

# **EXTERNAL CIVIL RIGHTS MANUAL**

**March 2022**

Prepared by

**North Dakota Department of Transportation**

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Bismarck, North Dakota 58505-0700

[www.dot.nd.gov](http://www.dot.nd.gov)

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## INTRODUCTION

As a recipient of federal funds, the North Dakota Department of Transportation (NDDOT) is required to comply with the rules and regulations of the U.S. Department of Transportation, Federal Highway Administration (USDOT, FHWA) as they pertain to the federal-aid highway program.

NDDOT's internal and external civil rights programs are a function of the Civil Rights Division (CRD). The CRD is located in the central office and is staffed by:

- CRD Director, overall internal and external civil rights program management: Ramona Bernard,
- Contractor Compliance, Internal EEO, and Labor Compliance: Dan Weaver,
- Disadvantaged Business Enterprise (DBE): Amy Conklin
- On-the-Job Training (OJT), and DBE/OJT Supportive Services Programs: Amy Conklin,
- NDDOT's Title VI/Nondiscrimination and ADA Program: Heather Christianson, and
- Civil Rights Program Assistant, specific assignments in various programs: Jessica Stadick-Feist.

Many of the internal and external civil rights monitoring responsibilities have been delegated to the district engineers. They, in turn, delegate the internal EEO responsibilities and external contractor compliance and labor compliance monitoring to their staff.

This manual deals only with the external civil rights program and includes:

- I. Title VI/Nondiscrimination and ADA Program
- II. Disadvantaged Business Enterprise
- III. Contractor Compliance
- IV. On-the-Job Training
- V. Labor Compliance

**This manual is to be used as a quick reference guide only. The full manuals for each program should be referenced for compliance as each are approved by FHWA.** Each district is responsible for keeping CRD informed of any EEO, OJT, Title VI and ADA, Title VII, DBE, contractor compliance, and labor compliance activities, either positive or negative, in a timely manner. The CRD Director and Civil Rights Program Managers are available for technical assistance at any time:

- |                                      |  |
|--------------------------------------|--|
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# TITLE VI/NONDISCRIMINATION AND ADA SECTION 1

## TABLE OF CONTENTS

|   |   |
|---|---|
| I. TITLE VI/NONDISCRIMINATION AND ADA PROGRAM .....                     | 1 |
| A. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 .....                       | 1 |
| B. AMERICANS WITH DISABILITIES ACT (ADA) .....                          | 1 |
| C. STANDARD TITLE VI/NON-DISCRIMINATION ASSURANCES .....                | 1 |
| D. TITLE VI/NONDISCRIMINATION AND ADA PROGRAM IMPLEMENTATION PLAN ..... | 2 |
| 1. PUBLIC INVOLVEMENT .....   | 2 |
| 2. TITLE VI AND ADA COMPLIANCE OVERSIGHT.....                           | 3 |
| 3. EXTERNAL COMPLAINTS OF DISCRIMINATION PROCESS .....                  | 4 |

## I. TITLE VI/NONDISCRIMINATION AND ADA PROGRAM

### A. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Title VI of the Civil Rights Act of 1964 prohibits discrimination in Federal and Federally-assisted projects, programs, and activities based upon race, color, and national origin.

1. Since 1964, additional related statutes have prohibited discrimination based on sex, age, and disability.
2. Two Executive Orders (E.O.) that place further emphasis upon Title VI protections are as follows:
  - a) Environmental Justice, E.O. 12898
    - 1) Entitled “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.” NDDOT considers the effects of our transportation decisions on minority and low-income populations.
  - b) Limited English Proficiency (LEP), E.O. 13166
    - 1) Entitled “Improving Access to Services for Persons With Limited English Proficiency.” NDDOT is committed to providing individuals with difficulty using and understanding English through meaningful access to programs and services.

### B. AMERICANS WITH DISABILITIES ACT (ADA)

ADA implementing regulations for Title II of the Act prohibit discrimination in the provision of services, programs, and activities by state and local governments. Public agencies with 50 or more employees must create an ADA Transition Plan.

The NDDOT implements, monitors, and updates the NDDOT ADA Transition Plan. It is located on the NDDOT website on the “Title VI/Nondiscrimination and ADA Program” web page at <https://www.dot.nd.gov/divisions/civilrights/titlevi.htm>

### C. STANDARD TITLE VI/NON-DISCRIMINATION ASSURANCES

William T. Panos, NDDOT Director, signed the Standard Title VI/Non-Discrimination Assurances on September 9, 2021. NDDOT agrees that, as a condition to receiving any Federal financial assistance from the U.S. DOT, through the FHWA, is subject to and will comply with the assurances.

1. The Assurances include Statutory/Regulatory Authorities; descriptions of requirements; General and Specific Assurances; and Appendices A-E.
  - a) Appendix A of the assurances requires prime contractors to insert Appendix A and E of the assurances in all subsequent subcontracts, all tiers, including procurement of materials and leases of equipment. The prime is responsible for compliance by any subcontractor, lower-tier subcontractor, supplier, and lessor of equipment.
  - b) Appendix E includes but is not limited to the pertinent non-discrimination authorities listed.

2. The Standard Title VI/Non-Discrimination Assurances are available online at NDDOT, CRD, Title VI/Nondiscrimination and ADA Program web page. <https://www.dot.nd.gov/divisions/civilrights/titlevi.htm>

## **D. TITLE VI/NONDISCRIMINATION AND ADA PROGRAM IMPLEMENTATION PLAN**

As a recipient of Federal financial assistance, NDDOT is required to protect the public interest by developing a Title VI/Nondiscrimination and ADA Program Implementation Plan for their benefit. NDDOT's Plan identifies implementation, compliance, and enforcement policies and procedures to ensure compliance with Title VI and nondiscrimination authorities at all levels which includes cities, counties, contractors, subcontractors, consultants, and subconsultants. It is located on the NDDOT website on the "Title VI/Nondiscrimination and ADA Program web page at <https://www.dot.nd.gov/divisions/civilrights/titlevi.htm>

### **1. PUBLIC INVOLVEMENT**

As part of the Title VI/Nondiscrimination and ADA Program, the NDDOT is required to ensure everyone has the opportunity to comment on the transportation programs and activities that affect their community.

- a) Data Collection Process
  - 1) NDDOT has developed and implemented a data collection process to collect and process demographics from participants and beneficiaries of transportation projects. This process provides us the necessary information to measure the effectiveness of our public involvement activities.
  - 2) Data collection is an important part of our Title VI/Nondiscrimination and ADA Program as it ensures that transportation programs, services, activities, facilities, and projects effectively meet the needs of "all persons" without discrimination. For example, disproportionately benefitting or harming one group over another is a violation of Title VI. Timely and accurate data allows for better decision-making and provides support to the decisions made. NDDOT is required to file reports with FHWA annually and FTA every three years including the information and results of our data collection process.
- b) NDDOT Title VI Public Participation Survey
  - 1) NDDOT developed the Title VI Public Participation Survey (SFN 60149 Rev. 03-2022). It is available on NDDOT website at <http://www.dot.nd.gov/forms/sfn60149.pdf>
  - 2) This survey can be used by NDDOT staff, cities, counties, consultants, or sub recipients.
  - 3) This survey must be available to the public at public meetings for all NDDOT state and federally funded projects.
  - 4) There are two sets of instructions available for the Public Participation Survey.

- 5) The NDDOT survey instructions are available on NDDOT website, CRD, Title VI/Nondiscrimination and ADA Program webpage at <https://www.dot.nd.gov/divisions/civilrights/titlevi.htm>
  - 6) The Sub Recipient Title VI Public Participation Survey Instructions are used by sub recipients only. The survey instructions are available on the NDDOT website, CRD, Title VI/Nondiscrimination and ADA Program, Sub recipient webpage at <https://www.dot.nd.gov/divisions/civilrights/titlevi-subrecipients.htm>
- c) Limited English Proficiency Plan
- 1) The State of North Dakota has entered into a NASPO Value Point contract with Language Link, telephonic interpreter service provider. The services are used to communicate with individuals that have limited English proficiency meaning that they have difficulty using and understanding English.
  - 2) NDDOT provides use of the department's telephonic interpreter services to consultants to conduct EEO/Labor Compliance interviews with limited English speaking employees.
  - 3) To arrange use of this service, please send your request through the chain of Project Engineer (PE) to Assistant District Engineer (ADE). The ADE will provide consultants the instructions, telephone number, and access code.
- d) Request For Reasonable Accommodations
- 1) NDDOT has developed a Request for Reasonable Accommodations form with Instructions (SFN 60135, 02-2016) for individuals to request accommodations for disabilities and language assistance to access NDDOT programs, services, and activities. It is available on NDDOT website at <http://www.dot.nd.gov/forms/sfn60135.pdf>

## 2. TITLE VI AND ADA COMPLIANCE OVERSIGHT

Enforcement responsibilities have been vested with NDDOT, which ultimately falls on the shoulders of the NDDOT, city, county, or consultant project engineer. The project engineer (PE) should be cognizant of these contractual requirements and monitor the contractor for compliance.

- a) If noncompliance with any provision is even suspected, the NDDOT, city, county, or consultant PE should notify the Assistant District Engineer (ADE) immediately. The ADE should consult with the CRD for a possible course of action.
- b) If department or project staff observe or receive a verbal report of discriminatory activity, they should direct the complainant and/or contact CRD immediately for a possible course of action. Make notes in your diary. NDDOT receives very few Title VI/ADA complaints from construction projects. Some examples of external discriminatory activity or complaints:
  - (1) Telling racial jokes or using racial slurs where members of the public are present.

(2) Making negative comments about minorities or LEP individuals where members of the public are present.

(3) Making negative/derogatory comments about individuals with disabilities where members of the public are present.

### 3. EXTERNAL COMPLAINTS OF DISCRIMINATION PROCESS

The External Complaints of Discrimination process was revised in March 2020.

- a) FHWA Jurisdiction (Roads and Bridges)
  - 1) Title VI Complaints
    - (a) NDDOT will forward all Title VI complaints to the Division Office.
  - 2) ADA Complaints
    - (a) All ADA complaints will be investigated by the Division Office or the NDDOT.
- b) FTA Jurisdiction (Public Transit)
  - 1) Complaints filed under Title VI, related Statutes, and section 504/ADA in which NDDOT is named as respondent will be handled as informally as possible without an investigation. If the complaint cannot be resolved by informal means, the NDDOT may investigate the complaint. For Title VI and ADA forms for public transit, go to [NDDOT - Transit Operator Portal](#).
  - 2) Title VI related statutes and Section 504/ADA complaints filed directly with NDDOT against its sub recipients or contractors will be processed by NDDOT in accordance with the FTA approved complaint procedures under FTA C 4710.1B, FTA C 4702.1B, 49 CFR 27.13(b). The subrecipient will be contacted to handle the complaint informally at the local level. If the complaint cannot be resolved by informal means, the NDDOT may investigate the complaint.
- c) Complaints must be filed, in writing, no later than 180 calendar days of the last date of the alleged discrimination, unless the time for filing is extended. Complaints may be submitted to one of the following agencies authorized to receive complaints: NDDOT, FHWA, FTA, the United States Department of Transportation (USDOT), or the United States Department of Justice (USDOJ). NDDOT's External Complaints of Discrimination form should be used.
- d) NDDOT's External Complaints of Discrimination form, instructions, and process are available in English (SFN 51795, 02-2022) or in Spanish (SFN 51795S, 02-2022) on NDDOT website in English at [www.dot.nd.gov/forms/sfn51795.pdf](http://www.dot.nd.gov/forms/sfn51795.pdf) or in Spanish at <http://www.dot.nd.gov/forms/SFN51795S.pdf>

# DISADVANTAGED BUSINESS ENTERPRISE (DBE) SECTION 2

## TABLE OF CONTENTS

|   |          |
|---|----------|
| <b>II. DISADVANTAGED BUSINESS ENTERPRISE .....</b>                          | <b>2</b> |
| <i>A. SPECIAL PROVISIONS DISADVANTAGED BUSINESS ENTERPRISE PROGRAM.....</i> | <i>2</i> |
| <i>B. DBE PARTICIPATION REVIEW (RGC) AND (RGN).....</i>                     | <i>2</i> |
| <i>C. PRE-AWARD &amp; POST-AWARD REQUIREMENTS.....</i>                      | <i>3</i> |
| <i>D. PRIME CONTRACTOR RESPONSIBILITIES.....</i>                            | <i>4</i> |
| <i>E. ON-SITE MONITORING BY PROJECT ENGINEER.....</i>                       | <i>6</i> |
| <i>F. COMMERCIALLY USEFUL FUNCTION (CUF).....</i>                           | <i>7</i> |
| <i>G. REPLACEMENT APPROVAL REQUEST.....</i>                                 | <i>8</i> |
| <i>H. PROMPT PAYMENT.....</i>   | <i>9</i> |
| <i>I. FORM LINKS.....</i>   | <i>9</i> |



## II. DISADVANTAGED BUSINESS ENTERPRISE

US Department of Transportation - 49 Code of Federal Regulations Part 26, requires NDDOT to implement a Disadvantaged Business Enterprise (DBE) Program to ensure nondiscrimination in the award and administration of federally assisted highway construction contracts.

