

HUB PREVAILING WAGE SOLUTIONS

# Working the Fringe

Prevailing Wage Bona Fide Fringe  
Benefit Plan Strategies for  
Non-Union Workforces

*Updated for new U.S. Department of Labor regulations effective October 2023.*



## Introduction

Construction companies that contract with the government (federal, state, municipalities, school districts, etc.) are subject to a multitude of laws and regulations. Included among them are special requirements that dictate mandatory wage and fringe benefit payments commonly referred to as “prevailing wage regulations.”

The fringe benefit portion of prevailing wage regulations are particularly complicated and, therefore, often misunderstood and misapplied by contractors.

Fringe benefit confusion can lead to:

1. Contractors missing opportunities to bid more competitively;
2. Compliance problems that generate large unanticipated liabilities; and
3. Inferior benefit programs for non-union companies compared to those provided by labor unions.

## History

### DAVIS-BACON ACT (DBA)

The Davis-Bacon Act (DBA) has been a cornerstone of labor law in the United States since its establishment in 1931, ensuring workers on federally funded construction projects receive fair wages and benefits. The DBA applies to federal government contracts in excess of \$2,000 for the construction, alteration, or repair of public buildings and public works. The U.S. Department of Labor (USDOL) determines what is “prevailing” in the location of a given federal contract and requires those rates be paid to any mechanics or laborers working on job sites.

**On August 8, 2023, the USDOL published a final rule titled “Updating the Davis-Bacon Act and Related Acts Regulations” that set forth rules for the administration of the law which became effective on October 23, 2023.**

DBA prevailing wage requirements are applicable in numerous other statutes such as the National Housing Act, Federal-Aid Highway Act and, most recently, the bipartisan Infrastructure Investment and Jobs Act, among others.

## State Prevailing Wage Laws and Regulations

Currently 28 states and the District of Columbia have prevailing wage-type laws and regulations affecting companies that contract directly with the state or local governments for construction or service-type contracts.

**Contractors are strongly encouraged to consult with their advisors if they have questions about prevailing wage rules in the states in which they work.**

## Bona Fide Benefit Plan Legal Requirements

The DBA prevailing wage rate is made up of two components — an hourly wage rate *and* an hourly fringe benefit rate. The total of both rates listed in a wage determination of the contract comprise the DBA prevailing wage requirement for a given worker’s classification.

A contractor’s prevailing wage obligation under DBA or state laws may be met by any combination of cash wages and creditable “bona fide” fringe benefits provided for a covered worker.

### COMMON FRINGE BENEFITS CONSIDERED BONA FIDE:

- Health insurance
- Dental insurance
- Life insurance
- Disability insurance
- Pension / retirement plan
- Apprenticeship training
- Vacation
- Holidays
- Sick leave
- Supplemental unemployment

### BENEFITS NOT CONSIDERED BONA FIDE:

- Use of company vehicle
- Tools
- Uniforms
- Cellular phone
- Travel expenses
- Holiday bonus
- Federal or state mandated paid time off
- Any statutory benefits such as:
  - Workers’ compensation
  - Unemployment compensation
  - Social security contributions

## Types of Fringe Benefit Plans

All fringe benefit plans fall into two categories: “funded” (29 C.F.R. §§ 5.26-5.27) or “unfunded” (29 C.F.R. § 5.28).

**Funded plans** are those where the contractor’s fringe benefit contributions are made irrevocably to a trustee or independent third party pursuant to a bona fide fringe benefit fund, plan, or program on a regular basis. These contributions can be credited towards meeting the prevailing fringe benefit requirement without prior USDOL approval. Examples of funded payments by contractors that can be credited include:

- Contractor makes weekly contributions to a health and welfare plan or trust for the provision of benefits (health insurance, vacation pay, apprentice training, supplemental unemployment, etc.);
- Contractor makes quarterly contributions to a retirement plan trust; or
- Contractor pays monthly health insurance premiums to an insurance company.

**Unfunded plans** or programs are where the contractor funds certain benefits from the company’s general assets rather than by payments to a trustee or third party. Vacation and holiday benefits are the most common types, but it is also common for self-insured medical plans to be unfunded.

