

# U.S. Department of Labor Rescinds Trump-Era Joint Employer Rule

On July 29, 2021, the U.S. Department of Labor (DOL) announced that it was rescinding the Trump-era rule on joint employer liability. In broad terms, joint employer liability exists when more than one employer is liable to an employee for wages and other benefits established by the Fair Labor Standards Act (FLSA). The Trump-era rule dramatically narrowed joint employer liability, making it harder for employees to make claims for owed wages against other employers higher up the subcontracting or franchising chain.

In reversing the Trump-era rule, DOL noted that it had gone against more than 80 years of agency interpretation of the FLSA and had very little basis among the nation's federal judiciary. Rather than applying the broader and more standard "economic realities" analysis for joint employment, the Trump administration's rule dramatically narrowed the analysis to a set of four factors looking at an employer's *exercise of control* over an employee. Previously, DOL's analysis of joint employment included whether an employer *reserved the right of control* over employees. The 2020 rule removed this element of the analysis and solely focused on the actual exercise of control. In practical terms, under the 2020 rule an employer could tell an employee what to do, when to do it, where to do it, but just not how to do it. This would allow the employer enough control to call the shots, yet avoid legal responsibility.



The Trump administration's joint employer rule was favored by business groups that often rely on subcontracting arrangements with labor brokers as a core component of their business model. The 2020 rule made it easier for employers engaging with labor brokers to avoid liability if the broker failed to pay or otherwise mistreated its employees. In the construction industry the presence of labor brokers is on the rise, as unscrupulous contractors increasingly search for more vulnerable and exploitable labor. The 2020 rule limiting joint employer liability would

have further opened the door for these contractors to exploit workers and turn a blind eye to wage theft. Therefore, in rescinding the 2020 rule DOL stated that it, "would have made it more difficult for workers to collect back wages owed and incentivized workplace fissuring, which are serious concerns that may have a disproportionate impact on low-wage and vulnerable workers."

The final rule rescinding the Trump administration's joint employment rule will take effect on Sept. 28, 2021.

## Renewed Focus on Davis-Bacon

As the infrastructure bill inches toward possible passage there has been renewed focus on federal prevailing wage standards. As of this writing, the infrastructure bill does not carry any stand-alone Davis-Bacon requirements in the section of the bill outlining private-sector investments. However, that could be a subject for debate as the bill moves forward. Nonetheless, federally funded projects to repair much of the nation's infrastructure would carry existing Davis-Bacon requirements. This has placed a renewed emphasis on Davis-Bacon enforcement, which has not been a high priority for DOL in recent years. But the DOL is reportedly preparing to prioritize enforcement in the event a significant infrastructure bill is indeed passed. A spike in Davis-Bacon enforcement would be consistent with temporary boosts in federal spending in the past, such as the American Recovery and Reinvestment Act of 2009.

It remains to be seen whether DOL will receive any additional resources necessary to ramp up enforcement. More tax dollars and more federally funded construction leads to more opportunities for cheaters in public construction. It's logical that more enforcement will be needed.

Meanwhile, FCF will work with all of you to monitor federally funded projects in Minnesota. Because when it comes to wage laws, organized labor is the first step toward organized enforcement.



Credit: FCF-Vince Muzik



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## Union trades workers install beams on a bridge over Interstate Highway 90 near Adrian, MN.



John Moen of Iron Workers Local 512 works to place a 61,000 lbs. beam over Interstate Highway 90 near Adrian, MN.

Photos: FCF-Vince Muzik

## Minnesota State Highway/Heavy Wage Rates

New Highway/Heavy Wage rates were published in September 2020, and we are expecting new rates again in September 2021. Please check these rates when they are published and contact MnDLI or FCF if you have questions.