\*Throughout this chapter “self-perform” is defined as a contractor’s use of its “own workforce” (employees who are on a contractor’s weekly certified payrolls and for whom the contractor contributes to unemployment, social security, and worker’s compensation) and its “own equipment” (equipment which is titled, licensed, and insured in the contractor’s name or leased from a bona fide equipment supplier). The contractor is not self-performing if it is using equipment or employees from another firm, an affiliate, or a subsidiary firm in place of the contractor’s own equipment and employees.

### A. SPECIAL PROVISIONS DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

DBE Special Provisions (SP) outline the requirements bidders on federal-aid jobs must follow to comply with the DBE regulations. The DBE SPs outline all pre-bid and post-award requirements.

#### USING CERTIFICATION AND COMPLIANCE SYSTEM (CCS) – PRE-AWARD REQUIREMENTS

The following information explains the requirements of using CCS. A copy of the SP can be viewed at <https://www.dot.nd.gov/divisions/civilrights/docs/dbe/DBE-PROJECT-PAYMENTS%20SP-B2GNOW-10-03-17.pdf>

With CCS each awarded bidder on a federally funded project receives notice that a Utilization Plan (UP) has been set up to report their plans.

Within 14 days of it being set up in the system, Primes must complete an individual UP which identifies their plan for all subcontractors and other vendors who will provide services and/or products to complete the project (this includes anyone being paid on the project, no matter the tier). A UP must include

- All subcontractors, manufacturers, brokers, regular dealers/suppliers to be used on the project. Both DBE and non-DBE must be included in the UP.
  - If a firm needs to add subs at a later date they must make a subcontractor request through the system, which is then approved or denied by DOT staff.
  - If a firm has no subs, they still must submit the UP without any as their payments are still tracked and reported through the system.
- Their overall intended DBE participation amount at time of award. If the amount on the UP submitted differs from the DBE Participation Review sheet the project was awarded with it will be returned for update to be corrected until approved.

***Any District personnel that would like access to CCS to view your projects can contact the DBE Program Administrator to set up an account. At this time we do not grant access to Consulting Engineers, but if you would like a report generated for you to review please contact the DBE Program Administrator.***

### B. DBE PARTICIPATION REVIEW (RGC) AND (RGN)

DBE Participation Review is the Project Engineer’s guide to the job as awarded. The UP provides a more “real time” guide that should also be analyzed for accuracy from time to time. The title of the form states

whether the RGC or RGN Special Provision governs the job. Any projects that are 100% state funded will not have a DBE Participation Review sheet as there are no DBE requirements.

1. SFN 13743a - RGC Participation Review - (internal form) states the project goal and the prime's achievement in the upper right corner. Any updates to participation after award will be included at the end of the packet in FileNet/CARS.
2. SFN 13743b - RGN Participation Review - (internal form) states the prime's achievement in the upper right corner. Any updates to participation after award will be included at the end of the packet in FileNet/CARS.
3. The prime's documentation (submitted to comply with the requirements of the SP) is attached to the Participation Review. They are:
  - a. [SFN 52160](#) *Intent to Use - Form C* (used for both RGC & RGN)
  - b. [SFN 60829](#) Contractor Good Faith Efforts Documentation (RGC only)
    - (1) The form guides the prime through the documentation required to support its efforts to meet the project goal.
    - (2) **Throughout the life of the contract, the prime must supply the same documentation to support its Good Faith Efforts prior to requesting approval to replace contractors listed on the participation review at the time of award. SFN 60829 provides the list of required supporting documents.**
  - c. Memo explaining efforts to attain goal and any other applicable documentation.
4. Following contract award, CRD stores Participation Reviews for every project awarded in FileNet, which makes the reviews available through CARS. Because subcontractors are continually added through the life of the project it is highly encouraged to also view your project(s) in CCS as those are kept current.
  - a. To retrieve the participation review prior to the Pre-Construction Conference:
    - Access CARS
    - Enter PCN for the project
    - Click Search Documents
    - Change the Document Type to REFERENCE
    - Click Search.
    - CARS will locate the PCN's participation review

## C. PRE-AWARD & POST-AWARD REQUIREMENTS

DBE SPs outline the pre-award and post-award requirements.

- a. Race/Gender Neutral DBE Special Provision  
<https://www.dot.nd.gov/divisions/civilrights/docs/dbe/raceneutral/20180201.pdf>
- b. Race/Gender Conscious DBE Special Provision  
<https://www.dot.nd.gov/divisions/civilrights/docs/dbe/raceconscious/20180201.pdf>

## D. PRIME CONTRACTOR RESPONSIBILITIES

The prime is responsible for compliance with the applicable DBE SP on the part of all subcontractors, suppliers, manufacturers on the project.

### 1. Pre-Construction Conference

- a. The prime contractor is responsible for gathering all subcontractors to the pre-construction conference, **especially DBEs.**
  - (1) The prime must invite and notify all subcontractors on the project.
  - (2) The prime must provide a copy of the pre-construction conference form and minutes to all DBE firms identified on the DBE Participation Review.
    - (a) If a firm listed in the DBE participation review and is unable to attend the prime must send copies of the conference form and the minutes to those firms not in attendance.
- b. The prime is responsible to communicate pertinent issues during the pre-construction conference including the following:
  - (1) The DBE firms and non-DBE firms listed on the Participation Review.
  - (2) The products or items of work the DBE firms, and non-DBE firms used in bid differentials, are to provide or to perform.
  - (3) **The time period for the products to be provided or the work to be performed.**
  - (4) Other items such as project scheduling; expected overtime; payment schedule; Davis-Bacon wage and payroll requirements; borrow pit, stockpile site, concrete or asphalt batch plant site, etc., locations; quantities; length of haul; type of haul road; etc.

### 2. Monitoring DBE Performance

- a. For the life of the project, the prime contractor is responsible to monitor and report any changes in the makeup of contract work to be performed and supplied on the project as stated in the DBE participation review. This includes DBEs, non-DBEs, and any work the prime indicated it would self-perform.
- b. It is the prime contractor's responsibility to:
  - (1) Ensure the prime contractor and its DBE and non-DBE subcontractors, suppliers, vendors, brokers, regular dealers, and manufacturers comply with the requirements of the applicable DBE special provision
  - (2) Monitor and report DBE performance
    - (a) Submit UP in CCS within 14 days of receiving notice. Once approved and payments start being made to the prime they must complete monthly audits of all their non-DBE and DBE subcontractor and supplier payments through the system.

Months with no payments must still be reported as zero. The sub/supplier will then be prompted to confirm that the payment reported is correct. If a discrepancy is initiated the prime and sub/supplier must try to resolve the issue amongst themselves. If they cannot the Project Engineer and CRD will have to get involved.

- (b) Submit [SFN 60595](#) Replacement Approval Request when **any** DBE changes in work type or dollar amount listed in the DBE Participation Review packet are proposed;

### 3. Monitoring Trucking Operations

The prime is responsible to monitor all trucking operations to ensure compliance with both the DBE and the labor standards provisions of the contract. The prime must obtain subcontracts and weekly certified payrolls as required from all tiers of subcontracting on the project.

The prime must monitor and verify the status of all truck owner-operators whether the truckers work directly for the prime or for its subcontractors while they are working on federal-aid highway construction projects or the site of the work.

If the prime does not maintain documentation, wage rate complaints filed by individuals with adequate documentation may not be disputed by the prime.

***Leased trucks must display the name and identification number (USDOT number issued for interstate commerce) of the DBE firm, including non-DBE match trucks.***

#### a. DBE Trucking – 1:1 Ratio

- (1) If a DBE trucking firm working on the project is utilizing the 1:1 Ratio, meaning they have non-DBE trucking companies as a subcontractor under them, the following additional monitoring/enforcement should be in place:
  - (a) To assist in the Department in correctly counting participation for DBE trucking operations when the 1:1 Ratio is being utilized, the DBE trucking company must complete [SFN 60781](#) DBE Weekly Trucking Report to the project engineer weekly on the Monday following the work.
    - A DBE trucking company is not allowed to send non-DBE match trucks ahead if their trucks are not available at the time. For the 1:1 DBE Trucking Ratio to count **both** DBE and non-DBE match trucks must be on-site at the same time.
  - (b) Non-DBE trucking companies or owner operators working under the DBE trucking company must be listed on the Form C included in the DBE Participation Review packet. Any changes from the time the Form C was completed to the time the work commences must be reported to Civil Rights.
  - (c) Non-DBE trucking companies or owner operators working under the DBE trucking company must display easily identifiable signage identifying what DBE firm they are working under while on the project site.
  - (d) DBE trucking companies that are utilizing the 1:1 Ratio must list all their non-DBE trucking companies or owner operators under them as

subcontractors on the project in the Certification and Compliance System and must report their payments to them monthly.

(2) Counting DBE Participation:

- (a) See full DBE Program Manual and/or the DBE Special Provisions for a description on how DBE Participation is counted.

4. Records and Reports

The prime must use CCS to submit any payments made to non-DBE and DBE subcontractors on the project. Payments must be reported timely to ensure prompt pay. If a dispute of payment is initiated the firms must work between each other to resolve the discrepancy. If a resolution is not reached between the firms the project engineer must intervene.

This includes all DBE firms used regardless of whether they were included in the project's DBE Participation Review.

**Monitoring Payments/Performance:**

All firms with federal aid projects are required to use CCS to report payments to non-DBE and DBE subcontractors and suppliers. Upon receipt of progress payments from the Department, enter the amounts paid to subcontractors and others paid as a result of their work on the project. After payments are entered into CCS, the system automatically sends notification to the payees. Each payee will then reply with confirmation or a different amount than the prime entered. The prime must report zero payments in months that no payment to subcontractor(s) were made or the system will identify that month as an incomplete audit. Any projects with discrepancies, unconfirmed payments and/or incomplete audits cannot be closed until they are resolved.

1. Monitoring DBE Performance

- a. For the life of the project, the prime contractor is responsible to monitor and report any changes in the makeup of contract work to be self-performed and/or performed or supplied by others on the project as stated in the Utilization Plan.
- b. Enter payments made to subcontractors, suppliers, etc. through CCS within 5 working days from receipt of payment by the DOT.
- c. Indicate through CCS when final payments to subcontractors, suppliers, etc. are made.

**E. ON-SITE MONITORING BY PROJECT ENGINEER**

The following activities and procedures must be monitored by the project engineer. Document and keep these items in the project records and diaries.

It is the project engineer's responsibility to immediately notify the ADE of any questions or issues concerning discrimination of any kind, and any labor compliance problems or concerns.

For instruction to retrieve the project's DBE Participation Review for reference, see B. 4a of this manual.

1. Pre-Construction Conference

Refer to [SFN 9423](#) Pre-Construction Conference Form for instructions and an outline of the items to be read and discussed at the Pre-Construction conference.

2. Replacement Approval Requests

Before signing/approving a request to sublet, retrieve the job's DBE Participation Review.

- (1) Compare the dollar value and material amounts.
- (2) Determine whether the prime is subcontracting work they intended to self-perform at the time of award.
  - (a) If so, SFN 60595 Replacement Approval Request is required.
- (3) Check signature dates on any requests to sublet against the replacement approval request. If they are dated prior to the replacement approval request, contact the ADE.
  - (a) Request clarification in writing from the prime prior to approving the request to sublet.
- (4) Note any discrepancies found between the documents included in the DBE Participation Review.
  - (a) If there are discrepancies and/or issues with a DBE or non-DBE/BD request to sublet, contact the prime and the DBE or DBE/BD for clarification.