## U.S. Department of Labor Approval for Unfunded Plans

The USDOL noted in the new rules, effective October 2023, that for payments made as part of an unfunded plan or program to be credited as fringe benefits, contractors must submit a written request to the Secretary of Labor for approval of the unfunded plan or program.

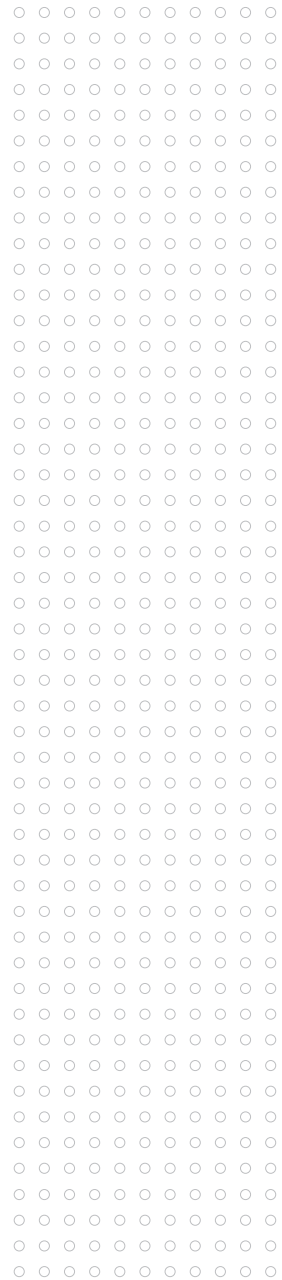
### **DETERMINATION OF WHETHER AN UNFUNDED PLAN MEETS THE STATUTORY AND REGULATORY REQUIREMENTS IS COMPLICATED.**



## Potential Complexities and Solutions

Unfunded medical plans are, by far, the most complex in terms of administration and recordkeeping. Determining the cost of coverage involves a multitude of variables such as continuous claims for medical and pharmacy care, plan administration, stop-loss insurance, and other factors. These costs must be allocated to each employee in a non-discriminatory manner for it to be credited towards the fringe benefit requirements of the DBA, and must also comply with other laws such as ERISA.

One potential solution to simplify administration and eliminate the need for approval is for contractors to convert unfunded plans to funded plans. Unfunded plans can be converted to funded plans by adopting an irrevocable trust fund managed by an independent trustee or third party pursuant to a fund, plan, or program.



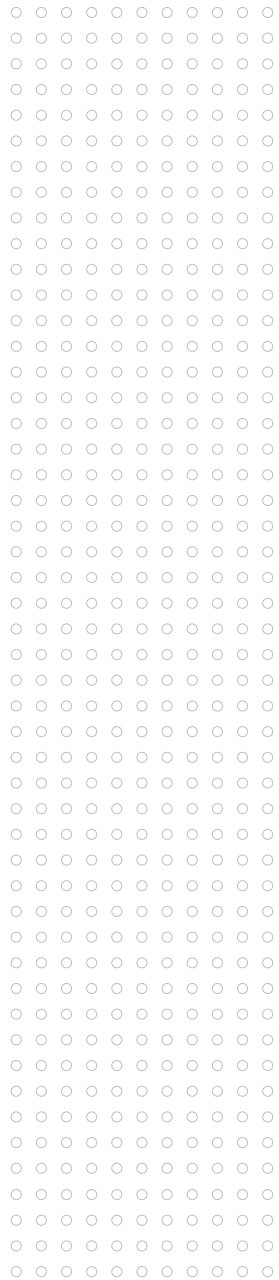
## Annualization

Annualization is a method used to calculate the hourly rate of contributions to bona fide fringe benefit plans or reasonably anticipated costs of an unfunded benefit plan. It is one of the most commonly misunderstood concepts in the DBA and state laws. However, knowledge about how annualization works and how it affects contractors' financial obligations for benefit plans is critical for all businesses engaged in public work.

