


STATE OF NEW HAMPSHIRE

Inter-Office Memorandum

Date: April 22, 2009

  
**FROM:** Anthony I. Blenkinsop      **AT (OFFICE):** Department of Justice  
Senior Assistant Attorney General

**SUBJECT:** RSA 277:5-a

**TO:** Martin Jenkins, Esq., New Hampshire Department of Labor

**CC:** File

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I write in response to your email inquiry of April 9, 2009, requesting advice on the proper interpretation of RSA 277:5-a. You asked four questions:

- 1) To what projects does the statute apply?
- 2) Who is subject to the monetary civil penalty?
- 3) When do the civil penalties/fines begin accruing?
- 4) What is the meaning of section IV(d) of the statute?

Like the New Hampshire Supreme Court, “[w]hen interpreting statutes, we look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning.” State v. Duran 158 N.H. 146, 155 (2008) (citing to DaimlerChrysler Corp. v. Victoria, 153 N.H. 664, 666 (2006)). “We do not pick and choose those portions of the language we find controlling and subvert those we do not; we read the statute as a whole.” See id. “We will neither consider what the legislature might have said nor add words that it did not see fit to include.” Id. “Nor will we interpret statutory language in a literal manner when such a reading would lead to an absurd result.” Duran, 158 N.H. at 155 (citing to Great Traditions Home Builders v. O’Connor, 157 N.H. 387, 388 (2008)).

I shall respond to each of your questions in turn.

1) To what projects does the statute apply?

RSA 277:5-a, I states that “[a]ny person signing a contract to work on a construction, reconstruction, alteration, remodeling, installation, demolition, maintenance, or repair of any public work or building by a state agency, municipality, or instrumentality thereof, and with a total project cost of \$100,000 or more, shall have an Occupational Safety and Health Administration (OSHA) 10-hour construction safety program for their on-site employees.” Section I goes on to state that “[t]his section shall apply to the construction, reconstruction, alteration, remodeling, installation, demolition, maintenance, or repair of

any public work or building paid for in whole or in part with state funds.” You have inquired whether both conditions have to be met for the statute to apply, or whether the conditions are independent of one another and the statute applies if either is met.

We interpret the statute to require both conditions to be met for the project to be covered. While the statute requires training for on-site employees on projects involving the specified type of work on any public work or building by a state agency, municipality, or instrumentality thereof with a total project cost of \$100,000 or more, it goes on to qualify this, stating that it applies to projects “paid for in whole or in part with state funds.” The provision regarding state funding modifies the types of projects covered. Therefore, training is required for on-site employees on projects involving the specified type of work on any public work or building by a state agency, municipality, or instrumentality thereof with a total project cost of \$100,000 or more, only if the project is paid for in whole or in part with state funds.

If the provisions were instead interpreted to be independent of one another, the provision regarding state funding would be superfluous, since all public works or buildings constructed using state funds would already be covered by the first provision. “Basic statutory construction rules require that all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words.” Appeal of Derry Education Assoc., 138 N.H. 69, 71 (1993) (internal quotations omitted). As such, it makes more sense to read the provisions together to exclude otherwise qualified projects that do not rely in whole or in part on state funding.

## 2) Who is subject to the monetary civil penalty?

It is clear that the person signing the contract (i.e. the employer) is subject to the monetary civil penalty. The plain language of RSA 277:5-a, III states that “[t]he commissioner may also assess a civil penalty of up to \$2,500; in addition, such an **employer** shall be assessed a civil penalty of \$100 per employee for each day of noncompliance.” (Emphasis added). By use of the term “such an employer,” the second clause regarding the assessment of a daily penalty clearly refers back to the first clause concerning the discretionary penalty. As such, it is the employer that is subject to both penalty provisions. Use of the term “employer” is also consistent with paragraph II wherein the employer can provide proof of documentation of the employee having completed the OSHA course. It is also clear that the “employer” is the individual or entity signing the contract as paragraph I refers to the “employees” as being employed by the person signing the contract. Furthermore, labor statutes generally set fines against employers, not employees. Therefore, such an interpretation is consistent with the overall statutory scheme.

## 3) When do the civil penalties/fines begin accruing?

The monetary civil penalty accrues from the date the employee without proper training begins work on the covered project. The plain language of RSA 277:5-a, III states that there shall be a civil penalty for each day of noncompliance. As employees are required to complete the training program prior to starting work on the project (see RSA 277:5-a, I), noncompliance would begin when an employee that had not completed training starts

work on the project. The language of RSA 277:5-a, II bolsters this view, wherein an employee has fifteen days from the date he/she is found to be in noncompliance to complete the training program. Clearly, the Legislature understood the difference between the date noncompliance begins (i.e. section III) and the date noncompliance is discovered or found (i.e. section II), and chose to have the civil penalty accrue from the date noncompliance begins. Furthermore, the fifteen-day period from the discovery of noncompliance in section II only applies to the grace period for an employee to receive his/her training and does not act to toll the penalty commencement under section III.

4) What is the meaning of section IV(d) of the statute?

Section IV exempts certain classes of individuals from the training requirement. Subsection (d) exempts “[a]ll individuals who are not considered to be on the site of work under the federal Davis-Bacon Act, including, but not limited to, construction and non-construction delivery personnel and non-trade personnel.” We do not interpret this exemption to mean that this law only applies to workers who are also subject to the Davis-Bacon Act. Rather, the exemption merely incorporates the Davis-Bacon Act definition of “on the site of work” in exempting certain employees, regardless of whether the Davis-Bacon Act applies to the project.