3. Trucking Operations

- a. Project engineers and ADEs must review trucking operations and procedures according to specifications.
- b. If DBE or non-DBE trucking firms listed in the DBE participation review form are not complying with trucking requirements, notify the prime and the ADE. It is the prime's responsibility to take corrective action to ensure compliance with the DBE and labor standards provisions of the contract.

4. Review [SFN 60595](#) for completeness and make recommendation(s) on necessity and adherence to RGC SP for processes to be followed concerning replacement approval requests for the termination, unfulfilled obligations, and/or replacement of work to be self-performed by the prime as listed on the DBE Participation Review (at the time of award).

## F. COMMERCIALLY USEFUL FUNCTION (CUF)

1. NDDOT counts expenditures to a DBE firm toward DBE goals only if the DBE firm is performing a commercially useful function review on the contract. The project engineer is responsible for assuring that DBEs working on the prime's contract are performing a commercially useful function and not acting as a pass-through for the purpose of meeting the project goal.

The project engineer must complete [SFN 62120](#) while the DBE is actively working on the job. The DBE Performance – Commercially Useful Function Certification (SFN 62120) must be completed for every DBE being counted towards the overall participation on the project, no matter the tier or type of DBE (trucking, sub, supplier, broker, manufacturer, etc.)

To complete SFN 62120, the project engineer must review the listed questions to determine if the DBE firm is in fact performing a commercially useful function.

Contact the ADE immediately if you are unable to answer any questions listed on the form or if you have any concerns after completing the form.

Upload SFN 62120 into CARS within five days of conducting the onsite work confirmation. Once the form has been uploaded CRD receives an email notification and will review the form for completeness, sign and resubmit the form for the record.

CARS is equipped with a new alert function that will email the project engineer a list of DBEs that were identified on the DBE Participation Review Packet at the time of award. All DBEs in the alert need to have a CUF completed on them. Any DBEs that are added to a project after award also need a CUF completed on them.

CRD tracks that CUFs are being completed on all DBEs on all federal aid projects. If the record shows CUFs have not been completed on a project the ADE and/or project engineer will be contacted and instructed to complete the forms.

If SFN 62120 is not completed NDDOT cannot count any of the work completed by the DBE firm(s) and subsequent DBE participation on the project. Any DBE work made ineligible because of missing paperwork/requirements could result in a DBE shortfall for the Department.

2. If there is a question concerning the total value of services provided by a DBE firm with owned equipment, or a question regarding employees who are driving, a truck registration card check must be made. This information must be used to determine truck ownership and driver relationships and/or to establish employee and owner-operator relationships and how drivers are listed on weekly certified payrolls. Information needed for a registration card check includes:
  - a. Driver's name;
  - b. Valid commercial driver's license;
  - c. Truck owner (from registration card);
  - d. Truck license number;
  - e. Truck number being used on scale tickets and haul sheets;
  - f. Truck make and model; and
  - g. Copies of signed lease or rental agreements.

## **G. REPLACEMENT APPROVAL REQUEST**

Any request for replacement of the work indicated on the DBE Participation Review at the time of award must be reviewed prior to approval.

Primes do not have to submit a [SFN 60595 - Replacement Approval Request](#) or go through GFE to replace a subcontractor if the total amount being counted toward the project goal has actually been paid to the DBE. If the DBE work is complete and the ADE determines the payment on the completed work will meet or exceed the project goal, the prime is not required to submit the approval request or go through GFE to replace a subcontractor on the job.

If the prime has not yet paid the DBE for the amount being counted toward the project goal and payment is not imminent, the prime must submit SFN 60595. Any replacement approval request must be accompanied by the Good Faith Efforts of the prime in replacing the work. Prior to replacement approval, the prime must contact all DBEs in the Directory for the specific work they are looking to replace or substitute.

Prior to submitting the prime's SFN 60595 and its accompanying documentation to the ADE, the project engineer must review the request for completeness and make recommendation(s) on necessity and adherence to RGC SP. Review the request to determine on how to proceed according to the documentation submitted, i.e., whether the prime followed the processes required concerning replacement approval requests for the termination, unfulfilled obligations, and/or replacement of work to be self-performed by the prime as listed on the DBE Participation Review (at the time of award).

Do not submit incomplete documentation to the ADE.

The prime is not limited to replace the exact same type of work. Therefore, a prime has the option to rearrange their self-performance work to solicit replacements for the contract value by substituting some other work.

The only time SFN 60595 is not required when a DBE replacement is being made is as follows:

- DBEs that were added after award if the goal was/is met
- Race Gender Neutral projects
- State or other non-Federally Funded projects – DBE Program does not apply
- When a DBE is no longer certified at time of replacement
  - The form must still be completed for the record, but no solicitation or replacement DBE is required

The prime's GFE responsibility is outlined in the DBE Special Provision.

The prime is also required to submit SFN 60595 and its accompanying documentation for Termination of Use, Unfulfilled Obligations, and Noncompliance/Failure to Perform. The RGN SP details the reasons for each type of situation under the same named sections.

## **H. PROMPT PAYMENT**

See current Standard Specifications for Road and Bridge Construction for detailed information of prompt payment procedures.

NDDOT personnel may be granted access to CCS to monitor payments on a project. Contact CRD to request access. To log in go to: <https://dotnd.diversitycompliance.com>

## **I. FORM LINKS**

The following may be obtained from the Department's website:

[www.dot.nd.gov/dotnet/forms/forms.aspx](http://www.dot.nd.gov/dotnet/forms/forms.aspx) (choose Category in the View forms by: drop-down box)

- SFN 62120 - DBE Performance - Commercially Useful Function Certification  
<https://www.dot.nd.gov/forms/sfn62120.pdf>
- SFN 60595 - Replacement Approval Request  
<http://www.dot.nd.gov/forms/sfn60595.pdf>
- SFN 60781 - DBE Weekly Trucking Summary  
<http://www.dot.nd.gov/forms/sfn60781.pdf>



# CONTRACTOR COMPLIANCE

## SECTION 3

### TABLE OF CONTENTS

|  |          |
|--|----------|
| <b>III. CONTRACTOR COMPLIANCE.....</b>         | <b>1</b> |
| A. CONTRACT SPECIAL PROVISIONS.....            | 1        |
| B. DISCRIMINATION ISSUES AND CONCERNS.....     | 3        |
| C. IN-DEPTH REVIEW SELECTION CRITERIA.....     | 5        |
| E. BULLETIN BOARDS .....                       | 7        |
| F. EEO INTERVIEWS.....                         | 8        |
| G. NONSEGREGATED FACILITIES.....               | 9        |
| H. MONTHLY EEO PROJECT INSPECTION REPORT ..... | 9        |
| I. TOILET FACILITIES.....                      | 10       |

### III. CONTRACTOR COMPLIANCE

Under 23 CFR 230, Subpart D, NDDOT is responsible for assuring contractor compliance with the requirements of federal-aid highway construction contracts, including the equal employment opportunity (EEO), on-the-job training (OJT), disadvantaged business enterprise (DBE), Title VI and nondiscrimination, and labor compliance responsibilities set forth in 23 CFR 230; 49 CFR 21; 49 CFR 26; 41 CFR 60; 49 CFR 29; and 29 CFR 1, 3, 5, 6, and 7. The CRD has the overall responsibility for monitoring and assuring prime contractor and covered subcontractor compliance with the above federal rules and regulations. Day-to-day project monitoring has been delegated to the districts.

#### A. CONTRACT SPECIAL PROVISIONS

1. All federally-aided highway construction contracts contain the following special provisions relative to the equal employment opportunity (EEO) responsibilities of contractors:
  - a. *Required Contract Provisions, Federal-Aid Construction Contracts (USDOT Form FHWA 1273 - Rev. 5-1-12).*  
<https://www.fhwa.dot.gov/programadmin/contracts/1273/1273.pdf>  
  
This special provision:
    - (1) Includes requirements not to discriminate and to take affirmative action to assure EEO as required by the Civil Rights Act of 1964, as amended;
    - (2) Incorporates, by reference, the requirements of 49 Code of Federal Regulations Part 26 and the State DOT's USDOT-approved DBE program; and
    - (3) Provides for the maintenance of statistical records, company reports, and related materials and information.
  - b. *EEO Affirmative Action Requirements (03-15-2014).* This special provision:
    - (1) Specifies a statewide employment goal of 6.9 percent for females in each trade and an assigned percentage goal, by county, for minorities in each trade; and
    - (2) Includes additional affirmative action steps contractors are required to implement to assure EEO in achieving the minority and female employment goals.
  - c. Prime contractors are required to include these special provisions in all subcontracts of \$10,000 or more and to further require their inclusion in any lower-tier subcontracts that may, in turn, be made. The prime contractor is responsible for compliance by any subcontractor or lower-tier subcontractor.
2. All federally-aided highway construction contracts contain the following special provisions relative to the labor compliance responsibilities of contractors:

- a. *Required Contract Provisions, Federal-Aid Construction Contracts (USDOT Form FHWA 1273 - Rev. 5-1-12)*. This special provision includes specific requirements for compliance with the rules, regulations, and relevant orders of USDOL as they pertain to the Davis-Bacon and Related Acts (DBRA).
  - b. *Labor Rates from U.S. Department of Labor*. This special provision specifies basic hourly rates and applicable fringe benefit payments for job classifications related to highway construction.
  - c. ***Contract Special Provision Mandatory Use of Automated Certified Payroll (9/06/2017)***. **From October 13, 2017 and forward, this provision is required and the mandatory use of LCPtracker will be required by all contractors for the filing of certified payroll.**
  - c. Prime contractors are required to include these special provisions in all subcontracts and to further require their inclusion in any lower-tier subcontracts that may, in turn, be made. The prime contractor is responsible for compliance by any subcontractor or lower-tier subcontractor.
3. With the exception of contracts funded solely with county funds and emergency relief projects that are not included in NDDOT's bid openings, all highway construction contracts (state and federally funded) contain *Special Provision On-the-Job Training Program (1-15-13)*. This special provision:
    - a. Includes the formula used to determine the number of trainee positions assigned to prime contractors and
    - b. Specifies standards contractors are required to follow in order to fulfill the training requirement.
  4. Most federally-aided highway construction contracts will contain either the *Special Provision Disadvantaged Business Enterprise Program Race/Gender Conscious (RGC)* or the *Special Provision Disadvantaged Business Enterprise Program Race/Gender Neutral (RGN)*. Please refer to the DBE portion of this manual for information on these provisions.
  5. The following prompt payment and retainage procedures are contained in Section 109.04, D, E, and F of the *Standard Specifications for Road and Bridge Construction* available online at:  
<http://www.dot.nd.gov/dotnet/supplspecs/standardspecs.aspx>
  6. All federally-aided highway construction contracts contain *Appendix A & E of the Title VI Assurances*. They can be found online at:  
<http://www.dot.nd.gov/divisions/civilrights/docs/titlevi/title-vi-assurances.pdf>
  7. Pursuant to Executive Order 13672, codified as 41 CFR, 60-1, 60-2, 60-4 and 60-50, for contracts awarded after April 9, 2015, discrimination on the basis of gender

identity or sexual orientation is prohibited on federal-aid contracts. Contractors on federal-aid jobs must include “gender identity or sexual orientation” as protected classes in the EEO policy and must act to rectify discrimination or harassment based on gender identity or sexual orientation.” Contractors must use updated posters on job site bulletin boards and update their EEO policies accordingly. Contractors are not required to list all protected classes in advertisements, but if they do list (race, sex, age, for instance), they may not exclude “gender identity or sexual orientation” from the advertisement.

## B. DISCRIMINATION ISSUES AND CONCERNS

### 1. Nondiscrimination Provisions/FHWA 1273

<https://www.fhwa.dot.gov/programadmin/contracts/1273/1273.pdf>:

- (1) The provisions of Section II of FHWA 1273 are related to 23 CFR Part 230 and are applicable to all federal-aid construction contracts and to all related subcontracts of \$10,000 or more. In addition, the contractor and all subcontractors must comply with the following laws, regulations and orders: Executive Order 11246; 41 CFR 60; 29 CFR 1625-1627; 23 USC 140; and the Rehabilitation Act of 1973, as amended (29 USC 794). The contractor and all subcontractors must also comply with the requirements of the Equal Opportunity Clause in 41 CFR 60-1.4(b) and, for all construction contracts exceeding \$10,000, the Standard Federal EEO Construction Contract Specifications in 41 CFR 60-4.3.