## How is it Calculated?

To annualize the cost of providing a fringe benefit, a contractor must divide the total cost of the fringe benefit contribution, or the reasonably anticipated costs of an unfunded benefit plan, by the total number of hours worked on both DBA projects and private, non-DBA projects during the time period to which the cost is attributable. This will determine the rate of contribution per hour, and **this calculation needs to be done for each individual worker.**

In instances where the creditable rate of contributions is less than the required prevailing rate, the difference must be paid to the worker as additional wages.



## Exemptions from Annualization

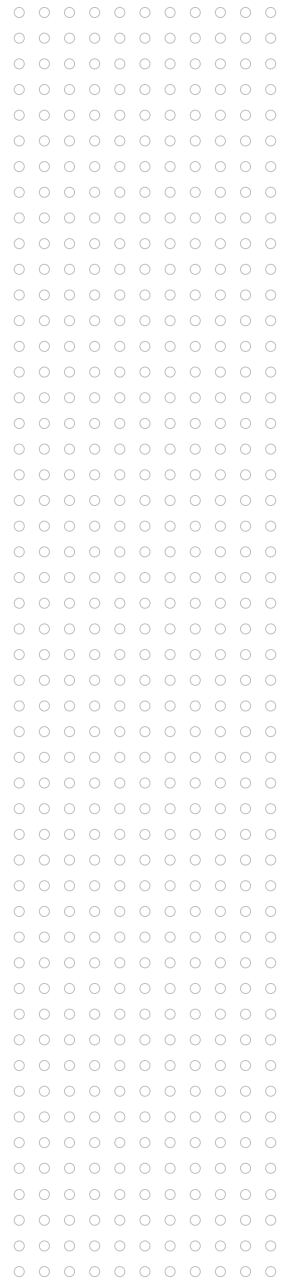
The DBA, and most states, exempt annualization for contributions made to a defined contribution pension plan that provides for immediate participation and essentially immediate vesting (e.g., 100 percent vesting after working 500 or fewer hours).

## Potential Complexities and Solutions

Complying with annualization can be quite complicated. Contractors who strategically design benefit plans that leverage the full cost of their fringe benefit plans to maximize allowable credit will have an advantage in the marketplace.

Combining bona fide health and welfare benefit plans along with annualization-exempt defined contribution pension plans is often an effective strategy.

Experienced third-party administrators, such as HUB Prevailing Wage Solutions, can provide the tools necessary to manage these programs in a compliant and efficient manner.