To check the wage rates go to: <https://www.dli.mn.gov> and search for 'Wage Rates'

To get on the e-mail list to be notified when new rates are published or changed, go to: [https://public.govdelivery.com/accounts/MNDLI/subscriber/new?topic\\_id=MNDLI\\_25](https://public.govdelivery.com/accounts/MNDLI/subscriber/new?topic_id=MNDLI_25)



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## Federal Prevailing Wage Rates (Davis-Bacon Wage Rates)

Instead of waiting until bidding on a federal project, we encourage checking the wage rates at least once per year for the counties and types of work of interest.

Union contractors are sometimes shocked when they see a Davis-Bacon rate in a county for a federal project that is not a current CBA rate. Sometimes the rate will appear too high because the rate is the CBA rate from another county, and sometimes it will appear too low, making it difficult to bid competitively.

All Davis-Bacon Wage Rates are determined by survey. The federal survey rules are more complicated than those used for the Minnesota State Prevailing Wage Survey, resulting in rates that can be much different than the state prevailing wage rates.

Anyone involved in federal projects should be familiar with the wage determinations published online. Those wage rates can be found at:

<https://sam.gov/content/home>

For additional information regarding the Davis-Bacon Act, regional contacts, and more, go to:

<https://www.dol.gov/agencies/whd/government-contracts/construction>

Please call FCF if you have additional questions regarding Federal Wage Determinations. Or call one of the Federal DOL contacts for Minnesota.



## National Highlights

- **Prevailing Wage takes effect in Virginia** – On May 1, Virginia became the most recent state to apply Prevailing Wage requirements to state-funded projects more than \$250,000. Virginia is one of only nine states that never had a prevailing wage law in its history. While this legislation initially passed April 2020, its implementation was delayed for a year due to COVID-19. This is a huge win for the union construction industry, and it shows what can be accomplished when the building trades and signatory contractors work with lawmakers to protect and enhance labor standards.
- **Largest Prevailing Wage criminal case in U.S. history** – On August 3, Glenn O. Hawbaker Inc., a Pennsylvania contractor, pleaded no-contest to four counts of theft of worker pay. The company will pay \$20.7 million to 1,267 workers for a years-long scheme that involved skimming fringe benefits from workers on state prevailing wage projects in order to pay retirement benefits for the company's other workers (including the owner and executives) who did not work on those projects. This was the single largest prevailing wage criminal case in both Pennsylvania and U.S. history.
- **Another bipartisan defeat of Right-to-Work** – On June 3, New Hampshire became the most recent state to reject a Right-to-Work law. The NH House voted 199-175 against the bill, including all Democrats and 20 Republicans. This marks the third time since 2011 that the state has rejected Right-to-Work legislation. This most recent success, as well as the vote against Right-to-Work in Montana earlier this year, shows the continued importance of building trades advocates engaging with lawmakers on both sides of the aisle to educate them about critical labor issues.

## Minnesota Building Trades' Convention Spotlight



Credit: FCF-Vince Muzik

FCF presented at the 2021 Minnesota Building & Construction Trades Convention at Madden's in Brainerd. As this is the 10-year anniversary of FCF's founding, we used the opportunity to look back at how Prevailing Wage compliance has evolved since the Great Recession, and highlighted some of the most important cases and results. We also looked at how the organized labor landscape has changed since the Great Recession. In many other parts of the country, labor standards have been under significant political attack, with traditionally pro-labor states passing Right-to-Work laws and repealing prevailing wage. However, these actions galvanized labor advocates to redouble their efforts at persuading lawmakers on both sides of the aisle that labor standards are in fact beneficial, not only to workers, but to states' economies at large. While there are still significant headwinds facing organized labor in this new decade, there is cause for optimism that advocacy works. Finally, we looked ahead to emerging compliance issues that will continue to challenge the high-road construction industry in the years ahead. Specifically, independent contractor misclassification continues to grow across many industries. And the growth of public-private partnerships (P3s) will make enforcement of labor standards more difficult, as public oversight on projects becomes further attenuated. All of this is to say that, while nothing comes easy in the construction industry, we can still achieve great things when workers and contractors work together to push for high-quality laws and regulations to sustain a healthy construction industry. We are very excited for what the next 10 years will bring!