Interpreting the statute as applying to only projects covered by the Davis-Bacon Act would lead to an absurd result. Specifically, as Davis-Bacon only applies to federally funded projects in New Hampshire, the provisions of paragraph I regarding applicability of the statute (i.e. state funded state and municipal projects) would be greatly constrained, if not entirely mooted, by such an interpretation. See Appeal of Ashland Electric Department, 141 N.H. 336, 340 (1996) (finding that it cannot be presumed that the legislature would pass an act leading to an absurd result and nullifying to an appreciable extent the purpose of the statute). As such, RSA 277:5-a, IV(d) exempts individuals from the requirements of the safety training if they would not be considered to be on the site of work under the Davis-Bacon Act, even if the Davis-Bacon Act does not apply to the project. See 29 CFR 5.2 (I) (defining “site of work” under Davis-Bacon Act).

I trust this is responsive to your inquiry. Should you have further questions, please do not hesitate to contact me.



April 22, 2009

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---DISCLAIMER---

**CFR** Code of Federal Regulations Pertaining to ESA↳ **Title 29** Labor↳ **Chapter I** Office of the Secretary of Labor↳ **Part 5** Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Covering Contract Work Hours and Safety Standards Act)↳ **Subpart A** Davis-Bacon and Related Acts Provisions and Procedures

## 29 CFR 5.2 - Definitions.

- **Section Number:** 5.2
- **Section Name:** Definitions.

(a) The term Secretary includes the Secretary of Labor, the Deputy Under Secretary for Employment Standards, and their authorized representatives.

(b) The term Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or authorized representative.

(c) The term Federal agency means the agency or instrumentality of the United States which enters into the contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to the project subject to a statute listed in Sec. 5.1.

(d) The term Agency Head means the principal official of the Federal agency and includes those persons duly authorized to act in the behalf of the Agency Head.

(e) The term Contracting Officer means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into contracts on behalf of the Federal agency.

(f) The term labor standards as used in this part means the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes listed in Sec. 5.1, and the regulations in parts 1 and 3 of this subtitle and this part.

(g) The term United States or the District of Columbia means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including corporations, all or substantially all of the stock of which is beneficially owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including nonappropriated fund instrumentalities.

(h) The term contract means any prime contract which is subject wholly or in part to the labor standards provisions of any of the acts listed in Sec. 5.1 and any subcontract of any tier thereunder, let under

the prime contract. A State or local Government is not regarded as a contractor under statutes providing loans, grants, or other Federal assistance in situations where construction is performed by its own employees. However, under statutes requiring payment of prevailing wages to all laborers and mechanics employed on the assisted project, such as the U.S. Housing Act of 1937, State and local recipients of Federal-aid must pay these employees according to Davis-Bacon labor standards.

(i) The terms building or work generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The manufacture or furnishing of materials, articles, supplies or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not a building or work within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.

(j) The terms construction, prosecution, completion, or repair mean the following:

(1) All types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work within the meaning of (paragraph (1) of this section by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, all work done in the construction or development of the project), including without limitation--

(i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;

(ii) Painting and decorating;

(iii) Manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996 in the construction or development of the project);

(iv) (A) Transportation between the site of the work within the meaning of paragraph (1)(1) of this section and a facility which is dedicated to the construction of the building or work and deemed a part of the site of the work within the meaning of paragraph (1)(2) of this section; and

(B) Transportation of portion(s) of the building or work between a site where a significant portion of such building or work is constructed, which is a part of the site of the work within the meaning of paragraph (1)(1) of this section, and the physical place or places where the building or work will remain.

(2) Except for laborers and mechanics employed in the construction or development of the project under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, and except as provided in paragraph (j)(1)(iv)(A) of this section, the transportation of materials or supplies to or from the site of the work by employees of

the construction contractor or a construction subcontractor is not "construction, prosecution, completion, or repair" (see Building and Construction Trades Department, AFL-CIO v. United States Department of Labor Wage Appeals Board (Midway Excavators, Inc.), 932 F.2d 985 (D.C. Cir. 1991)).

(k) The term public building or public work includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

(1) The term site of the work is defined as follows:

(1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (1)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (1)(1) of this section;

(3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (1)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

(m) The term laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term laborer or mechanic includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent.

(n) The terms apprentice, trainee, and helper are defined as follows:

(1) Apprentice means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Bureau, or (ii) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for

probationary employment as an apprentice;

(2) Trainee means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that Administration.

(3) These provisions do not apply to apprentices and trainees employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c).

(4) A distinct classification of ``helper'' will be issued in wage determinations applicable to work performed on construction projects covered by the labor standards provisions of the Davis-Bacon and Related Acts only where:

(i) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;

(ii) The use of such helpers is an established prevailing practice in the area; and

(iii) The helper is not employed as a trainee in an informal training program. A ``helper'' classification will be added to wage determinations pursuant to Sec. 5.5(a)(1)(ii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.


(o) Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or guarantees from the United States is employed regardless of any contractual relationship alleged to exist between the contractor and such person.

(p) The term wages means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan of program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis-Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

(q) The term wage determination includes the original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision. The application of the wage determination shall be in accordance with the provisions of Sec. 1.6 of this title.

[48 FR 19541, Apr. 29, 1983, as amended at 48 FR 50313, Nov. 1, 1983; 55 FR 50149, Dec. 4, 1990; 57 FR 19206, May 4, 1992; 65 FR 69674, Nov. 20, 2000; 65 FR 80267, Dec. 20, 2000]



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