

Davis-Bacon Implementation Handbook for State Energy Offices

State Energy Program (SEP) and Energy Efficiency Conservation Block Grant (EECBG) Program

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1. Background

American Recovery and Reinvestment Act of 2009 (Recovery Act) funds used for a project that involves a new construction, repair, or energy savings retrofit or installation contract must comply with the prevailing wage requirements of the Davis-Bacon and Related Acts (DBRA). This includes projects funded by the U.S. Department of Energy’s State Energy Program (SEP) and Energy Efficiency Conservation Block Grant (EECBG) program grants.

Many State Energy Office (SEO) recipients of SEP and EECBG grants have made a large number of sub-grants with their allocations. Both SEP and EECBG have issued program guidance on monitoring Sub-Recipients (SEP Program Notice 10-015 effective October 26, 2010; EECBG Program Notice 10-019 effective October 26, 2010). The guidance includes sample tools that SEOs have developed to monitor their Sub-Recipients. This document is intended as a supplement to the Sub-Recipient monitoring guidance, with the goal of sharing additional advice and best practices on DBRA implementation. The contents of this document are based on interviews with SEO staff and DOE Project Officers, as well as on consultations with the DOE General Counsel’s Office and the U.S. Department of Labor (DOL).

Please note that while SEOs need not replace already established systems and procedures concerning Sub-Recipient monitoring, SEOs should be aware of the basic standards and criteria described in this document. This document suggests criteria specific enough to be actionable, yet general enough to allow for variation in how grantees execute their monitoring of Sub-Recipients. Each SEO should employ Sub-Recipient monitoring procedures that are most suitable for its unique program environment.

2. Roles and Responsibilities

To start, this document summarizes the responsibilities of each participant in the DBRA implementation and compliance process. Subsequent sections of this document expand on the summary of SEO DBRA implementation responsibilities.

2.1. Summary of Contractor Roles and Responsibilities

- Determine the number of each classification of worker;
- Decide the appropriate job classification for each worker;
- Submit a completed SF-1444, Request for Additional Classification, if a worker classification needed to perform the work is missing (also known as a “Conformance Request”);
- Pay employees at least the minimum wage plus fringe rates indicated in the Wage Determination included in the contract with the Sub-Recipient;
- Pay laborers and mechanics working on the site of the project, on a weekly basis;
- Provide certified weekly payrolls to the Sub-Recipient (or the other party in the contract);
- Post DOL’s Davis-Bacon poster and the Wage Determination at the worksite; and
- Maintain payroll records for three years after the end of the contract.

2.2. Summary of Sub-Recipient Roles and Responsibilities

- Flow down DBRA language and Wage Determination in all RFP and contracting materials;
- Receive weekly certified payroll reports (CPRs) from contractors; review the CPRs for accuracy; send originals or electronic copies to the State Energy Office (per SEO instructions on original copy vs. electronic copy);
- Visit worksites 1) to interview workers and verify the information submitted by the contractor on the certified payroll reports (i.e., were the employees actually paid the amounts reported by the contractor?); and 2) to confirm the employer has posted the DOL’s DBRA poster and the relevant wage determination;
- Work to correct any problems; bring in State Energy Office (SEO) as necessary; and
- Notify SEO of any non-compliance with DBRA requirements.

2.3. Summary of State Energy Office Roles and Responsibilities (when working with Sub-Recipients)

- Flow down DBRA language in all RFP and grant agreements with Sub-Recipients.
- Educate Sub-Recipients on DBRA policy and compliance—provide up-front education (webinars, training documents, etc.) and ongoing assistance (answer questions from Sub-Recipients, provide feedback on certified payroll submissions, etc.)
- Review a selection of CPRs to spot-check the reviews conducted by the Sub-Recipients.
- Visit a selection of worksites to spot-check the worksite monitoring conducted by the Sub-Recipients.
- Work to correct any problems; notify your DOE Contracting Officer of non-compliances with DBRA; and
- Collect liquidated damages pursuant to the Contract Work Hours and Safety Standards Act (CWHSSA) requirements that contractors pay overtime for all hours worked over 40 in a work week.