**NOTE:** The U.S. Department of Labor (USDOL), Office of Federal Contract Compliance has exclusive authority to determine compliance with Executive Order 11246.

By signing the contract, the contractor agrees to comply with the following minimum specific requirement activities of EEO:

- (a) Section II.1 requires the contractor ensure that it has made every good faith effort to provide equal opportunity with respect to all of its terms and conditions of employment and in their review of activities under the contract. Pursuant to this Section, the contractor must have an EEO Policy that prohibits discrimination and provides for affirmative action in its employment practices.
- (b) Section II.2 requires the contractor to have a designated EEO Officer who has the responsibility and authority to administer the contractor’s EEO program.
- (c) Section II.3 requires all of the contractor’s employees who have an active role in the hiring, supervision, or advancement of employees to be aware of, and to implement the contractor’s EEO Policy. In addition, it is required that employees, including applicants and potential employees, be informed of the contractor’s EEO Policy through posted notices, posters, handbooks, and employee meetings.

- (d) Section II.4 requires the contractor not to discriminate in its recruitment practices and to make an effort to identify sources for potential minority and female employees.
- (e) Section II.5 requires the contractor to periodically review project sites, wages, personnel actions, etc., for evidence of discriminatory treatment. The contractor is to promptly investigate all alleged discrimination complaints.
- Contractors are required to have and to post a discrimination complaint procedure and form on their project-site bulletin board.
  - A sample discrimination complaint procedure and form is included as an attachment to the pre-construction conference form.
  - The contractor's discrimination complaint procedure must include the avenues of appeal available to employees and applicants should the contractor fail to resolve the complaint to the employee's or applicant's satisfaction or should the employee or applicant choose to file the complaint directly with the Equal Employment Opportunity Commission (EEOC) or The North Dakota Department of Labor, a Fair Employment Practices Agency.
  - The contractor is also required to notify the Civil Rights Division of any discrimination complaints received (to include a copy of the complaint). Upon resolution of the complaint, the contractor is required to provide a "Report of Investigation" to the Civil Rights Division.
- (f) Section II.6 requires the contractor to advise employees and applicants of training programs available and to assist in the improvement of the skills of minorities, females, and applicants through such programs.
- (g) Section II.7 requires any contractor that relies on unions as a source of employees to obtain the cooperation of such unions to increase opportunities for minorities and females. The contractor is required to use good faith efforts to incorporate an EEO clause into each union agreement.
- (h) Section II.8 requires the contractor to become familiar with the requirements for and to comply with the Americans with Disabilities Act and all rules and regulations established thereunder.
- (i) Section II.9 requires the contractor to not discriminate in its selection and retention of subcontractors, including material suppliers and equipment leasing companies. Furthermore, the

contractor is required to notify all subcontractors, suppliers, and lessors of their EEO obligations and to use good faith efforts to ensure that the subcontractors comply with those obligations.

- (j) Section II.10 incorporates the requirements of 49 CFR Part 26 and NDDOT's approved DBE program into the contract and requires the contractor to not discriminate in the performance of the contract.
- (k) Section II.11 requires the contractor to keep records that document compliance with the EEO requirements and to retain these records for a period of three years after project completion. The records should include the number and work hours of minority, female, and nonminority employees in each work classification on the project, and the progress and effort being made to increase the employment opportunities for minorities and females. The contractor is required to submit an annual EEO report to NDDOT each July for the duration of the project. If the project contains the training special provision, this information is also required to be collected and reported.

## 2. Compliance Oversight

- a. Enforcement responsibilities are vested with NDDOT, which ultimately falls on the shoulders of the project engineers and ADEs. The project engineer should be aware on nondiscrimination requirements and monitor the contractor for compliance. Noncompliance with the EEO specifications may be considered a breach of contract for which sanctions can be imposed as detailed in FHWA 1273.
- b. If noncompliance with any provision is suspected, the project engineer should notify the ADE immediately. The ADE should consult with the CRD for a possible course of action.
- c. In addition, complaints of discrimination can surface at any time. Both Title VI and Title VII of the Civil Rights Act of 1964, and their related statutes, prohibit discrimination on federal-aid construction projects.
- d. If anyone on the project observes conduct or activity of a discriminatory nature or is approached by an employee of the prime contractor or a subcontractor with a complaint of discrimination, the Assistant District Engineer and the Civil Rights Division should be notified immediately. The Civil Rights Division will determine whether the conduct, activity, or complaint falls under Title VI or Title VII and whether it should be investigated by the contractor, NDDOT, or FHWA.

## C. IN-DEPTH REVIEW SELECTION CRITERIA

- 1. The CRD conducts at least ten in-depth contractor compliance reviews annually. Selection criteria include project size (\$3 million or more), type, location, whether OJT
- External Civil Rights Manual – March 2022

or DBE requirements are a part of the contract, and when the contractor was last reviewed.

2. All reviews must be conducted prior to or at peak employment. In addition, enough work must have been completed to generate three or more weekly certified payrolls. Contracts and subcontracts must also be large enough to produce meaningful employment figures.
3. Reviews are scheduled at least three weeks in advance in order to give the contractor enough time to gather and submit their review materials one week prior to the review date.
4. All reviews must be completed prior to **October 1 each year** in order to be counted toward NDDOT's annual goal.
5. The Contract Compliance Coordinator will contact ADEs and Team Leads in the spring to collect information on which projects the ADE would like to see reviewed and to receive guidance on time frames for review. After doing this, the ADE and project engineer will be notified when a project is selected for review. The ADE and PE should keep the Coordinator informed on the construction schedule as it might affect the scheduling of the review. Generally speaking, there should be 3-5 weeks of payroll and the project should be at peak employment before an Exit Conference is scheduled.
6. The CRD conducts a desk audit, or a review of all paperwork submitted by the contractor on the project selected, prior to the interview portion of the audit.
7. The interview portion of the Compliance Review may be done by conference call, by video conference, or by an onsite or district site meeting. The Department conducts a conference call or video conference when the following criteria have been met:
  - a. No serious noncompliance issues have been raised; and
  - b. All of the required information is received timely and, after review, there are only a few basic questions.
8. A video conference will typically be done with the contractor and district staff in the district office and the reviewing officer in the central office. If an onsite interview is done, it will typically take place in the district office conference space. A decision will be made and conveyed to the contractor and other participants approximately forty-eight hours in advance of the scheduled review concerning the method used to conduct the interview.
9. **Prior to** the scheduled review, the ADE is responsible for ensuring that the district, city, county, or consultant project engineer has done the following and for reporting his or her findings during the conference call or on-site visit:
  - a. Conducted labor compliance and EEO contractor compliance job-site interviews;
  - b. Completed the Project Bulletin Board Review Form to ensure that all required notices and posters are displayed, current, and legible, to include a photo of the Board (typically with a cell phone) attached electronically to the Bulletin Board

Review Form when filing in CARS/FileNet; and

- c. Inspected the project site to ensure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel and that non-segregated facilities are maintained.

## E. BULLETIN BOARDS

- 1. An inspection of the contractor's bulletin board must be made to ensure that all required notices and posters are displayed. Posted on the bulletin board must be:**
  - a. ***Poster Boards DOT 3350 - 1 of 3(07-2017), 2 of 3(03-2019), and 3 of 3(01-2021) provided by NDDOT, or their equivalents;***
  - b. **DBRA wage rate decision found in the contract;**
  - c. **Contractor's discrimination complaint procedure (a sample is attached to the pre- job conference form); and**
2. Bulletin Boards should be inspected for every federal-aid project within 15 days of work commencing on the project. It should also be done immediately prior to an in-depth Contractor Compliance Review. After inspecting the Prime Contractor's Bulletin Board, fill out the Project Bulletin Board Review Form, SFN 60547: <https://www.dot.nd.gov/forms/sfn60547.pdf>. This Form provides a record in the CCR file that an onsite inspection was done pursuant to the Compliance Review and that the required posters and notices were on the Board. Fill this out only for the Prime Contractor and not for subcontractors who might also be using the Board. Use the link in CARS to the SFN 60547, under "Add Documents/Civil Rights Forms."
3. When completing the Project Bulletin Board Review Form, take a photo of the Bulletin Board and file it in CARS/FileNet together with the Project Bulletin Board Review Form. This photo provides a context for accessibility and location of the Board.
4. Prime Contractors must always have a Bulletin Board on site, regardless of the proximity to the home office.
5. Instead of providing their own bulletin board, subcontractors may opt to post their company EEO policy, letters appointing their EEO and DBE officers, and their discrimination complaint procedure on the prime contractor's bulletin board and to share the prime contractor's poster boards and DBRA wage rate decision.
6. When a subcontractor is on a federal-aid highway construction project, or the *site of work*, for less than one week (seven calendar days), or when a subcontractor is extremely mobile on a federal-aid highway construction project, or the *site of the work*



(e.g., pavement markers, guardrail installers, fencers, etc.), the subcontractor will not be required to provide a *project-site* bulletin board if:

- a. The subcontractor's home office is located in North Dakota.
  - b. The subcontractor maintains a bulletin board at their home office location in an area readily accessible to all employees, applicants for employment, and other interested parties.
  - c. The bulletin board contains all of the required notices and posters.
  - d. The subcontractor provides documentation that their employees are required to check in at the home office on a daily and/or weekly basis and do so.
  - e. The subcontractor's employees know where the bulletin board is located.
7. The ADE in which the subcontractor's home office is located must conduct an annual supplemental review of the subcontractor's bulletin board at the location identified to ensure all of the required notices and posters are displayed, current, and legible. The ADE must initiate the supplemental review whenever the subcontractor begins work on a project in the district or whenever another ADE requests a supplemental review be conducted. The supplemental review must then be shared with the other ADEs.
  8. In cases where a subcontractor works away from their home office location and hires local individuals who do not check in at the home office, a copy of each of the required notices and posters must be given to those individuals. The subcontractor must obtain an acknowledgement of receipt from each individual and provide a copy of each acknowledgement to the ADE of the district in which the project is located.
  9. Whenever the subcontractor performs any work on the federal-aid highway construction project, a copy of the supplemental review or a copy of each acknowledgement of receipt must be attached to the *Monthly EEO Project Inspection Report (SFN 9425 - Rev. 08-2017)* <https://www.dot.nd.gov/forms/sfn09425.pdf> for the month in which the subcontractor worked. Refer to paragraph B of Section I for information concerning the *Monthly EEO Project Inspection Report*.
  10. During routine labor compliance job-site interviews, contractor employees are asked if they know where the bulletin board is located. Any negative answers by the subcontractor's employees must be brought to the attention of the subcontractor. The allowance for the subcontractor to display the required notices and posters at their home office rather than at the project site will be re-evaluated at that time.

## F. EEO INTERVIEWS

1. Labor compliance and EEO contractor compliance job-site interviews must be conducted on those projects scheduled for in-depth contractor compliance reviews. ADE and project engineers will receive prior notification of scheduled contractor compliance reviews and are required to attend the reviews. **All Labor Compliance interviews shall be conducted using the LCP Tracker on-site**

**application when mobile devices are available. If a mobile device is not available, completed Labor Compliance interviews must be uploaded via the edocuments function in LCP Tracker.**

2. In selecting employees for these interviews, try to concentrate on those most vulnerable to mistreatment – i.e. laborers as opposed to higher paid workers, anyone who does not speak English proficiently, females, minorities, those recently hired, etc. One minority, one nonminority, and one female, if available, should be interviewed. Ideally, five (5) interviews should be conducted.
3. Interviews should not be conducted with bona fide owner-operators of trucks or with haulers and suppliers of petroleum products.
4. All statements and questions on interview forms must be answered fully and detailed information and/or explanations provided where necessary. *All statements made by an employee, whether orally or in writing, must be treated as confidential to avoid disclosure of the employee's identity to the contractor without the employee's consent.*
5. All follow-up data should be obtained on the same day the employee interview data is gathered. The only exception would be verification of the certified payroll for the week of the interviews.
6. Use the Department's interpreter service on your cell phone to interview any worker with Limited English Proficiency (LEP). Do not fail to interview a worker because he or she has LEP.
7. If any interviewee reports suspected discrimination, contact the ADE immediately. The allegations will need to be addressed at the Exit Conference and must be investigated by the contractor.
8. Even if the report of discrimination is made on another project – i.e. the worker reports alleged illegal discrimination or harassment on another project he or she is working on, report the allegations to ADE.

