10, 5.40. It remains to be seen if DOL can take advantage of its own severability provisions to salvage the remainder of its new Davis-Bacon and Related Acts regulations when specific portions are challenged and potentially struck down. Contractors and subcontractors should be vigilant of impending court challenges and stay up to date on which portions of the new regulations are stayed or struck down. Depending on which portions of the regulations are challenged, there could be significant financial and/or legal implications for contractors and subcontractors.

"Prime Contractor"

The final rules also add a new definition of "prime contractor." In an apparent effort to expand the potential sources for withholding and the number of enforcement targets for DOL, the final rules define a "prime contractor" to include "the controlling shareholders or members of any entity holding the prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, and any contractor (e.g., a general contractor) that has been delegated the responsibility for overseeing all or substantially all of the construction anticipated by the prime contract." The biggest potential concern with this new definition is that it now has the potential to make all individual controlling shareholders and owners personally liable for any alleged Davis-Bacon Act violations. The question of how much ownership does an individual or company need to have in order to be "controlling" will likely be the source of much litigation under the new regulations.

"Public Building or Public Work"

The definition of "public building or public work" was left largely intact, except for an additional phrase at the very end clearly intended by DOL to counteract the U.S. Court of Appeals for the District of Columbia's decision in *District of Columbia v. Dep't of Labor*, 819 F.3d 444 (D.C. Cir. 2016) ("*CityCenterDC*"). In *CityCenterDC*, the appellate court ruled that construction work on District of Columbia land leased to a private developer and to be used for private commercial and residential purposes was not a "public work" subject to Davis-Bacon Act coverage. DOL's new regulation states: "… even where the entire building or work is not owned, leased by, or to be used by a Federal agency, as long as the construction, prosecution, completion, or repair of that portion of the building or work, or the installation (where appropriate) of equipment or components into that building or work, is carried on by authority of or with funds of a Federal agency to serve the interest of the general public," such building is a "public work." It remains to be seen, in this era of decreased *Chevron* deference to agency interpretations and in light of the plain language of the *CityCenterDC* case, whether this new definition of "public work" will survive legal challenge.

DOL ENFORCEMENT TOOLS

Aside from DOL's potentially unchecked expansion of "development statutes," the regulatory changes with the biggest impact on contractors and subcontractors lie in the expanded and more muscular enforcement tools DOL creates through its new regulations.

Recordkeeping

The new regulations contain a variety of recordkeeping revisions and enhancements. There are two that bear special attention here.

First, contractors and subcontractors must maintain and produce (upon request) telephone numbers and email addresses for workers covered by the Davis-Bacon and Related Acts. Most existing DOL regulatory schemes do not require contractors to maintain or produce email addresses. Clearly, DOL wants this information so that it may more easily contact laborers and mechanics when conducting investigations.

Second, contractors and subcontractors must keep all contracts, subcontracts, payrolls, basic records, and certified payrolls for at least three years after all work on the prime contract is completed. This means that subcontractors may need to maintain these records far beyond three years from when they finish their scope of work on a project and instead be mindful of when the overall project is completed for record retention purposes.

Flowdowns

Contractors and subcontractors are still required to "flowdown" all Davis-Bacon Act contract clauses and wage determinations to all lower tier subcontractors subject to the Davis-Bacon and Related Acts. However, while agencies are required to insert the full text of the contract clauses and wage determinations into any prime contracts, contractors and subcontractors may incorporate such clauses and wage determinations "by reference" and that "will be given the same force and effect as if they were inserted in full text." While contractors are now permitted to "incorporate by reference," they should still be careful in how they do so, so as not to test the limits of DOL's newfound reasonableness on this issue.

Omissions of Clauses and Wage Determinations / By Operation of Law

The new 29 C.F.R. § 5.5(e) states that both any required contract clauses and "the correct wage determinations, will be considered to be a part of every prime contract . . . to include such clauses and will be effective by operation of law, whether or not they are included or incorporated by reference into such contract." This is an overt attempt to apply the *Christian Doctrine* through a regulatory mechanism. While the *Christian Doctrine* theoretically could apply to the standard 29 C.F.R. § 5.5 contract clauses or their FAR counterparts, it is unclear how DOL by itself (with or without the *Christian Doctrine)* could mandate the retroactive inclusion of any particular wage determinations

by regulation when the selection of wage determinations requires a degree of discretion on the part of contracting officers and/or the DOL. This regulatory change will likely be the subject of future litigation.