2.4. Summary of U.S. Department of Energy Roles and Responsibilities

- Flow down DBRA language in grant agreements with SEOs;
- Assist SEOs in Sub-Recipient education efforts: publish resources, conduct webinars, trainings, and answer questions;
- The DOE Contracting Officer (CO) for the grant serves as the final authority on whether DBRA applies to a specific project;
- The DOE Contracting Officer (CO) submits conformance requests (SF-1444) to the DOL—these requests are initiated by construction contractors and then routed to DOE via the Sub-Recipient/Recipient;
- Advise SEOs on problems/troubleshooting as requested by the SEO;
- Conduct onsite monitoring of SEOs: visit SEO offices, review SEO systems for monitoring Sub-Recipients on DBRA to ensure they provide adequate oversight;

- Interface with DOL on policy questions as well as to initiate investigations and enforcement; DOE CO receives liquidated damages collected by SEO; receives appeals from contractors requesting rescission or waiver of the liquidated damages; forwards collected liquidated damages to the U.S. Treasury.

2.5. Summary of U.S. Department of Labor Roles and Responsibilities

- Sets prevailing wages for each locality via surveys of local employers;
- Issue decisions on conformance requests (SF-1444);
- Conducts random construction worksite inspections;
- Conducts enforcement investigations and levies penalties against non-compliant construction contractors.

3. SEO Staffing and Resources

Many SEOs have decided to bring on additional resources to help them manage DBRA implementation and compliance. Some have hired specialized labor compliance firms. Others have hired additional SEO staff members to assist in monitoring Sub-Recipients. SEP and EECBG grant recipients are permitted to use a portion of their awards for administrative expenses. The costs of complying with DBRA are generally allowable administrative expenses. Please speak with your DOE Project Officer or Contract Specialist if you have questions about using grant funds to pay for DBRA compliance costs.

3.1. Technology Solutions to Help Manage DBRA Compliance

There are a number of software products that allow grant recipients to collect certified payrolls from their contractors in electronic format rather than hard copy format. **Many of these software products also automatically review the submitted payrolls for accuracy, and compare the wage rates in the payroll to the relevant Wage Determination. These products can greatly reduce the need for SEOs and their Sub-Recipients to perform manual payroll reviews.** Many states already have such systems in place, and it may be helpful to explore if your state already has a system that you might be able to tap into. Otherwise, DOE recommends that you contact a vendor for a free demonstration of such a system. Here is a partial list of vendors.

NB: This list is intended to be a sampling of possible vendors. DOE does not suggest that it is a comprehensive list, and does not intend to endorse any of the vendors on the list by including them in the list.

Emars, Inc.
<http://emarsinc.com/>

TRS Consultants
http://www.mylcm.com/index_jc.html

LCPtracker

<http://www.lcptracker.com/>

Elation Systems

<http://www.elationsys.com/elationsys/index.htm>

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4. Sub-Recipient Training and Education

DOE and many SEOs have developed resources to help educate Sub-Recipients and construction contractors on DBRA policies and compliance. DOE's resources are available for download at the following site:

http://www1.eere.energy.gov/wip/davis-bacon_act.html

Key DOE-created items include a 45-page summary of DBRA policies and compliance (the "Desk Guide to Davis-Bacon"), recordings of DBRA training webinars, and a searchable database of FAQs that is continuously updated.