## **G. NONSEGREGATED FACILITIES**

The project site must be inspected to ensure that working conditions and employee facilities do not indicate discriminatory treatment of project personnel and that the contractor does not maintain segregated facilities or allow their employees to work at any location under their control where segregated facilities are maintained. Segregated facilities include waiting rooms, work areas, restrooms and washrooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, and transportation and housing facilities. The only exceptions would be when the demands for accessibility override (disabled parking) and where separate or single- user toilet and necessary changing facilities are provided to assure privacy between the sexes.

## **H. MONTHLY EEO PROJECT INSPECTION REPORT**

1. The Monthly EEO Project Inspection Report (**SFN 9425 - Rev. 08-2017**) <https://www.dot.nd.gov/forms/sfn09425.pdf> must be submitted monthly by district, city, county, and consultant project engineers for each active federal-aid highway construction project under their supervision.
2. The Monthly EEO Project Inspection Report should be filed by the 10<sup>th</sup> day of each month, beginning the first full month following commencement of a federal-aid project.
3. The report should include an ongoing inspection of the project bulletin board, a verification of efforts to ensure that trucking operations are in compliance with DBE and DBRA standards, and a summary of labor compliance interviews planned or completed.

## I. TOILET FACILITIES

Complaints with regard to adequate toilet facilities are sometimes characterized as discriminatory treatment. It is, however, the prime contractor’s responsibility to provide adequate toilet facilities and access to these facilities to *all* workers. Toilet facilities on construction sites, including highway construction, are regulated under 29 CFR 1926.51(c) (1), which requires that, on construction jobsites, a specified minimum number of "toilets shall be provided for employees . . ." in accordance with Table D-1.

*Toilets at construction jobsites. (1) Toilets shall be provided for employees according to the following table:*

**Table 1 – Toilets at Construction Sites**

| <i>Number of employees</i> | <i>Minimum number of facilities</i>               |
|----------------------------|---|
| <i>20 or less . . . .</i>  | <i>1</i>  |
| <i>20 or more . . . .</i>  | <i>1 toilet seat and 1 urinal per 40 workers.</i> |
| <i>200 or more . . . .</i> | <i>1 toilet seat and 1 urinal per 50 workers.</i> |

OSHA has ruled “provide” means to make available, and that access to toilet facilities must be provided to employees in a prompt manner. This means that it must not take an employee more than 10 minutes, generally, to walk, drive or be driven to a toilet. In the case of flagger, who must be relieved by another worker in order to use the toilet, the prime contractor must ensure that there is a method under which the flagger can call for relief and be able to use toilet facilities within a reasonable amount of time, or the contractor is not “providing” a toilet to the flagger. Similarly, toilets that are unsanitary to the point of being unusable and not "provided" under §1926.51(c)(1)

# ON THE JOB TRAINING (OJT)

## SECTION 4

### TABLE OF CONTENTS

|   |                                     |
|---|-------------------------------------|
| <b>IV. ON-THE-JOB TRAINING (OJT)</b> .....                    | <b>1</b>                            |
| <b>A. OJT ASSIGNMENTS</b> .....                               | <b>1</b>                            |
| <b>B. PROJECT ENGINEERS' PRIMARY RESPONSIBILITIES</b> .....   | <b>1</b>                            |
| <b>C. OJT PROGRAM ADMINISTRATION</b> .....                    | <i>ERROR! BOOKMARK NOT DEFINED.</i> |
| <b>D. SPECIAL PROVISION ON-THE-JOB TRAINING PROGRAM</b> ..... | <b>2</b>                            |
| <b>E. APPROVALS REQUIRED</b> .....                            | <b>2</b>                            |
| <b>F. TRAINEE CANDIDATE REQUIREMENTS</b> .....                | <b>2</b>                            |
| <b>G. CONTRACTOR REIMBURSEMENTS</b> .....                     | <b>2</b>                            |
| <b>H. MINIMUM WAGE RATES AND FRINGE BENEFITS</b> .....        | <b>3</b>                            |
| <b>I. ON-SITE MONITORING BY PROJECT ENGINEER</b> .....        | <b>3</b>                            |
| <b>J. TRAINEE ON-SITE VISITS</b> .....                        | <b>3</b>                            |
| <b>K. FAILURE TO COMPLY</b> .....                             | <b>4</b>                            |

## IV. ON-THE-JOB TRAINING (OJT)

Under 23 Code of Federal Regulations Part 230, NDDOT must provide training and skill improvement opportunities to increase participation of minorities, women, and economically disadvantaged persons in the highway construction industry.

### A. OJT ASSIGNMENTS

Each year around March the OJT Program Administrator makes the calculations necessary to identify construction firms that have been awarded NDDOT projects between April and March. Once the firms are identified a further analysis is done to ensure that the Department is within their OJT goal, which is approved by FHWA annually, and that the program will likely be successful. The following is basic criteria for OJT assignments, for further information please reference the [On-the-Job Training Program Administration Manual](#):

1. Contractors may count 100 percent of the training hours worked on municipal, private, out-of-state projects or other non-highway work toward the OJT Program completion in addition to counting training hours on state and federal funded jobs.
  - Hours counted toward completion of the trainee's program must be paid at the OJT Program's minimum wage scale.
  - Contractors may count the hours worked on other than state or federal jobs toward completion, however, no program reimbursement will be made for those hours.
  - All projects must be located within North Dakota.
  - All trainees must be a resident of North Dakota and may be required to provide proof with a North Dakota Drivers License and/or current utility bill in the trainees name with a North Dakota mailing address.
  - NEW OJT Program Dependent Child Daycare Reimbursement (SFN 62136) Program allows for approved daycare reimbursement for trainees participating in an active training program. Reimbursements are made directly to the trainee and not through the contractor.
2. The federal-aid contract dollar thresholds for the number of trainee position assignments are:

|                          |            |
|--------------------------|------------|
| 8,000,000 to 16,000,000  | 1 trainee  |
| 16,000,001 to 24,000,000 | 2 trainees |
| 24,000,001 and above     | 3 trainees |

### B. PROJECT ENGINEERS' PRIMARY RESPONSIBILITIES

The project engineer's primary responsibility for an OJT trainee working on a NDDOT project is to observe and note in the project diary such things as: how is the trainee(s) being treated, whether a trainee is on the job, whether the trainee is learning the craft and working on the equipment related to the approved program, etc. The project engineer also needs to make sure the trainee is available to the OJT Supportive Services Contractor when they are doing an on-site interview.

It is the contractor's responsibility to provide training hours so the trainee can adequately learn the skills required by the program's curriculum.

It is the project engineer's responsibility, when notified by CRD, to withhold progress payments when/if the contractor is not responding or complying with the OJT contract provision.

### **C. SPECIAL PROVISION ON-THE-JOB TRAINING PROGRAM**

All state and federally funded highway construction contracts contain the [Special Provision On-the-Job Training Program](#). The OJT SP, while not contained in contracts solely funded by private companies/entities, municipalities, counties, TERO, etc, must be followed with a contractor's trainee as approved under the program. This means that at all times a trainee's training hours may be counted toward completion of their approved program, the training wage stated in the program approval must be paid.

### **D. APPROVALS REQUIRED**

1. The process for selecting training programs and trainee candidates is covered in the OJT Program Administration Manual (<https://www.dot.nd.gov/divisions/civilrights/docs/ojtprogram.pdf>).
2. Prior to any of a trainee's hours counting toward their program completion, contractors must submit [Request for OJT Program and Trainee Approval \(SFN 60226\)](#), submit the trainee candidate's job application, the program curriculum proposed for approval, and the wage rates associated with the program.

### **E. TRAINEE CANDIDATE REQUIREMENTS**

1. A contractor may not employ an individual as a trainee in a classification for which the individual has completed training or been employed as a journeyworker.
  - The proposed candidate's work experience will be reviewed to determine whether the candidate is eligible.
2. Individuals enrolled in the truck driver training program must possess appropriate driver permits or licenses for the operation of Class A, B, and C trucks.
3. Trainees must be a resident of North Dakota and may be required to show proof with a North Dakota Drivers License and/or a current utility bill in their name with a North Dakota mailing address.
4. The contractor must notify CRD when a trainee completes the program.

### **F. CONTRACTOR REIMBURSEMENTS**

1. Contractors are reimbursed \$4.00 per hour for each eligible hour of training provided. To request reimbursement, contractors must complete [SFN 51023 Voucher for On-the-Job Training Program Hourly Reimbursement](#) for each OJT program trainee.
  - Project engineers must ACCEPT payrolls so they can be "seen" and reviewed by OJT Supportive Services. If payroll remains unapproved/unaccepted in LCPtracker, OJT Supportive Services cannot see them. Contractor's reimbursement requests and the trainee's hours cannot be approved without them.

## **G. MINIMUM WAGE RATES and FRINGE BENEFITS**

1. All wage rates are specifically stated in the Program Administration Manual according to trade. All wages are based on the federal Davis-Bacon Wage rate decision in the contract proposal.
2. Basic hourly rates for all job classifications and fringe benefit payments, are established by USDOL under the Davis-Bacon and Related Acts.
3. On-the-job trainees and apprentices must be paid fringe benefits in accordance with the provisions of the approved program and its wage scale or apprenticeship program and its indenture agreement.

## **H. ON-SITE MONITORING BY PROJECT ENGINEER**

1. When a trainee completes their program, the wages will then be monitored by the District staff, as part of the regular payroll monitoring responsibilities.
  - Project engineers should be aware of trainees working on a highway construction project under their jurisdiction, regardless of the funding source. Particular attention should be paid to the type of work the trainees are performing, i.e., an equipment operator or a truck driver trainee should not be continually performing laborer work.
2. All project engineers should immediately report observed abuses of the OJT program requirements to the ADE and note the abuses in the project diary.
  - The ADE must bring the matter to the contractor's project superintendent attention.
  - The project superintendent must direct the assigned trainer to provide the training required under the contractor's contract with NDDOT.
  - If abuse continues, the assistant district engineer must immediately notify CRD.
3. Project engineers are responsible for immediately reporting any observed abuses of the trainees and note the abuses in the project diary.
  - If the project engineer or their project staff observe other contractor employees verbally abusing a trainee, making derogatory remarks within hearing distance of a trainee, throwing tools or materials at or in the direction of a trainee, or any other such inappropriate activity, the project engineer must first step in and stop the behavior, then notify the contractor's project superintendent, and the ADE. The ADE will notify CRD.

## **I. TRAINEE ON-SITE VISITS**

1. Approved trainees are monitored by NDDOT's OJTSS consultant.
  - The OJTSS consultant:
    - (1) Makes two work-site visits to trainees working on the job
      - (a) Contractors must make the trainees available to the OJTSS

consultant for on-site visits.

- (b) OJTSS will confer with the project engineer and the contractor's project superintendent regarding the trainee's progress.
  - (c) The project engineer should reassure the contractor that OJTSS has a contract with NDDOT and that the process is part of the contractor's contractual responsibility under the OJTSP.
- (2) Contacts contractors responsible for completion of trainee positions each week to determine trainee progress
    - (a) Contractor's appointees who do not respond timely, risk sanctions.
  - (3) Reviews all requests for reimbursement prior to CRD approval.
  - (4) Analyzes weekly payroll excerpts (on federal and state funded projects) which are submitted monthly with reimbursement requests.
  - (5) Assesses trainee hours and ascertains whether their wages and fringes are paid correctly and appropriately

## J. FAILURE TO COMPLY

1. No payment will be made to a contractor for failure to provide the required training or failure to hire the trainee when such failure is caused by the contractor and evidences a lack of good faith on the part of the contractor in meeting the requirements of [Special Provision On-the-Job Training Program](#).
  - If payments have been made, the CRD will notify the ADE to withhold the amount paid from the contractor's progress payment.
  - The contractor may be subject to sanctions up to and including revocation of bidding privileges.
2. Any OJT positions not completed during the construction year they were assigned in will need to be completed the following year and/or the assigned contractor will have carryover positions each subsequent year until they fulfill their obligations.