On the plus side, the new regulation makes clear that if contract clauses and wage determinations are retroactively incorporated by operation of law, then "the prime contractor must be compensated for any resulting increase in wages in accordance with applicable law."

Fringes and Related Administrative Expenses

There are several changes related to fringes in the new final rules. Perhaps the most significant (and the only one we'll discuss here) concerns creditable administrative costs. Over the last several years, the DOL has raised questions as to whether fees paid to third-party administrators to administer bona fide fringe plans were creditable against fringes paid to laborers and mechanics. The new final rule adds a new 29 C.F.R. § 5.33, removing all doubt that such costs are creditable, under certain circumstances. Specifically, "[t]he costs incurred by a contractor's insurance carrier, third-party trust fund, or other third-party administrator that are directly related to the administration and delivery of bona fide fringe benefits . . . can be credited." Examples of these creditable costs are premiums paid to third-party administrators where those premiums are used "to pay for bona fide fringe benefits and for the administration and delivery of such benefits, including evaluating benefit claims, deciding whether they should be paid, approving referrals to specialists, and other reasonable costs of administering the plan."

DOL defines non-creditable costs as a "contractor's own administrative expenses (whether performed by a contractor or a third party), such as costs of office employees who perform tasks such a filling out medical insurance claim forms for submission to an insurance carrier, paying and tracking invoices from insurance carriers or plan administrators, updating the contractor's personal records when workers are hired or separate from employment, sending lists of new hires and separations to insurance carriers . . . or sending out tax documents to the contractor's workers."

New Anti-Retaliation Provisions

When Congress originally enacted the Davis-Bacon Act and in each of its recodifications since, the statute did not contain anti-retaliation provisions. In the new final rule, DOL adds new anti-retaliation provisions that appear to be modeled after the anti-retaliation provisions in 29 C.F.R. Part 13 (enforcing Executive Order 13706's paid sick leave requirements) and 29 C.F.R. Part 23 (enforcing Executive Order 14026's federal contractor minimum wage requirements). In short, the new regulations effectively grant DOL the power to investigate and take corrective action with regards to any personnel action taken against any worker or job applicant for reporting any Davis-Bacon Act violations, filing complaints, cooperating in any investigation or compliance action, or informing any other person about their rights under the Davis-Bacon Act.

Other portions of the new regulations expressly grant DOL the ability to hold contractors and subcontractors liable for "monetary damages caused by violations" of the new anti-retaliation

provisions and require payment of daily compounded interest on such monetary damages to "be calculated using the percentage established for the underpayment of taxes under 26 U.S.C. 6621." In other words, DOL has now created a potentially significant monetary "sword of Damocles" hanging over the head of each contractor and subcontractor to compel rapid settlements lest the penalties and interest eclipse the value of any alleged prevailing wage underpayments.

These "new" protections are somewhat duplicative of those already available at 41 U.S.C. § 4712 and other applicable whistleblower protection statutes. None of those statutes (or the Davis-Bacon Act) expressly grant DOL authority to create its own anti-retaliation regime specifically associated with the Davis-Bacon Act. It remains to be seen whether this new regulatory anti-retaliation regime unconnected to the plain language of the Davis-Bacon Act can survive, in whole or in part, likely legal challenges.

New Restitution and Monetary Penalty Tools

Even though not contemplated in the plain language of the Davis-Bacon and Related Acts, DOL has added a new penalty interest provision related to underpayment of prevailing wages and fringes. Specifically, 29 C.F.R. § 5.10 provides that contractors must pay "interest from the date of the underpayment or loss." This interest will be "compounded daily" and "be calculated using the percentage established for the underpayment of taxes under 29 U.S.C. 6621." It remains an open question as to whether DOL can add a penalty interest requirement by regulatory fiat where none exists in the underlying Great Depression Era federal statute. Regardless, until this issue is resolved in the courts, contractors and subcontractors should be very wary of any alleged underpayments and take quick action to identify and rectify any alleged underpayments so as to avoid or mitigate penalty interest payments.