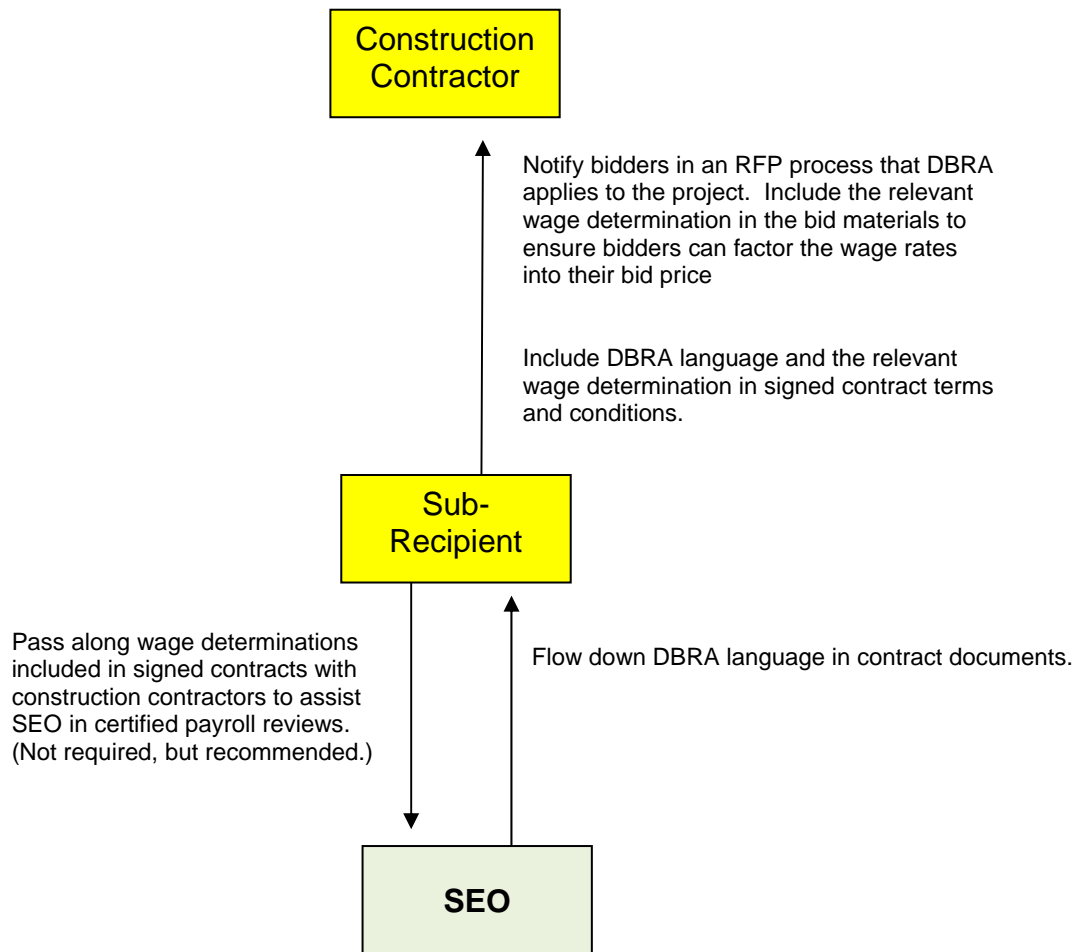
DOE is happy to work with SEOs to develop training plans for Sub-Recipients and to provide DOE staff resources to help train SEO Sub-Recipients. For example, DOE has held numerous DBRA training webinars for Sub-Recipients and is happy to repeat these upon request.

In particular, we recommend training Sub-Recipients on the following:

- Basics of DBRA policy and compliance: Summary of Sub-Recipient responsibilities; summary of construction contractor responsibilities.
- Selecting the appropriate Wage Determination for a project.
- Reviewing weekly certified payrolls for accuracy.
- Visiting worksites and how to conduct employee interviews.
- Record-keeping requirements and how to best flow weekly certified payrolls to the State Energy Office.