To contact CRD, phone: 701-328-3116, Email: [civilrights@nd.gov](mailto:civilrights@nd.gov)

Forms necessary for the OJT Program are available on the NDDOT web site at:  
[www.dot.nd.gov/dotnet/forms/forms.aspx](http://www.dot.nd.gov/dotnet/forms/forms.aspx)

- NDDOT OJT Special Provision  
<https://www.dot.nd.gov/divisions/civilrights/docs/ojtspecialprovision.pdf>
- NDDOT's OJT Program Manual, includes the Minimum Wage Scales  
[www.dot.nd.gov/divisions/civilrights/docs/ojtprogram.pdf](http://www.dot.nd.gov/divisions/civilrights/docs/ojtprogram.pdf)
- SFN 60226 Request for OJT Trainee Candidate Approval  
[www.dot.nd.gov/forms/sfn60226.pdf](http://www.dot.nd.gov/forms/sfn60226.pdf)
- SFN 51023 Voucher for On-the-Job Training Program Hourly Reimbursement  
<https://www.dot.nd.gov/forms/sfn51023.pdf>
- SFN 62136 OJT Dependent Child Care Reimbursement  
<https://www.dot.nd.gov/forms/sfn62136.pdf>



# LABOR COMPLIANCE

## SECTION 5

### TABLE OF CONTENTS

|   |           |
|---|-----------|
| <b>V. LABOR COMPLIANCE</b> .....                                      | <b>2</b>  |
| <i>A. DAVIS-BACON AND RELATED ACTS COVERAGE</i> .....                 | <i>2</i>  |
| <i>B. TRUCK DRIVERS AND DBRA</i> .....                                | <i>3</i>  |
| <i>C. PAYMENT OF PREDETERMINED MINIMUM WAGE</i> .....                 | <i>3</i>  |
| <i>D. PAYROLL REQUIREMENTS</i> .....                                  | <i>3</i>  |
| <i>E. CLASSIFICATIONS</i> .....                                       | <i>3</i>  |
| <i>F. EXEMPTIONS FROM DBRA COVERAGE</i> .....                         | <i>3</i>  |
| <i>G. CONFORMANCE PROCESS</i> .....                                   | <i>4</i>  |
| <i>H. CHILD LABOR LAWS</i> .....                                      | <i>4</i>  |
| <i>I. UNCLAIMED PAYCHECKS</i> .....                                   | <i>5</i>  |
| <i>J. EMPLOYEES HIRED THROUGH TEMPORARY EMPLOYMENT AGENCIES</i> ..... | <i>5</i>  |
| <i>K. ON-SITE MONITORING BY PROJECT MANAGER-ENGINEER</i> .....        | <i>5</i>  |
| <i>L. FEDERAL AND STATE DEPARTMENT OF LABOR PERSONNEL</i> .....       | <i>9</i>  |
| <i>M. REFERENCE SOURCES</i> .....                                     | <i>9</i>  |
| <i>N. REPORTING THE NEED FOR INVESTIGATIONS</i> .....                 | <i>10</i> |
| <i>O. INVESTIGATING COMPLAINTS AND VIOLATIONS</i> .....               | <i>10</i> |

## V. LABOR COMPLIANCE

The Davis-Bacon and Related Acts (DBRA) and the Contract Work Hours and Safety Standards Act (CWHSSA), 29 CFR 1, 3, 5, 6, and 7, contain wage and payroll requirements applicable to federal –aid highway construction projects and are incorporated into contracts and subcontracts through FHWA 1273 (*Required Contract Provisions, Federal-aid Construction Contracts ,USDOT Form FHWA 1273 - Rev. 5-1-12*) <https://www.fhwa.dot.gov/programadmin/contracts/1273/1273.pdf> . DBRA are binding on all federal-aid highway construction contracts.

NDDOT has the primary responsibility for the enforcement of the labor standards provisions included in all federally funded highway construction contracts. Overall monitoring of contractors for labor compliance is the responsibility of the assistant district engineer. District, city, county, and consultant project managers-engineers have the responsibility for day-to-day monitoring at the project level.

The *U.S. Department of Labor (USDOL) Field Operations Handbook - Chapter 15 (revised 10-25-10)* <https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15> covers the federal rules and regulations that govern labor compliance, and assistant district engineers and district, city, county, and consultant project managers-engineers must familiarize themselves with this handbook. This Handbook does not contain all laws and rulings surrounding DBRA, but rather it contains material on guidelines contained hereinafter are not all inclusive of the federal laws, rules, regulations, regulatory guidance, etc., that are available concerning DBRA coverage and other labor standards provisions of federal-aid highway construction contracts. [Refer to paragraph M of this section for reference sources.] The guidelines are not meant to preclude, replace, supersede, or otherwise circumvent any previously existing or future federal laws, rules, regulations, regulatory guidance, etc., that have or may be issued by USDOL. These guidelines are provided to assist district, city, county, and consultant project managers-engineers in monitoring contractors for compliance with the federal wage and payroll requirements of DBRA on NDDOT federally funded highway construction projects only. Although the information has been obtained from reputable sources in accordance with currently available information, it may not be applicable to other contracting agencies or other State Departments of Transportation. The CRD provides technical assistance to only those district, city, county, and consultant project managers-engineers who administer federally funded highway construction projects in North Dakota.

### A. DAVIS-BACON AND RELATED ACTS COVERAGE

#### 1. Davis-Bacon and Related Acts (DBRA)

- a) Davis-Bacon Act: The Davis-Bacon Act requires payment of prevailing wages and fringe benefits, as determined by the U.S. Department of Labor (USDOL), to all laborers and mechanics working on the site of federal and federal-aid government construction projects in excess of \$2,000.00. Construction includes the alteration and/or repair of public buildings and public works and roads.
- b) Contract Work Hours and Safety Standards Act: The Contract Work Hours and Safety Standards Act (CWHSSA) requires payment at time and one-half of the basic hourly rate of pay for overtime (OT) hours (over 40 hours in any seven-day work week) worked on covered project(s). Violations may result in liquidated damage penalties (\$10/day per violation).
- c) Copeland Act: The Copeland (Anti-Kickback) Act makes it a crime for anyone to require any laborer or mechanic employed on a federally funded project to pay back any part of his or her wages. In addition,

the Act prohibits any deductions from pay other than those specifically listed as permissible. The Copeland Act also requires that contractors and subcontractors at all tiers submit weekly certified payrolls.

Additional information regarding Davis Bacon and Related Acts Coverage can be found in the Davis-Bacon Wage and Payroll Requirements handbook:

<https://www.dot.nd.gov/manuals/civilrights/davisbacon.pdf>

## **B. TRUCK DRIVERS AND DBRA**

1. Truck Drivers and DBRA coverage can be found in the Davis-Bacon Wage and Payroll requirements handbook <https://www.dot.nd.gov/manuals/civilrights/davisbacon.pdf>

## **C. PAYMENT OF PREDETERMINED MINIMUM WAGE**

1. Payment of predetermined minimum wage information can be found in the Davis-Bacon Wage and Payroll requirements handbook <https://www.dot.nd.gov/manuals/civilrights/davisbacon.pdf>

## **D. PAYROLL REQUIREMENTS**

1. All payrolls must be filed electronically through LCPtracker weekly. Procedures for reviewing certified payroll can be found in the NDDOT LCPtracker procedure manual for NDDOT staff: <https://www.dot.nd.gov/divisions/civilrights/docs/NDDOT-LCPtracker-Procedure-Manual-for-Engineers.pdf>.
2. Additional information regarding payroll requirements is located in the Davis-Bacon Wage and Payroll requirements handbook <https://www.dot.nd.gov/manuals/civilrights/davisbacon.pdf>

## **E. CLASSIFICATIONS**

1. Classifications not traditionally found in the wage decision can be found in the Davis-Bacon Wage and Payroll Requirements handbook: <https://www.dot.nd.gov/manuals/civilrights/davisbacon.pdf>

## **F. EXEMPTIONS FROM DBRA COVERAGE**

1. Exemptions from DBRA coverage can be found in the Davis-Bacon Wage and Payroll Requirements handbook: <https://www.dot.nd.gov/manuals/civilrights/davisbacon.pdf>

## G. CONFORMANCE PROCESS

1. When a job classification is not included in the Davis-Bacon wage rate decision incorporated into the contract, the job classification and wage rate, including any fringe benefit amounts, must be conformed *after the contract has been awarded*. This means the contractor must submit a proposed job classification and base hourly rate, plus any fringe benefits, to the CRD. The CRD forwards the contractor's request to USDOL for approval. Included with the contractor's request must be the following supporting documentation:

- a) *Request For Authorization of Additional Classification and Rate (SF-1444)* <https://www.dol.gov/agencies/whd/government-contracts/construction/forms>
- b) Copies of weekly certified payrolls issued for the project or other projects located in the area showing the current rate of pay and fringe benefits, where appropriate, for the job classification in question, or If the contractor belongs to a union, a copy of the current collective bargaining agreement showing the required rate of pay and any appropriate fringe benefit amounts for the job classification in question and the project area; and
- c) Statements by the employees involved concerning whether they agree or disagree with the proposed job classification and wage rate, including fringe benefits where appropriate, or If the employees are unknown, a statement to that effect.

**NOTE:** Contractors may use Block 16 of the *Request For Authorization of Additional Classification and Rate (SF-1444)* to provide this information or the *Classification & Wage Rate Request – Employee Information (SFN 50043 - Rev. 09-2017)* <https://www.dot.nd.gov/forms/sfn50043.pdf> form developed by the CRD.

2. An instructional package is available through the CRD to aid contractors in making a request. A letter explaining the process and including the following attachments is sent to the contractor:
- a) A sample letter to NDDOT requesting a job classification and wage rate determination;
  - b) The federal requirements;
  - c) The USDOL form *Request For Authorization of Additional Classification and Rate (SF-1444)*; <https://www.dol.gov/agencies/whd/government-contracts/construction/forms> and
  - d) The *Classification & Wage Rate Request – Employee Information (SFN 50043 - Rev. 09-2017)* <https://www.dot.nd.gov/forms/sfn50043.pdf> form developed by the CRD for providing the employee statements.

## H. CHILD LABOR LAWS

1. Federal and state child labor laws can be found in the Davis-Bacon Wage and Payroll Requirements handbook: <https://www.dot.nd.gov/manuals/civilrights/davisbacon.pdf>

## **I. UNCLAIMED PAYCHECKS**

If, for any reason, a contractor is unable to deliver a paycheck to a current or former employee, the money must be turned over to the Unclaimed Property Division of the North Dakota Department of Trust Lands. The Unclaimed Property Division makes every effort to reunite the money with its rightful owner or with the rightful owner's heirs. The procedure for turning over unclaimed property to the Department of Trust Lands can be found on their Web site at: [www.land.nd.gov](http://www.land.nd.gov). Contact 701-328-2800 for needed assistance.