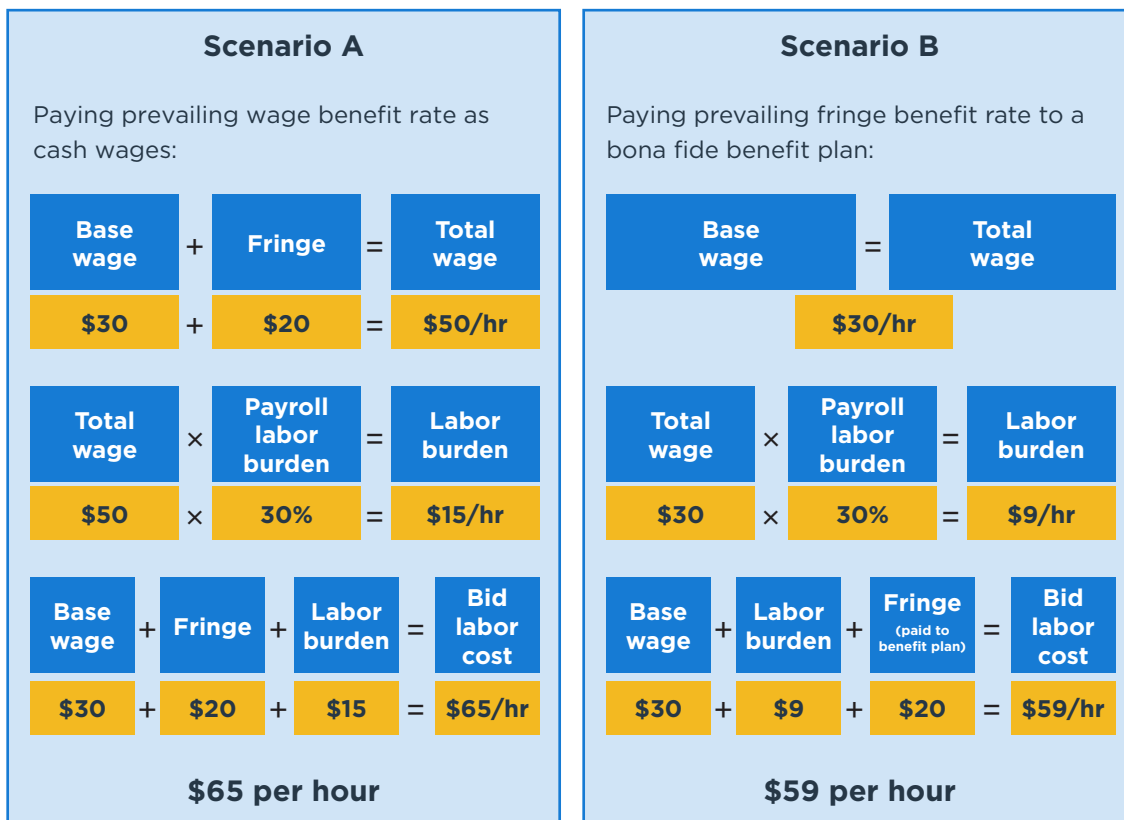


## Bona Fide Benefit Plan Tax Advantages

Contractors can choose between providing prevailing fringe benefit rates as additional cash wages or bona fide benefits. The cost of paying the fringe rate as cash can be expensive since they are subject to payroll taxes and insurance premiums such as FICA, unemployment taxes, workers' compensation premiums, etc. These costs are typically referred to as "labor burden" and can range between 15%–40% of payroll.

Contributions of the prevailing wage fringe benefit rate to bona fide benefit plans, however, are not subject to labor burden costs because **they are not wages**. They are treated as employer contributions to company benefit plans, not employee contributions or salary deferrals.

**THIS TAX ADVANTAGE CAN CREATE A VERY LARGE SAVINGS TO CONTRACTORS WHICH CAN RESULT IN MORE COMPETITIVE BIDDING.**



In the above example, a contractor would save \$6 per hour, or over 9%, by contributing the fringe benefit portion of the prevailing wage to a bona fide benefit plan. If this contractor has 100 employees each working 2,000 hours in a year, the company's annual savings would be \$1.2 million.

Employees also achieve significant savings since contributions to bona fide benefit plans defer (for retirement plan benefits) or avoid (for insurance premiums) income-based taxes.

## Factors That Affect Strategy

### Amount of work subject to prevailing wage law:

- The amount of money you can save in labor burden expenses and how that savings can translate to more successful bidding.
- The amount of money available to fund benefits.



### Demographics, culture, and seasonality:

- How is your workforce organized?
- Frequent turnover vs. long-term team.
- Do employees work all year or is there a seasonal layoff?



### Existing benefit plan structure:

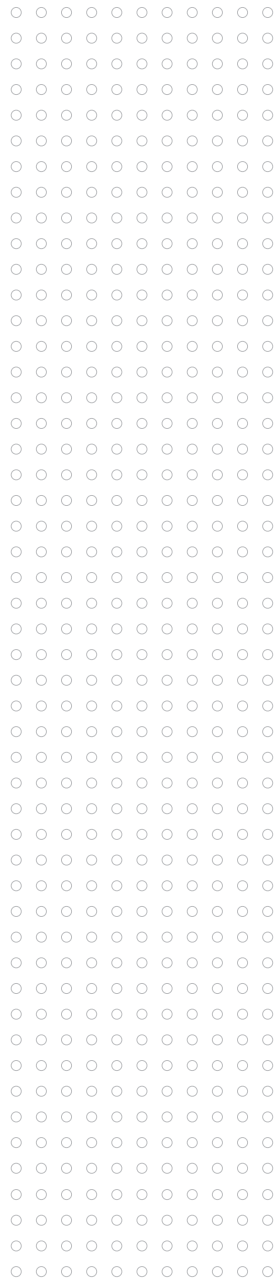
- Creative design may be able to complement what is already in place.
- Employee cost sharing.