5. Contracting Process

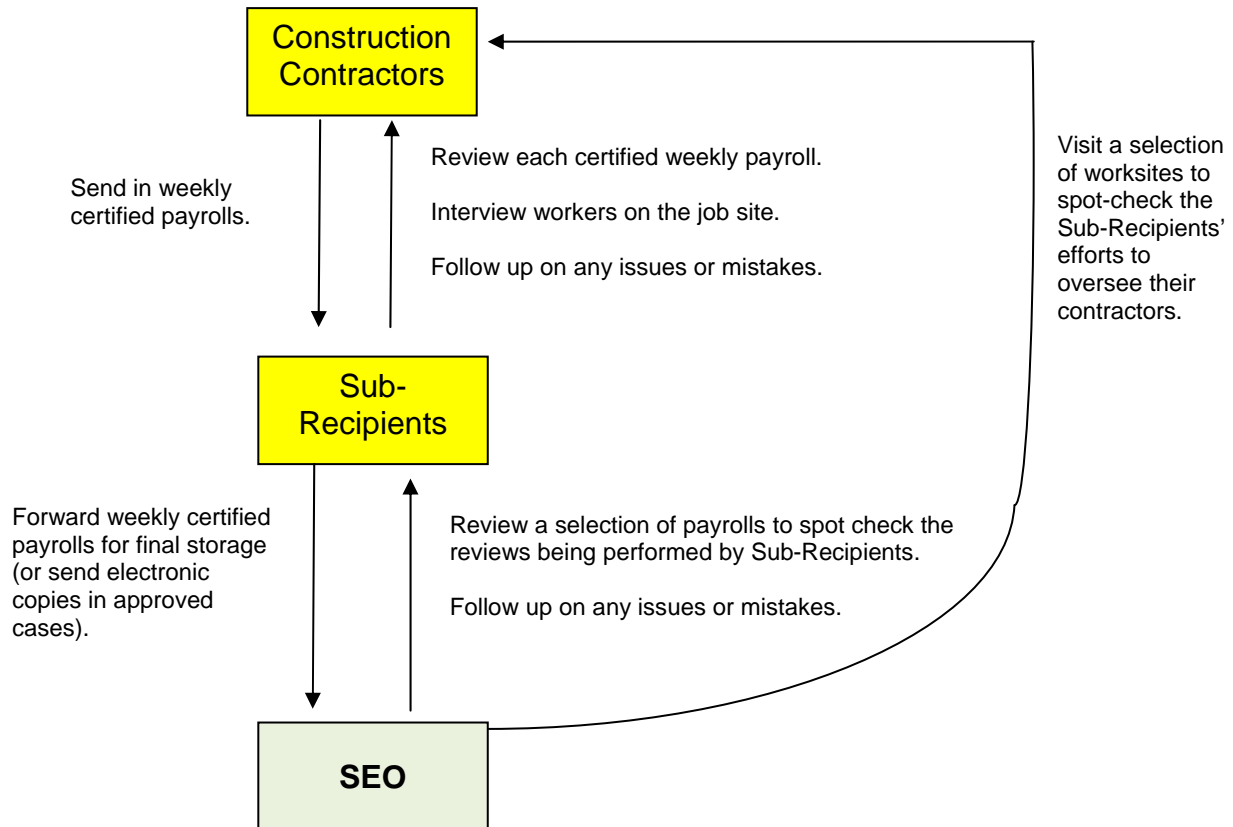
The below diagram illustrates the DBRA contracting process and the relationship among SEOs, Sub-Recipients, and construction contractors.



SEOs must flow DBRA language down to Sub-Recipients via grant agreements. In the RFP process, Sub-Recipients must notify all bidders that DBRA applies. Sub-Recipients must also include the relevant Wage Determination in the bid materials, in part to help bidders factor the wage rates into their bid price. Sub-Recipients must then include DBRA language and the Wage Determination in their contracts with construction contractors.

6. Monitoring Process

This diagram illustrates the DBRA monitoring relationship between SEOs, Sub-Recipients, and construction contractors.



The Sub-Recipient’s primary monitoring function is to ensure their contractors are complying with DBRA. Sub-Recipients do this by reviewing each weekly certified weekly payroll for accuracy and by visiting work sites to interview workers to verify the workers were properly paid.