## **J. EMPLOYEES HIRED THROUGH TEMPORARY EMPLOYMENT AGENCIES**

1. Information regarding employees hired through temporary employment agencies can be found in the Davis-Bacon Wage and Payroll Requirements handbook:  
<https://www.dot.nd.gov/manuals/civilrights/davisbacon.pdf>

## **K. ON-SITE MONITORING BY PROJECT MANAGER-ENGINEER**

1. Project Engineers are responsible for monitoring prime contractor and subcontractor compliance with the labor standards provisions through the use of proper inspection procedures. A distinction must be drawn between investigations, which are concerned with a specific allegation or allegations of wrongdoing, and inspections, which are checks on procedures and practices regarding labor matters without any allegations of improper actions.
2. Early and complete labor compliance inspections are essential to the development of a sound compliance pattern on all federal-aid highway construction projects. Projects where the contract is of short duration (six months or less) must be inspected at least once while the work is in progress. In the case of contracts extending over a longer period, the inspections must be made with such frequency as may be necessary to assure compliance.
3. Inspections must include:
  - i. A check to determine whether the proper Davis-Bacon wage rate decision and other required wage posters and notices are properly displayed on job-site bulletin boards;
  - ii. Interviews with employees with reference to payroll data and classification information; and
  - iii. Examinations of the weekly certified payrolls themselves.
4. Bulletin Boards
  - a. The following must be displayed on federal-aid highway construction projects, or the *site of the work*, in an area readily accessible to all employees, applicants for employment, and other interested parties:
    1. A complete list of required job site posters can be accessed at:  
<https://www.fhwa.dot.gov/programadmin/contracts/poster.cfm>

2. If any contractors would like to use the posters provided by DOT(DOT 3350 1 OF 3, 2 OF 3 , and 3 of 3) contact the Civil Rights Program Manger at (701) 328-2605.
  3. \*\*Davis-Bacon wage rate decision incorporated into the contract.
1. Instead of providing their own bulletin board, subcontractors may opt to post their company EEO policy, letters appointing their EEO and DBE officers, and their discrimination complaint procedure on the prime contractor's bulletin board and to share the prime contractor's poster boards, and Davis-Bacon wage rate decision.
  2. When a subcontractor is on a federal-aid highway construction project, or the *site of the work*, for less than one week (seven calendar days), or when a subcontractor is extremely mobile on a federal-aid highway construction project, or the *site of the work* (e.g., paint strippers, guardrail installers, fencers, etc.), the subcontractor will not be required to provide a *project-site* bulletin board if:
    - a) The subcontractor's home office is located in North Dakota.
    - b) The subcontractor maintains a bulletin board at their home office location in an area readily accessible to all employees, applicants for employment, and other interested parties.
    - c) The bulletin board contains all of the required notices and posters.
    - d) The subcontractor provides documentation that their employees are required to check in at the home office on a daily and/or weekly basis and do so.
    - e) The subcontractor's employees know where the bulletin board is located.
  3. The Assistant District Engineer of the District in which the subcontractor's home office is located must conduct an annual supplemental review of the subcontractor's bulletin board at the location identified to ensure all of the required notices and posters are displayed, current, and legible. The assistant district engineer must initiate the supplemental review whenever the subcontractor begins work on a project in his or her district, or whenever another assistant district engineer requests a supplemental review be conducted. The supplemental review must then be shared with the other seven assistant district engineers.
  4. In cases where a subcontractor works away from their home office location and hires local individuals who do not check in at the home office, a copy of each of the required notices and posters must be given to those individuals. The subcontractor must obtain an acknowledgement of receipt from each individual and provide a copy of each acknowledgement to the assistant district engineer of the district in which the project is located.
  5. Whenever the subcontractor performs any work on the federal-aid highway construction project, a copy of the supplemental review or a copy of each acknowledgement of receipt MUST be attached to the *Monthly EEO Project Inspection Report (SFN 9425 - Rev. 08-2017)* <https://www.dot.nd.gov/forms/sfn09425.pdf> for the month in which the subcontractor worked. Refer to paragraph B of Section I for information concerning the *Monthly EEO Project Inspection Report*.
  6. During routine labor compliance job-site interviews, contractor employees are asked if they know where the bulletin board is located. Any negative answers by the subcontractor's employees must be brought to the attention of the subcontractor. The allowance for the subcontractor to display the required notices and posters at their home office rather than at the project site must be re-evaluated at that time.

## 5. Labor Compliance Job-site Interviews

**Please note: The use of the LCP Tracker on-site application is mandatory for those project staff with access to a mobile device. For project staff that do not have a mobile device, all completed Labor Compliance Interviews must be uploaded to LCP Tracker using the edocuments function.**

7. Systematic spot interviews with the contractor's project employees must be conducted by Project Engineers or their staffs. The interviews are used to determine whether the Davis-Bacon wage rate decision and other labor standards provisions of the contract are being fully complied with, and that there is no misclassification of employees.
8. Each prime contractor with a project in a district's jurisdiction must have labor compliance job-site interviews\* conducted on a portion of their project workforce at least once annually. For those prime contractors with more than one project in a district, daily monitoring will be required but it will not be necessary to conduct job-site interviews. Only one project per contractor need be selected for interviews.

\*\*\*Not required for contracts and subcontracts under \$10,000 where work on the project is sporadic and of short duration (three weeks or less).

9. If a contractor has a history of labor compliance problems, however, the assistant district engineer will be so informed and instructed to conduct interviews on all of the contractor's projects located within the district.
10. Every subcontractor, regardless of the number of subcontracts they hold in the district, must have job-site interviews conducted on at least one project annually.
11. No interviews should be conducted with bona fide owner-operators of trucks or with haulers and suppliers of petroleum products.
12. Generally, projects must be selected and interviews scheduled for the time when the contractor is at peak activity for the project.
13. All statements and questions on the form must be answered fully, and detailed information and/or explanations provided where necessary. *All statements made by an employee, whether orally or in*

*writing, must be treated as confidential so as to avoid disclosure of the employee's identity to the contractor without the employee's written consent.*

14. Particular attention must be paid to determine whether there are any subcontractors not submitting weekly certified payrolls. Interviews with operators of equipment not clearly identified as belonging to the prime contractor, or an approved subcontractor, will disclose this problem. In such interviews, the names of the subcontractors must always be requested and recorded.
15. All follow-up data normally can and must be obtained on the same day the employee interview data is gathered. The only exception would be verification of the certified payroll for the week of the interviews.
16. When conducting the interviews, a good cross-section of the contractor's project employees should be selected. Selection criteria should include race, sex, job classification, and age. One minority, one nonminority, and one female in each trade, job classification, or occupation should be interviewed. A *minimum of five (5) interviews should be conducted if at all possible.* Contractors must allow their employees to be interviewed.
17. **The ADE should be informed and consulted any time there is an irregularity or issue of concern under the DBRA or certified payroll.** It is also important to remember that all of the employee's responses must be treated as confidential. The employee's identity must not be revealed to the contractor unless the employee has given his or her written permission.

#### 18. Weekly Certified Payrolls

- i. The sole use of LCP Tracker for the submission of certified payrolls is mandatory. Instructions for the review of payroll can be found in the LCP Tracker Procedure Manual for NDDOT Staff: <https://www.dot.nd.gov/divisions/civilrights/docs/NDDOT-LCPTracker-Procedure-Manual-for-Engineers.pdf>
- ii. Additional items to keep in mind when reviewing payroll:
  - a) Whether any flagged violations have merit;
  - b) Whether the work being performed by the employees, including apprentices and trainees, conforms to the job classifications included in the Davis-Bacon wage rate decision – i.e. are employees properly classified;
  - c) Whether any employees appear “missing” or have been misclassified.
  - d) Whether there is evidence of any disproportionate employment of laborers and apprentices or trainees to journeyworkers so as to indicate avoidance of the Davis-Bacon wage rate decision and other labor standards provisions of the contract; and
  - e) Whether fringe benefits paid into bona fide plans are being paid appropriately. To do this, one employee of each broad job classification (operators, truckers, laborers, and other trades) should be “audited.”



- f) Minor payroll issues or discrepancies (improper job classifications, basic hourly rates, overtime rates, fringe benefits, etc.) should be handled by Project Engineer at the project level. If it is not possible to bring the issue to settlement within a reasonable length of time (thirty calendar days), the matter must be referred to the Assistant District Engineer.
- g) When there is reason to believe violations exist that are not readily adjustable, are of a serious nature, or may be willful or criminal in nature, the Project Engineer must report such findings, including sufficient data concerning the nature and extent of the violations, to the Assistant District Engineer. The ADE must notify the CRD immediately. CRD will determine who should investigate and resolve the matter.

## a. FEDERAL AND STATE DEPARTMENT OF LABOR PERSONNEL

Wage and Hour Division  
 U.S. Department of Labor  
 Room 323  
 220 East Rosser Avenue  
 Bismarck, ND 58501-3869  
 Phone: 701-250-4320

North Dakota Dept. of Labor  
 State Capitol, 13<sup>th</sup> floor  
 600 East Boulevard Avenue  
 Bismarck, ND 58505-0340  
 Phone: 701-328-2660 or  
 In-state, toll-free: 1-800-582-8032  
 Email: [labor@nd.gov](mailto:labor@nd.gov)

Wage and Hour Division  
 U.S. Department of Labor  
 Denver District Office  
 Phone: 720-264-3250

Government Contracts Enforcement Division  
 U.S. Department of Labor  
 Suite 800  
 525 South Griffin Street  
 Dallas, TX 75202  
 Phone: 972-850-2648 or 872-850-2647

## b. REFERENCE SOURCES

The following were used in the development of this section but are not all inclusive of the federal laws, rules, regulations, regulatory guidance, etc., that are available concerning DBRA coverage and other labor standards provisions of federal-aid highway construction projects:

- *29 CFR Parts 1, 3, 5, 6, and 7*
- *USDOL Field Operations Handbook - Chapter 15 (10-25-10)* available online at:  
[www.dol.gov/whd/FOH/FOH\\_Ch15.pdf](http://www.dol.gov/whd/FOH/FOH_Ch15.pdf)
- Required Contract Provisions, Federal-aid Construction Contracts (USDOT Form FHWA 1273 - Rev. 5-1-12) available online at:

### **c. REPORTING THE NEED FOR INVESTIGATIONS**

1. As a result of regular project inspections, an employee's or other interested person's complaint, or a routine check of weekly certified payrolls, indicators or *red flags* may surface that signal the presence of violations that are of a serious nature, or ones that are not readily adjustable. The district, city, county, or consultant project manager-engineer must bring to the attention of the assistant district engineer the need for investigative assistance or a complete investigation whenever:
  - a. Complaints alleging intentional violations are received that the district, city, county, or consultant project manager-engineer feels may have some validity. Some of the sources of such complaints will be employees, their representatives (unions), competing contractors, or other interested persons. *Complaints must be treated confidentially.*
  - b. There are habitual and persistent violations of other requirements of the contract so as to indicate a general carelessness on the part of the contractor with respect to his or her contractual responsibilities.
  - c. There is a delay by a contractor in furnishing the required weekly certified payrolls and a satisfactory explanation is not forthcoming, or other suspicious circumstances exist.
  - d. Discrepancies, other than routine errors, are discovered. The discovery of falsifications in the time and payroll records, or reasonable cause to believe such a situation exists, calls for especially prompt and vigorous action.
2. In all such cases, the assistant district engineer must notify the CRD immediately. The CRD will determine a possible course of action.
3. When anyone on the project observes a violation, they should not wait for a complaint to be filed. The assistant district engineer or the district, city, county, or consultant project engineer must be alerted to the situation immediately so they can work with the contractor and the CRD to get the matter resolved before it becomes a major problem. The situation will be much easier to settle while it is still fresh in everyone's mind rather than months later. In addition, the uncovering of a violation in the early stages will save time on the part of NDDOT and will avoid large back pay obligations on the part of the contractor.
4. If you need technical assistance on a Davis Bacon question, call the Labor Compliance Administrator (701-328-2605). If, however, a problem exists on the project, or there is a complaint (formal or informal), report to the ADE prior to calling CRD and refer to the following Section (O "Investigating Complaints and Violations).

### **d. INVESTIGATING COMPLAINTS AND VIOLATIONS**

1. If a Davis-Bacon wage issue cannot be handled informally, the employee may file a *Davis-Bacon Complaint Form*, SFN 60557 (9-2017) <https://www.dot.nd.gov/forms/sfn60557.pdf> . This Form may

be used for complaints concerning unpaid wages, improper job classifications, improper wage rates, overtime rates, fringe benefit payments, payroll requirements, improper deductions, etc. The employee should be directed to the CRD, and referred to the appropriate form online, if he or she has access.