## TIPS



- A contractor may only take credit for their cost of benefits, not for any contributions an employee makes towards the cost of their own benefits.
- When calculating credit for self-insured medical plans, costs including claims, stop-loss premiums, administration, etc. must be allocated across all participating employees in a non-discriminatory manner.
- If taking credit for unfunded benefits such as vacation pay, the vacation program must be submitted and approved by the USDOL. The program or policy must be in writing and given to all employees such as within an employee handbook.
- When calculating the number of hours an employee will work in a given year, it is permissible under the DBA to look to the preceding year to determine what is a representative normal work year. When benefits are paid on a monthly basis, such as health insurance, it is permissible to look back to the prior month to determine the number of hours that is representative of a normal work month.
- Investigations and inquiries from regulators are common regardless of how a prevailing wage benefit program is structured. Careful accounting and the proper supporting documentation are critical to minimizing disruptions from regulatory bodies.



## How We Can Help

HUB Prevailing Wage Solutions provides bona fide benefit plan consulting and third-party administrative services to non-union construction companies subject to the Davis-Bacon Act and state prevailing wage regulations. Our solutions are free from any conflict of interest as we are product agnostic. We work with existing agents, brokers, and insurance companies.

Contact one of our **HUB Prevailing Wage specialists** to help you navigate the complexities of these requirements.



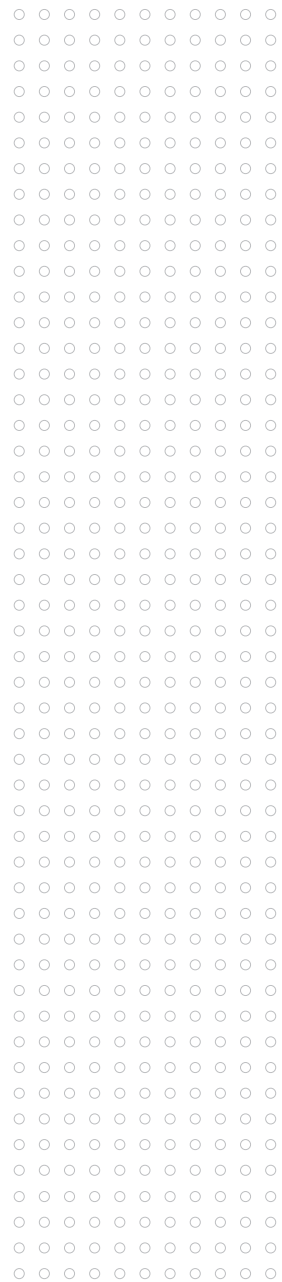
**Jeff Bennett, AIF<sup>®</sup>, MBA**  
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Jeff is an authority in retirement and employee benefit programs designed to comply with prevailing wage regulations. He consults on plan design for both health and welfare programs and retirement programs for non-union construction companies throughout the United States. He works closely with his team to ensure that the administration of benefit programs are integrated with all regulations to ensure seamless compliance. Jeff is an Accredited Investment Fiduciary (AIF) and a former human resources director for a large electrical contractor.



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Tom is a specialist in plan design and fiduciary investment management. For more than 25 years, he has provided insights and guidance to commercial enterprises subject to prevailing wage regulations. Tom is an Accredited Investment Fiduciary (AIF) and Certified Plan Fiduciary Advisor (CPFA). He is also an active board member of the Empire State Chapter of the Associated Builders and Contractors.



# Unlock the power of fringe benefit plans with HUB Prevailing Wage Solutions.

Navigating the complex world of prevailing wage regulations can be a challenge, especially when it comes to the fringe benefit requirements. Non-union contractors can face costly mistakes due to misunderstanding of these laws. Our insights help you better understand how prevailing wage affects your business, while our solutions enable your adherence to government regulations and your ability to remain competitive.

For more information on how to unlock the power of fringe benefit plans, contact a HUB Prevailing Wage specialist.

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