The SEO’s primary monitoring function is to ensure Sub-Recipients are performing high-quality oversight of their construction contractors. The SEO does this by reviewing a selection of payrolls to spot-check the reviews being conducted by Sub-Recipients and by visiting a selection of worksites to spot-check the Sub-Recipient’s efforts to oversee their contractors.

In cases where the Sub-Recipient is a commercial entity, SEOs should take a different approach. In these cases, SEOs should review all payrolls and conduct the worksite interviews, instead of delegating these responsibilities to the Sub-Recipient.

7. Monitoring Sub-Recipients: Reviewing Weekly Certified Payrolls

State Energy Offices typically receive three kinds of DBRA certified payrolls:

1. Certified payrolls from Sub-Recipients that have hired construction contractors. Sub-Recipients should be reviewing these payrolls and working with their contractors to fix any mistakes before passing the payroll on to the SEO. Payrolls from this category likely make up the large majority of the payrolls SEOs receive.
2. Certified payrolls submitted by Sub-Recipients that are performing the work themselves. These are cases where the Sub-Recipient is actually filling out the certified payroll themselves, and thus the SEO would be the first reviewer of the payroll.
3. Certified payrolls submitted by Sub-Recipients that are commercial entities.
4. Certified payrolls submitted by construction contractors the SEO has hired directly.

❖ **For category 1 above (likely the vast majority of the payrolls SEOs receive), rather than reviewing every individual payroll that Sub-Recipients submit, State Energy Offices may elect to take a risk-based approach to monitoring the quality of Sub-Recipient payroll submissions. The Sub-Recipient should have already reviewed the payroll before sending it to the SEO. Also, there are many technology/software products on the market that automate the certified payroll review process and greatly reduce the need for manual reviews. Please see the above section on “Technology Solutions to Help Manage DBRA Compliance” for more information.**

❖ **For categories 2-4 above, we recommend that SEOs review each payroll received. In these cases, SEOs are actually the first check to ensure that the contractor is complying with DBRA. In these cases, SEOs would perform all of the responsibilities that come with direct oversight of construction contractors working on DBRA-covered projects, including all certified payroll reviews and worker interviews. For category 1 above, the SEO’s role is different—it is to ensure that Sub-Recipients are performing all of the responsibilities that come with direct oversight of construction contractors.**