## The Dawn of a NEW Construction Era

"Once in a generation investment in our infrastructure," is how it has been described. The U.S. Senate's bipartisan passage of the infrastructure bill brought 19 Republicans onboard with all 50 Senate Democrats to advance this monumental piece of legislation to the House of Representatives, where it is expected to pass. It is the most significant investment in our infrastructure in nearly a century.

Hopefully, by the time you read this newsletter, the 2,700-page bill will become law. Then the U.S. construction industry can get to work for years on these projects:

- Roads, bridges & projects - \$110 Billion
- Public transit - \$105 Billion
- Clean energy infrastructure - \$73 Billion
- High-speed internet - \$65 Billion
- Clean drinking water - \$55 Billion
- Airports - \$25 Billion
- Environmental remediation - \$21 Billion
- Ports & waterways - \$17 Billion

Every construction craft will see an increase in work opportunities across the country if this bill passes. The JATC programs will likely increase apprentice enrollment. Contractors will see bidding opportunities on big projects in record numbers. Hiring halls will be scrambling to fill vacancies, as new ground is broken. And FCF will strive to do its part to enforce Minnesota standards upon which a generation of construction workers will reap the benefit. If it sounds too good to be true, let's remember that it started with a rare phenomenon to begin with: it needed Democrats AND Republicans to pass the Senate. Born of a miracle!

## Publication Of New Prevailing Wage Rates And CBA Increases

New Minnesota prevailing wage rates, whether for Commercial or Highway/Heavy work, are determined by survey and updated each year. If a certified rate is a CBA rate, an issue arises as to whether the allocation of the increase between base and fringe has been determined.

If the allocation between base and fringe has not been determined at the time of certification, the entire increase will be put on the base pay. This has ramifications for overtime, which is calculated using the prevailing wage base wage, not the CBA base wage. **It is MnDLI's policy not to adjust any allocations until the next time wage rates are certified.** Each year FCF receives several calls questioning why the increase went all to the base pay. The reason is that the allocation was not known at the time the new prevailing wage was set, and MnDLI policy allocates all the increase to base pay and no mid-year adjustments to the allocation.

## Mankato Trades Bootcamp

For the second consecutive year, high school students from the South Central region of Minnesota got an opportunity to gain real-world, hands-on experience in the construction trades at the South Central Construction Trades Boot Camp. Over the course of two weeks in late June at Mankato West High School, students did a daily hands-on, day-long, trades-specific project led by one of the trades instructors. Eight trades participated, including the cement masons, carpenters, millwrights, painters and glaziers, electricians, operators, bricklayers, and laborers. On the final day the students traveled to the IUPAT training center in Little Canada for a graduation ceremony and to check out where union building trades apprentices get their training.

Caleb Watson, the head tech instructor at Mankato West, said this year's group "has been phenomenal. The instructors told me every day they've come in and worked hard the whole time."

Alli Westra-Smith, a student at Minnesota New Country School in Henderson, Minn., heard about the camp from a friend whose mom teaches at the school. She knew nothing about jobs in the union building trades and thought the boot camp would be a great way to learn. "I love it. There're some things I love more than others. Some things feel more like work than fun, like doing destructive stuff," she joked. "But I really like it. I think it's very rewarding work."



Alli Westra-Smith of New Country School in Henderson, Minn., saws through concrete as Stacey Karels of Laborers Local 563 sprays water.

Last year the trades boot camp was a pilot program offered just to Mankato-area schools. This year it was expanded to the entire region according to Heather Gleason, executive director of the South Central Workforce Council. Funding was provided by a one-year career exploring grant (MNRAE) from the Minnesota Department of Labor & Industry.

"We are going to have to tweak it (the program) going forward," Gleason said. "We have some different ideas on how to do it. The trades have been very supportive of the program. It's been very well received."