Expanded Withholding of Contract Funds

To facilitate its enforcement efforts, DOL's new regulations make two significant changes in 29 C.F.R. § 5.9 to how and when federal agencies can withhold funds from existing federal contracts to satisfy alleged Davis-Bacon and Related Acts liability.

First, the new regulations authorize the withholding of funds from the contract(s) under which the violations occurred, as well as "any other Federal contract with the same prime contractor…regardless of whether the other contract was awarded or assisted by the same agency."

Second, cross-withholding is authorized "from contracts held by other entities that may be considered to be the same prime contractor." The caveat to this new sweeping power is that such cross-withholding is only authorized "where the separate legal entities have independently consented to it by entering into contracts" containing the new contractual withholding provisions.

It is unclear whether these new provisions could survive legal challenge as the foregoing withholding scheme significantly departs from the plain language of the Davis-Bacon Act itself. *See* 40 U.S.C.

§ 3142(c)(3) ("there may be withheld from the contractor so much of accrued payments as the contracting officer considers necessary to pay laborers and mechanics employed …on the work."). Until such time as these new regulations are challenged, contractors should expect DOL to engage in aggressive cross-withholding to cover any alleged wage or fringe underpayments or any retaliation related damages or compensation.

Debarment

DOL has no apparent intention of "going easy" on any alleged violator of the Davis-Bacon and Related Acts. The last set of changes reflected in the new final rules concerns DOL's ultimate enforcement tool—debarment. Among the debarment-related changes are:

- Setting a uniform standard of "disregard of obligations" as the basis for debarment under both the Davis-Bacon Act and any Related Acts;
- Setting a mandatory three-year debarment period across both the Davis-Bacon Act and the Related Acts;
- Eliminating the possibility of early removal from debarment lists related to Related Acts debarments;
- Expanding the reach of debarment remedies to those persons or entities with an "interest" in any contractor or subcontractor subject to debarment; and
- Expressly authorizing DOL to seek the personal debarment of "responsible officers" of a contractor or subcontractor found to have violated the Davis-Bacon and Related Acts.

Each of the foregoing changes either codifies or expands upon existing DOL debarment remedies to create a far more potent and far-reaching enforcement tool when DOL chooses to invoke the death penalty of federal contracting that is debarment.

KEY TAKEAWAYS

President Biden has repeatedly proclaimed, from the very start of his administration, that he intends to be a pro-union president. In addition, the Biden administration's DOL has been led by a variety of former construction trade union leaders, so it is no surprise that DOL would move forward with a major rewrite of its Davis-Bacon and Related Acts regulations. Given the foregoing emphasis on unionized construction labor and the new final regulations, here are a few key takeaways:

- Contractors should expect prevailing wage rates to rise significantly after the new rules take effect as the new thirty percent rule for calculating prevailing wages and other changes in how prevailing wages are to be calculated take effect.
- Contractors, as well as taxpayers/owners/developers, should pay close attention to how DOL interprets and applies the term "development statute" to the Inflation Reduction Act and other legacy statutes involving federally supported or encouraged construction. DOL's self-granted authority could cause severe problems in the future, depending how DOL chooses to apply its authority to expand Davis-Bacon and Related Acts jurisdiction.
- DOL's new enforcement tools—from new anti-retaliation provisions and daily compounded penalty interest authority to cross-withholding and new robust debarment provisions—grant DOL formidable enforcement powers and put contractors and subcontractors at a procedural and financial disadvantage when facing any DOL audits. These new powers have the potential to all but eliminate contractor challenges to DOL audits for fear of receiving enterprise-threatening penalties and debarment while waiting for the administrative review and appeal process to work itself out over the course of years.
- Finally, it is likely that many of the provisions highlighted above will be challenged in the courts as exceeding DOL's authority and struck down as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedure Act. Contractors and subcontractors should remain vigilant for legal developments and also consult with counsel for situations where it might be beneficial to raise procedural challenges to parts of DOL's new regulations.