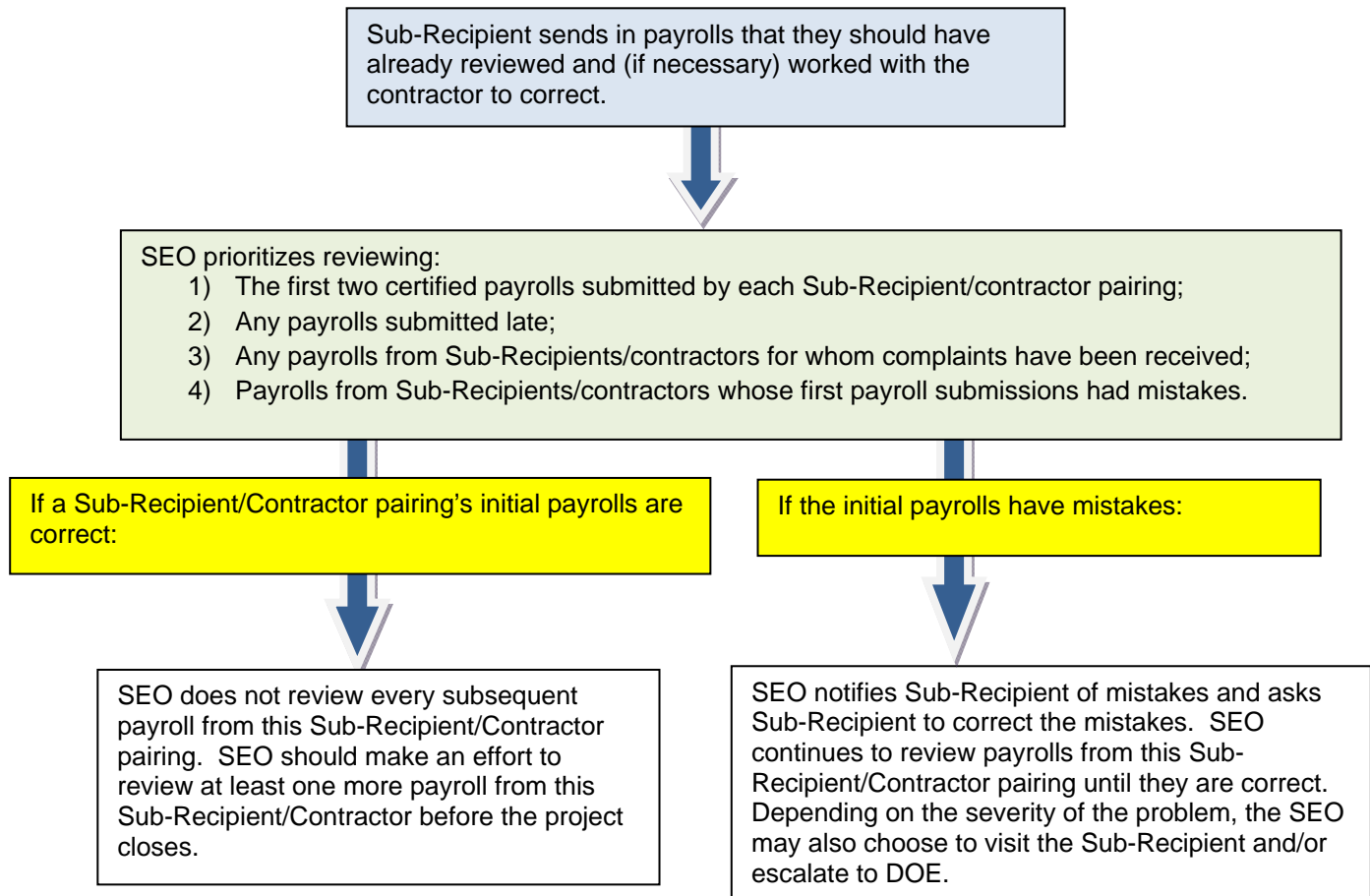
There are a number of valid risk-based approaches SEOs may use to manage their certified payroll review. SEOs are free to choose a risk-based approach that ensures a reasonable standard of due diligence. When developing a risk-based DBRA monitoring plan, factors SEOs could incorporate into their approach include:

- Dollar amount of project
- Complexity of project
- Past performance history of Sub-Recipient and/or Contractor

Below is a sample approach SEOs may use when reviewing certified payrolls that have already been reviewed by Sub-Recipients:

- The SEO reviews the first two weeks of certified payroll documents submitted from each Sub-Recipient/Contractor pairing.
- If a Sub-Recipient/Contractor pairing’s first set of payrolls is not correct, the SEO should continue to review each payroll from this Sub-Recipient/Contractor pairing until the quality of submissions improves.
- If a Sub-Recipient/Contractor pairing’s first set of payrolls is correct, the SEO could begin to review subsequent payrolls from this Sub-Recipient/Contractor pairing at random. For example, the SEO might elect to review at least one more payroll from this Sub-Recipient/Contractor pairing before their construction project is complete.
- The SEO could prioritize reviewing subsequent payrolls of any high-dollar or particularly complex projects (even if the initial payroll submissions for this project are correct).
- The SEO could also prioritize reviewing any payrolls submitted late (even if the initial payroll submissions from this Sub-Recipient/contractor pairing have been correct).
- The SEO could also prioritize the review of payroll records of any Sub-Recipients/contractors for whom reports of failure to comply with DBRA have been received (even if the initial payroll submissions from this Sub-Recipient/contractor pairing have been correct).

Below is a diagram of the process outlined above:



Please note that the above process is just one of many approaches an SEO might take to conduct certified payroll reviews to ensure a reasonable standard of due diligence. SEOs are by no means obligated to use this particular approach.

