primarily benefits test, is used to determine whether employee-incurred lodging and meal costs are primarily for the benefit of the employee or contractor. Then, deciding upon whether such costs primarily benefits the contractor or employee, then the contractor either must reimburse an employee for such costs or must show that they customarily furnish such lodging and meal costs.

Current Law on Payment of Lodging and Meal Expenses

The Davis-Bacon Act (DBA), 40 U.S.C. §§ 3141-3148, and its implementing regulations in 29 C.F.R. Part 5, require that laborers and mechanics receive prevailing wages and fringe benefits unconditionally and without deduction. 40 U.S.C. § 3142(c)(1). ("unconditionally . . . without subsequent deduction or rebate . . . "). The DBA regulations state that "laborers and mechanics … will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate … the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination." 29 C.F.R. 5.5(a)(1). General wage determinations impose prevailing wage and fringe rates based on the location of the construction project, not based on where the construction contractor's employees performing the work may make their permanent residences.

Neither the DBA nor any general DBA wage determination mentions that contractors have a duty to pay their employees' actual or reasonable lodging and meal expenses when they work at remote DBA-covered construction sites. There is little mention of the subject in the DBA regulations. For example, the implementing regulations only state that per diem payments "normally" do not qualify as a fringe benefit for which a contractor may take credit toward meeting DBA prevailing wage obligations. (While each situation must be separately considered on its own merits, payments made for travel, subsistence … are not normally payments for fringe benefits."). 29 C.F.R. 5.29(f).

US DOL/WHD does have and has had a provision in its Field Operations Handbook (FOH) DBA Chapter for many years that addresses board, lodging and transportation costs. It reads as follows:

> Where an employer sends employees who are regularly employed in their home community away from home to perform a special job at a location outside daily commuting distances from their 2.9(de)4.0(u-3.0(.)-250.09hFng)--2.0(t)-2..9(ut)-2..0(i)-2.0(r)-4qa(he)4.d

FOH par. 15f19 (Oct. 25, 2010). This same "special job" language appeared in the prior version of the DBA chapter in the FOH as paragraph 15f18, dated June 29, 1990, and rarely has been challenged by contractors. The FOH is viewed as internal guidance issued by US DOL/WHD to instruct investigators on various enforcement positions for conducting investigations as well as interpretive assistance for employers and employees. A court will not blindly follow the FOH when reviewing a DBA lodging and meal expense case, but there is a presumption that it can provide useful and potentially persuasive guidance on a particular DBA subject. *William J. Lang Land Clearing, Inc.*, 520 F.Supp.2d 879 (E.D. Mich. 2007).

In the *Lang* case, the court upheld an ARB lodging and food expense ruling. The ruling involved remote DBA projects, applied the FOH "special job" provision noted above, and refused to permit a contractor to pay less than the governing DBA wage and fringe rates to take into account the actual cost of employer-provided board and lodging. Significantly, the contractor chose to pay the employees' remote lodging and meal expenses "rather than increase the pay for its employees while they were out of town," and the employees testified that had the company not reimbursed them that "they would have quit." 520 F. Supp.2d at 881.

Construction companies should understand also that there is no legal distinction between making a deduction of a cost from an employee's wages and shifting or transferring that cost to

employer's employee. 29 U.S.C. § 203(m). The FLSA regulations that define the term "reasonable cost", however, state that where the facilities, which would include board and lodging, are found to be primarily for the benefit or convenience of an employer, then the cost of furnishing such facilities is not reasonable and may not be included in the computation of an employee's wage. 29 C.F.R. §531.3(d)(1). Since the reasonable cost of facilities that primarily benefit the employer cannot constitute part of wages, then it cannot be shifted to the employee to bear either or it would constitute an impermissible deduction.

US DOL/WHD's Enforcement Policy

a. Weeks Marine Case

The issue over the payment of per diems by contractors to reimburse an employee for their lodging and meal expenses has been lurking in US DOL/WHD's enforcement practices but has not gained much traction until the investigation of Weeks Marine, Inc., and the DBA beach replenishment project it performed at Fire Island in New York during late 2007 and early 2008. In the *Weeks Marine* case, the company used unionized employees who did not live within a commuting distance of the project and these employees, who were employed seven days a week on the project, arranged for their own lodging by renting hotel rooms, etc. Weeks Marine did not reimburse most of these employees for their lodging costs, with one or two exceptions. There was a collective bargaining agreement (CBA) in place which obligated Weeks Marine to pay these away-from home employees working on the Fire Island beach replenishment project a travel allowance of $250 each way and a $35 per diem subsistence stipend ($245 per week) to cover, lodging, board and other costs. This per diem subsistence did not cover the lodging and meal costs for these union employees and they paid the difference in the lodging and meal costs out of their pockets.

Beginning in January, 2008, US DOL/WHD conducted an investigation of the Weeks

December 16, 2015

DOL/WHD's apparent lodging and meal reimbursement enforcement position. Another approach could be for a contractor to provide lodging and meals and deduct the "reasonable" costs from employees' weekly DBA prevailing wages. Under this scenario, the result of the primarily benefits test must show that these expenses primarily benefit a contractor's employees and that it (or competitors) customarily furnishes such lodging and meal costs on projects outside the commute area from employee's residences.

If the contractor plans to hire employees from outside a normal commute from their residence, then the contractor may want to investigate available lodging within commuting distance and negotiate rates. Contractors may want to examine other living options or alternatives in order to prescribe dictate the living arrangements.

Another possible strategy would be for a construction company to continue to pay its employees at least the prevailing wage and fringe benefit rates required by the wage determination applicable to the project without reimbursing employees for their remote lodging and meal costs beyond any per diem the company may have in place while awaiting the outcome of the *Weeks Marine* litigation. In addition, the contractor could formally advise the contracting officer in advance that the firm will seek adjustment relief if it is required to absorb employee lodging and meal expenses. Should Weeks Marine prevail in its challenge, a contractor would be considered to have paid its employees "unconditionally" at or above the prevailing rate and without "subsequent deduction" and, therefore, should be found DBA compliant. On the other hand, should US DOL/WHD prevail, the contractors would need to re-evaluate their pay practices. Regardless, it will be important to reevaluate any interim compliance approach as soon as there is a final agency ruling in the *Weeks Marine* case.

ABR:dhpsd