2. The Davis-Bacon Complaint Form consists of two pages – a main complaint form and a supplemental complaint form for truckers. If a complainant is trucking or hauling for on a federally assisted project, they should fill out the supplemental section for truckers. Otherwise, the complainant should fill out only the main complaint form (first page). The Davis-Bacon Complaint Form should be printed out and signed by the complainant and mailed (or faxed/emailed) to the CRD together with documentation, if any. CRD will coordinate the investigation, if required.
3. An investigation will be necessary if the alleged violations are not readily adjustable, are of a serious nature, or may be willful or criminal in character. The assistant district engineer **MUST** notify the CRD **IMMEDIATELY** and the CRD will determine who should investigate and resolve the matter. If a full-scale investigation is warranted, the CRD will conduct the investigation.
4. Upon notification that a wage claim has been received, the CRD will instruct the assistant district engineer or the district, city, county, or consultant project engineer to withhold a portion (an amount sufficient to cover the claim) or all of the prime contractor's progress payments until the claim has been resolved.
5. When any situation involves a subcontractor, all actions concerning the matter must go through the prime contractor. Even if the subcontractor contacts the Project Engineer on the issue of a Davis-Bacon complaint or investigation, they should be informed politely but firmly that all matters should go through the prime contractor and the conversation should end.
6. The assistant district engineer may be asked to investigate and resolve the wage claim or complaint. If this is the case, the assistant district engineer must keep the CRD informed of the progress being made in resolving the matter. If it is not possible to effect a settlement within a reasonable length of time (thirty calendar days), the matter must be referred to the CRD for advice, guidance, and/or resolution.
7. Investigations are much more thorough than inspections in that they are designed either to dispel allegations of wrongdoing or to assemble concrete evidence upon which administrative or other action can be taken. Because of the seriousness of investigations, much more attention must be paid to details; and evidence must be obtained to substantiate all of the investigator's findings. In other words, if the contractor maintains that payment has been made, the investigating engineer should ask to see cancelled checks or proof of automatic deposit that cannot be altered or faked. All facts must be substantiated – if withholding is being done pursuant to a court order, ask to see an official copy of the order.
8. A case file must be established at the start of the investigation. All documentary material pertaining to the investigation, such as wage claims or complaints, if any; employee statements; employment and payroll records; and all other papers relevant to the investigation must be placed in the case file.
9. The employee or complainant must provide documentation wherever possible (timecards, check stubs, etc.). In some instances, the claim or complaint will be in sufficient detail so that a personal interview with the employee or complainant won't be necessary. If this is the case, an explanation

to that effect must be included in the file. If a personal interview is warranted, it must be conducted in such a manner so as not to compromise the employee's or complainant's identity. In some cases, it may be desirable to conduct the interview by phone.

10. Depending on the nature or extent of the claim or complaint, any or all of the following investigatory steps may or must be taken:

- a) An examination of the contract must be made to determine whether the Davis-Bacon wage rate decision and the required labor standards provisions were inserted into the prime contract and all subcontracts. In addition, the following information must be noted for the case file:
- b) Contract number;
- c) Date of award;
- d) Description of work of the prime contractor and each subcontractor;
- e) Applicable Davis-Bacon wage rate decision; and
- f) The name and address of the prime contractor and each subcontractor.
- g) A visit to the project site must be made to ensure the applicable Davis-Bacon wage rate decision is properly posted on the bulletin board.
- h) An examination of the weekly certified payrolls of the prime contractor and each subcontractor must be made for completeness and accuracy.
- i) The number of employees in each job classification must be checked to determine if there exists a disproportionate number of laborers and apprentices or trainees to journeyworkers. For example, existence of any of the following circumstances may indicate a disproportionate ratio, depending on the status and type of project:
- j) Several laborers and only one journeyworker electrician on a weekly certified payroll submitted by an electrical contractor would normally indicate that laborers are performing journeyworker electrician's work.
- k) A greater number of apprentices or trainees than journeyworkers generally indicates that the ratio of apprentices or trainees to journeyworkers is being disregarded, apprentices or trainees are performing the work of journeyworkers, all of the apprentices or trainees are not properly registered in approved programs, or the contractor is not conforming to approved apprenticeship or on-the-job training standards.

**NOTE:** The allowable ratio of apprentices or trainees is generally considered to be one apprentice or trainee to every three to five journeyworkers.

1. A careful review of project logs, diaries, progress reports, project files, etc., must be made. They may provide valuable information that can be used in comparing the kinds of work performed during a certain period with the job classifications listed on the certified payrolls for the corresponding period. For instance, if pile-driving work was being done during a particular month and weekly certified payrolls

for that month fail to show any pile drivers, it may be that the contractor is in violation of the labor standards provisions.

2. The contractor must be required to present the canceled checks (front and back) of a randomly selected weekly certified payroll for verification of actual payment made to the employees.
3. A sufficient number of checks of timecards, books, sheets, or other work or personnel records of a representative number of employees in each job classification must be made against the payroll records in order to disclose any possible discrepancies, or to give reasonable assurance that none exist. Pertinent excerpts or copies of such records must be included in the case file.
4. The records of individual employees must also be included in the check whenever there appears to be any doubt or question concerning an individual as a result of the weekly certified payroll examinations, employee interviews, or for other pertinent reason.
5. Conducting employee interviews is essential to carrying out a successful investigation. A sufficient number of employees must be interviewed to serve as a check against the contractor's records and the substance of the violations alleged. Oral interviews must be conducted with a number of employees in various job classifications on the project, and where appropriate, must include former employees.
6. If possible, former employees must be interviewed in person. If this proves to be inconvenient, a carefully prepared questionnaire, to which short answers may be given, must be mailed. However, every attempt must be made to conduct personal interviews, with the mail method being used only as a last resort.
7. Information obtained from individuals involved in a labor compliance investigation is exempt from disclosure under the Freedom of Information Act, Subsection (b), (7), (D). Such information may also be protected under the Privacy Act of 1974, Subsections (k), (2); (k), (5); and (k), (7) [5 USC 552a].
8. Interviews conducted at the job site or the *site of the work* must be arranged so as to cause the least inconvenience to both the contractor and the employee and to provide for a necessary degree of privacy. No employee should ever be interviewed in the presence of other employees or owner/managers. Care should be taken not to disclose the identity of complainants or interviewees. If the elements of fear and intimidation are present, the interview must be conducted at the employee's residence or some other mutually agreeable place. Interviews conducted elsewhere must be scheduled during the employee's non-work hours and at his or her convenience. Care must be taken in scheduling the interviews to allow for adequate time, and the schedule must be rigidly adhered to.
9. Each employee should be informed that the information given is confidential to the fullest extent of the law, and that his or her identity will not be disclosed to the employer without the employee's written permission insofar as the law permits. (See *Department of Labor Prevailing Wage Resource Book*, p.12; 29 CFR 5.6(a)(5).)
10. In some situations, interviews with prior employees may be appropriate, but only with prior permission of CRD.
11. An early step in most investigations will be an interview with the complainant. The interview must be conducted in such a manner so as not to compromise the complainant's identity. To avoid such compromise, it may be necessary to conduct the interview at a place other than the job site or by phone. In some cases, the complaint will be in sufficient detail so that a personal interview with the

complainant will not be necessary. If this is the case, an explanation to that effect must be included in the case file.

12. Employee statements that merely confirm information in the contractor's records and do not indicate a violation where none has been otherwise alleged need not be recorded. However, notes of the interviews with names, dates, places where they were held, and comments such as *no additional information obtained* must be made for the case file.
13. To preserve confidentiality, any statements recorded must be put on a separate sheet or sheets of paper. Repetitive statements by various employees concerning the same facts may be recorded once; however, a comment listing the names of the additional employees must be included for the case file. Signed statements must be obtained from employees when the information given is needed to prove a violation. For example, signed statements must always be taken when:
  - a) Information concerning conditions of employment when such information is missing from, or possibly falsified in, the contractor's records;
  - b) Intimidation, or other *kickback* activity involving employees being forced to relinquish part of their compensation, is involved;
  - c) Pertinent information concerning an actual or potential controversy with the contractor involved, as to the occurrence of a given violation, is disclosed; and
  - d) Information concerning possible violations not previously known to the investigator, or other information which may become material to the overall investigation, is obtained.
14. Written employee statements must be prepared by the investigator and must contain:
  - a) The contractor's name and address;
  - b) The project number and location;
  - c) The employee's name and address;
  - d) His or her status as a present or former employee;
  - e) The place and date of the interview;
  - f) The employee's job classification and a brief description of the exact duties performed, including equipment operated, tools used and the frequency of their use, and the place where the work is performed;
  - g) The period of employment, starting and quitting times, daily and weekly hours worked, and the manner in which the working time is recorded and by whom;
  - h) The rate of pay and wages received;
  - i) Any information the employee is able to furnish concerning the matters involved in the allegation or allegations and any intimidation involved with *kickback* activity; and

- j) Any further essential information concerning the accuracy or adequacy of the contractor's records.

15. The information given by the employee for the statement must be paraphrased in a concise and clear manner while clearly reflecting the intent of the employee. It must be written in the first person form as though the employee prepared the statement. A final line must be added stating that the employee has read the foregoing statement and that it accurately reflects his or her intent. The statement must be signed by the employee and witnessed by the investigator. Any changes made to the statement must be initialed by the employee. If the statement is longer than one page, each and every page must be signed or initialed by the employee.
16. The investigator must always keep in mind that it is his or her function to ascertain and report the facts concerning a given investigation, not to take sides with either the contractor or the employee involved. The investigator must not give to the employees, or allow them access to, the contractor's records that are made available to the investigator. For example, employees must not be shown copies of the hours worked and wages paid with regard to them, but rather must be questioned regarding the wages paid and hours worked. The answers can then be compared with the contractor's records. The investigator may inform employees as to how the wages and overtime are computed but must not express an opinion as to whether wages are due, or encourage lawsuits by an employee or group of employees with regard to the subject matter of the investigation.
17. At the conclusion of the investigation, within 90 (ninety) days of the filing of the complaint, in most cases, a final report must be prepared and recommendations for corrective action made to the CRD. The report must consist of a narrative summary of the facts disclosed by the investigation. Answers to the following questions must appear in the report: Who? What? Where? When? Why? And how? In addition, the following specific items must be noted in the report:
  - i. The contract number and location.
  - ii. The name and address of the prime contractor and, where appropriate, subcontractor(s) involved.
  - iii. A brief statement concerning the circumstances that brought about the investigation.
  - iv. A statement concerning the extent of the investigation. For example: Who the investigator talked with, what records were examined, and any other action taken by the investigator.
  - v. A statement of facts concerning what the investigation disclosed. For example: Were the allegations proven? If so, how? Were they dispelled? If so, how?
  - vi. Conclusions of the investigator as to willfulness, negligence, or other factors involved in the matter.
  - vii. Recommendations of the investigator as to further action required, with reasons for the recommendations and facts supporting them; or if the matter was resolved, how was such resolution accomplished?
18. **A Final Conference should be scheduled with the prime contractor when the investigation is completed. At this Conference, the contractor is informed generally as to investigation findings and indicated the factual basis of these findings. Detail specifically what must be done in order**

**to eliminate the violations. The ADE and CRD should be willing to consider additional evidence, if any, offered at this conference. The Contractor should be informed of the possibility of liquidated damages under DBRA.**

19. **If there is agreement to pay at this stage, appropriate supplementary payroll must be issued.** The contractor must submit a copy of the supplementary payroll and canceled check (front and back) to NDDOT as proof that restitution was made. If no agreement can be reached, the file must be forwarded by CRD to the appropriate WHD Regional Office pursuant to 29 CFR 5.7 for review, possible collection of back wages and possible debarment consideration.
20. **In refusal to pay cases, the contracting agency (NDDOT) is required to withhold contract funds to cover the back wages due.** If funds remaining on the contract under which the violation occurred are insufficient to cover the back wages due, the contracting agency can withhold funds from other contracts subject to the Davis-Bacon Act held by the same prime contractor. This is optional and is referred to as “cross-withholding.” *USDOL Prevailing Wage Resource Book, DBRA Investigations, p.19.*
21. The USDOL Wage and Hour Division will send a “Due Process” letter to the contractor and will go forward if the contractor refuses to pay back wages. The WHD will also advise the contractor of hearing and appeal rights. Only the WHD may debar the contractor. See 29 CFR 5.11 and 5.12.
22. When the wage claim or complaint has been resolved and all of the necessary follow-up documentation has been received, in most cases within 6 months, the *Labor Compliance Report (SFN 13082 - Rev. 08-2006)* must be completed and forwarded to the CRD. The report lists the nature of the complaint or problem (improper job classification, overtime, incorrect wages or fringe benefits, kickback, etc.); the outcome; and the amount of wages found due, if applicable. A copy of the supplementary payroll and canceled check (front and back) must be attached to the report when applicable.
23. The CRD will instruct the assistant district engineer or the district, city, county, or consultant project manager-engineer to release any progress payments being withheld from the prime contractor.