8. Monitoring Sub-Recipients: Correcting Payroll Mistakes

If the SEO finds a routine mistake on a certified weekly payroll, the SEO should notify the Sub-Recipient and ask the Sub-Recipient to correct the mistake. For example, if a contractor did not correctly calculate a worker's pay, leading to an underpayment of wages, and the Sub-Recipient did not catch this mistake, the SEO could notify the Sub-Recipient, who would then ask the contractor to correct the mistake. Typically, correcting the mistake would involve paying the necessary back wages and submitting a corrected certified payroll. Of course, the SEO may coach the Sub-Recipient through this process. Also, the SEO may withhold payment to the Sub-Recipient until the mistake is fixed, as the Sub-Recipient is not in compliance with their subgrant if its contractors' Davis-Bacon payrolls are found to contain mistakes.

If the contractor is willing to make changes, the SEO is not required to notify the DOE Contracting Officer, but should keep track of the investigation and the amount of back wages recovered – this information will be collected for DOE's semi-annual report to DOL.

The SEO should notify the DOE Contracting Officer immediately in any of the following cases:

- The contractor is not willing to make corrections;
- They discover an egregious mistake on a certified payroll;
- They suspect that the Sub-Recipient is knowingly acting in non-compliance;
- They suspect that the Sub-Recipient is committing fraud,.

In such cases, it may become necessary for DOE to involve the U.S. Department of Labor for enforcement purposes.

9. Monitoring Sub-Recipients: Visiting Worksites

SEOs are advised to do some degree of in-person, onsite monitoring of their Sub-Recipients to monitor Sub-Recipient adherence to all grant terms and conditions—not just to DBRA. Please see SEP and EECBG Program Guidance on monitoring Sub-Recipients for more information. Whenever possible, onsite Sub-Recipient visits should include visits to construction worksites.

While at the worksite, SEOs should make ensure that DOL's Davis-Bacon poster and the appropriate Wage Determination are posted. SEOs are also advised to observe the Sub-Recipient performing employee interviews to ensure that the Sub-Recipient is conducting effective interviews. Interviews should verify:

- Employee work classification(s);
- Employee rates of pay;
- Employee job duties, including tools and equipment used; and
- Whether employees work overtime, number of hours of overtime, and whether employee is receiving proper pay for overtime.

DOE recommends that SEOs also use their reviews of certified payrolls to prioritize which Sub-Recipients should receive onsite visits. For example, if a Sub-Recipient’s payrolls regularly contain mistakes or arrive late, the SEO should prioritize adding that Sub-Recipient to their onsite monitoring schedule.

10. Options for Getting Weekly Certified Payrolls in Electronic Format

Please note that while SEOs may elect not to review every single payroll submitted, SEOs must ensure that a process is in place to recover each single payroll in the event of an audit. A system of records should be in place for capturing the certified payrolls and for retaining them. If the payrolls are collected in hard copy form, the payroll records should be filed in a manner that would make them accessible for an audit. For example, the SEO might file the payrolls first by Sub-Recipient, then by contractor within each Sub-Recipient category, and then by payroll number within each contractor.

SEOs have options for receiving certified weekly payrolls in electronic format rather than hard copy:

1) Scanned copies of certified payrolls permissible in certain circumstances

The Department of Labor (DOL) recently provided updated guidance to the Department of Energy (DOE) on this subject. Sub-Recipients may submit scanned electronic copies to the Prime Recipient under certain circumstances as described below:

A. Upon approval of a Recipient/Grantee, a Sub-Recipient that is a State or local unit of government may receive an original certified payroll from a contractor or subcontractor and scan the document into an electronic pdf document and forward that electronic copy to the Recipient/Grantee. The Sub-Recipient must have a facility to maintain the original certified payroll records in an appropriate manner so as to protect and preserve the payroll records, as required under its subgrant, and allow for easy access to the original document should DOE or DOL require the documents for auditing, review, or other purposes. The Recipient must then review the electronic pdf documents submitted by the Sub-Recipient.

