**DBRA-75**

June 23, 1980

This is in further reference to your letter concerning crediting certain fringe benefit costs towards meeting your prevailing wage rate obligations under the Davis-Bacon Act. We regret the delay in responding; however, your letter was inadvertently misplaced.

It is the Department's position that a contractor or subcontractor performing work subject to a Davis-Bacon Act prevailing wage decision may discharge his minimum wage obligations for both straight time wages and fringe benefits by paying cash, or making contributions, or incurring costs or by any combination thereof for "bona fide" fringe benefits which meet the requirements of section 1(b)(2) of the Davis-Bacon Act and the standards set forth in Regulations 29 CFR Part 5, Subpart B. For example, a wage decision might list the following prevailing wage for plumbers:

Plumbers:

| | |
|---|---|
| Basic Hourly Rate | $10.00 |
| Health & Welfare | 1.00 |
| Vacation | .50 |
| Total | $11.50 |

A contractor could discharge his obligation to pay this prevailing wage rate to a plumber working on the Government project in the following ways:

- a. By paying $11.50 in cash wages.
- b. By paying $10.00 plus $1.50 in health and welfare contributions on behalf of the employee.
- c. By paying $9.00* plus $2.00 in health and welfare and $.50 cents in pension contributions or any combination of bona fide fringe benefits on behalf of the employee.
- d. By paying $9.00* plus $1.00 in pension, $1.00 in health and welfare and $.50 cents in vacation contributions or any combination of bona fide fringe benefits on behalf of the employee.

*Note - overtime must be paid at time and one-half the basic hourly rate of $10.00 or the regular rate, whichever is higher.

We would initially like to clarify one point. Your letter speaks of deductions. The manner in which you use the term "deductions" is unclear to us and so the following information is provided. The regulations of the Department of Labor clearly distinguish between "payroll deductions" for fringe benefit plans and "contributions" to fringe benefit plans. See 29 CFR Parts 3 and 5 (copies attached.) Among the requirements concerning payroll deductions for bona

fide benefits are that such deductions must be "voluntarily consented to by the employee in writing and in advance of the period in which the work is to be done...or provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its employees" (29 CFR Section 3.5(d)). There are no such requirements for employer "contributions" to bona fide fringe benefit plans (29 CFR Part 5.)

If the fringe benefits provided your employees are funded by "deductions" from employees' wages and meet the requirements provided by 29 CFR Part 3, then you would subtract these deductions from the total hourly rate including fringe benefits listed on the wage determination, and pay the remainder to your employees in cash. If the fringe benefits provided your employees are funded by employer "contributions," then the discussion which follows is applicable.

With regard to your health plan we are assuming, for the purpose of our discussion, that the plan is funded under a trust or insurance program which meets the criteria of section 5.26 and 5.27 of Regulations, Part 5. As such, it would be bona fide within the meaning of the Act, and contributions thereto would be creditable towards meeting your fringe benefit obligations under the Act. Because insurance premiums, depending on the type of employee coverage vary under many plans, the amount contributed per employee may vary significantly. Consequently, you would have to determine the amount contributed for each employee and take credit accordingly.

In determining the hourly cash equivalent credit for fringe benefit payments, the period of time to be used is the period covered by the contributions. If contributions are made bi-weekly, cash equivalents would be computed bi-weekly. If contributions are made quarterly, cash equivalents would be computed quarterly. It is imperative that the total hours worked by employees be used as a divisor to determine the rate of contribution per hour, since employees may work on both Davis-Bacon and nongovernment work. For example, let us assume a contractor's expense in providing health insurance for a particular employee is computed to be $200 per year. If that employee works 1500 hours of the year on a Davis-Bacon project and 500 hours of the year on another job not covered by the Davis-Bacon provisions only $150 or $.10 cents per hour, would be creditable towards meeting the contractor's obligation to pay the prevailing wage on the Davis-Bacon project. This principle would be applicable for all computations of the per hour cost of fringe benefit payments.

With respect to the vacation plan described in your correspondence, it also appears to be an unfunded plan within the meaning of section 5.28 of the Regulations (copy enclosed.) This regulation requires "an enforceable commitment to carry out a financially responsible plan or program," and authorizes the Secretary of Labor to "direct a contractor or subcontractor to set aside in an account assets which, under sound actuarial principles, will be sufficient to meet the future obligation under the plan." Assuming the vacation plan is unfunded, in order to insure that it is a financially responsible plan and to insure that your client may receive credit for the vacation benefit for all participating employees, it would be necessary for him to establish a trust account to which he deposits weekly, or no less than quarterly, the appropriate vacation benefit contribution. At the time the employee takes his vacation the monies in such an account could be distributed and used as an offset against the vacation plan obligation of the company. However, since contributions made on Government work may not be used to fund the vacation plan for periods of nongovernment work, the monies held in trust may be used to offset only that

portion of the total hours worked by such employee during the year which is attributable to work covered by the Davis-Bacon and Related Acts. Any excess monies remaining in the trust at the end of the year would have to be proportionately divided among participating employees according to the number of hours they worked on Davis-Bacon projects during the year.

With regard to holiday pay, you may receive credit for any past holiday payments you have made to employees working on the project. However, your holiday plan also appears to be unfunded. Thus the same requirements which are applicable to your vacation plan are applicable to your holiday plan, and for future credit you must set up a trust arrangement similar to that required above for vacations. You could also provide just one trust for both vacations and holiday pay if you wish.

It should be noted also that your vacation and holiday plans appear to be employee welfare benefit plans within the meaning of section 3(1) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). ERISA imposes separate requirements in connection with the operation of such a plan, which are applicable even with respect to activities which are undertaken in order to comply with the Davis-Bacon Act. For example, ERISA contains provisions relating to reporting and disclosure with respect to welfare benefit plans. In addition, under ERISA all plan fiduciaries have a number of obligations. These include requirements that a fiduciary discharge his duties with respect to the plan solely in the interests of participants and beneficiaries and for their exclusive benefit, and that he act in accordance with the documents and instruments of the plan. Furthermore, unless an exemption is available under section 403(b) of ERISA, all plan assets are required to be held in trust, and persons who handle plan funds or other property are subject to the bonding requirements of section 412 of ERISA.

We have on final comment with regard to uniform costs. It is the Department's position that payments made for uniforms are not payments for fringe benefits under the Act. Furthermore, if it is a requirement of your firm that employees must wear uniforms, or if the use of uniforms is required by the nature of the job, they are deemed to be part of working equipment and are not considered as serving the convenience and interest of the employees within the meaning of section 3.6(d) of the Regulations and such deductions are prohibited. See section 3.9 of the Regulations.

We hope the foregoing clarifies the Department's position in this matter.

Sincerely,

Dorothy P. Come
Assistant Administrator