***Example:** Under the EECBG program, the State (Recipient) receives a grant and awards a subgrant to a small town (Sub-Recipient) for energy saving improvements. The Sub-Recipient contracts with a contractor to perform energy savings upgrades/retrofits to town buildings. The Sub-Recipient may scan the contractor’s original certified payrolls and send them to the Recipient/State electronically, if it has the facilities to maintain the original documents.*

B. A Sub-Recipient that is NOT a State or local unit of government may NOT scan an original certified payroll into an electronic pdf document and forward that electronic copy to the Recipient/Grantee. DOL's position is that entities that are not State or local units of government are in the same position as a contractor and are required under DOL regulations (see 29 C.F.R. 5.5(a)(3)(ii)(A) as well as 29 C.F.R 3.3 and 3.4) to submit a certified payroll record to a government agency. A State or local unit of government is not considered to be a contractor for purposes of these regulations.

***Example:** Under the State Energy Program, a Sub-Recipient is a commercial entity (not a unit of State or local government) and it has its own employees and/or subcontracts work to perform construction-related work funded by the grant. In this case, the Sub-Recipient must submit all original certified payrolls to the Recipient/State Energy Office.*

2. Electronic Payroll Systems

The Department of Labor allows grant recipients to collect certified payrolls via electronic payroll systems that meet certain requirements. The main requirement is that the contractor submitting the payroll uses an official digital signature, typically a unique PIN number and/or password that verifies the identity of the contractor. Certified electronic payroll systems allow for electronic submissions of both payroll documents and certification statements. Many of these products also perform automated reviews of the payrolls to check for accuracy, which greatly reduces the need for SEOs to perform manual payroll reviews. Many states already have such systems in place, and it may be helpful to explore if your state has a system in place that you might be able to tap into. Please see the above section on "Technology Solutions to Help Manage DBRA Compliance" for more information.

11. Dealing with uncooperative Sub-Recipients and Other Challenging Situations of Non-Compliance

As noted above in the certified payroll review section, SEOs should work directly with their Sub-Recipients to correct routine findings of underpaid workers, missing payroll documentation, etc. However, if a Sub-Recipient (or in turn, a construction contractor) does not cooperate with SEO requests to correct mistakes or issues of non-compliance, the SEO should notify the DOE Contracting Officer immediately. At some point, it may become necessary for DOE to involve the U.S. Department of Labor for enforcement purposes.

Also, please notify DOE immediately of any cases where you suspect a Sub-Recipient may be acting willfully in non-compliance or committing fraud.

In general, if you are unsure how to handle a situation of non-compliance, please feel free to reach out to DOE for help and advice.

12. Collecting Liquidated Damages for Overtime Pay Violations

Under the Contract Work Hours and Safety Standards Act (CWHSSA), contractors are assessed liquidated damages for overtime pay violations (in addition to paying back wages). If recipients come across overtime pay violations, they should collect liquidated damages from contractors. Checks should be made out to the U.S. Treasury and should be sent to your DOE Contracting Officer.

The liquidated damages charge is \$10/day where the overtime was improperly paid. For example, a DBRA-covered laborer works 12 hour days for 5 days in a week (60 hours total), and their employer does not properly pay the overtime hours. Starting on day four of the week, the laborer crosses the 40 hour threshold and begins to work overtime hours. Thus, the employee worked overtime hours on days four and five of the workweek, or on two total days. Thus, the liquidated damages charge would be \$20 = \$10/day x 2 days worked where overtime was not properly paid.

13. Engaging with DOE for Further Assistance on DBRA

DOE is aware of the unique challenges that SEOs face in implementing the DBRA requirements of your grants. DOE has a team of DBRA policy, compliance, and implementation specialists ready to assist you. Our team can do everything from answering questions to conducting in-depth engagements to helping design a DBRA monitoring process. Please ask your Project Officer or Contract Specialist to put you in touch with DOE's DBRA team if you should require any of these services.