



Davis-Bacon and Related Acts Final Rule Provisions

Revisions to 29 CFR Parts 1, 3, and 5



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

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Summary of the Final Rule

Davis-Bacon Act Coverage

- Applies to contracts in excess of \$2,000 to which the Federal Government or the District of Columbia is a party for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works.

Davis-Bacon Related Acts

- Davis-Bacon (DB) requirements extended to numerous “Related Acts” that provide federal assistance by, for example
 - Grants
 - Loans
 - Loan guarantees
 - Insurance

Overview of Major Changes

- Determining applicable prevailing wage rates
- Coverage
- Incorporation of contract clauses and wage determinations
- Payment of prevailing wages
- Recordkeeping
- Anti-Retaliation
- Enforcement mechanisms

Important Dates

- Effective Date – October 23, 2023
- Applicability Dates
 - Part 1 provisions relating to wage determination methodologies apply to wage determinations completed and published after October 23, 2023
 - 29 CFR 1.6(c)(2)(iii) provisions relating to updating wage determinations after contract award apply to new and existing contracts as of October 23, 2023
 - All other provisions apply to contracts awarded after October 23, 2023



Determining Applicable Prevailing Wage Rates

Definition of Prevailing Wage Rate

- Wage paid to the majority (at least 50%)
- If the majority wage is not paid, then prevailing wage will be the wage paid to the greatest number, *provided* at least 30%, or
- If no wage rate is paid to 30%, the prevailing wage will be the average.

Functionally Equivalent Rates

- Variable wage rates paid by contractor(s) may be treated as the same wage rate where the rates are functionally equivalent, as explained by:
 - One or more collective bargaining agreements or
 - Written policies maintained by contractor(s)

Scope of Consideration - Area

- The *area* from which wage data will be drawn will typically be the county
- If data is insufficient at the county level, data from groups of counties can be used to determine craft sufficiency in the following progression:
 - Surrounding counties may be considered
 - Comparable counties or groups of counties may be considered
 - All counties statewide may be considered

Frequently Conformed Rates

- If there is insufficient wage survey data to determine the prevailing wage for a classification for which conformance requests are regularly submitted, the Administrator may list the classification, wage rate, and fringe benefit rate for the classification on the wage determination, provided certain criteria are met.

Frequently Conformed Rates - Criteria

- The work performed by the classification is not performed by a classification in the wage determination;
- The classification is used in the area by the construction industry; and
- The wage rate for the classification bears a reasonable relationship to the wage rates contained in the wage determination.

Adoption of State or Local Rates

- Wage rates determined for public construction by State and/or local officials may be adopted, with or without modification, provided that certain conditions are met.
- Methods and criteria used by State or local officials may differ from those otherwise used by the Administrator.

Adoption of State or Local Rates - Process

- To submit state or local wage rates for adoption, prevailing wage rates, relevant supporting documentation and data, may be submitted to:
 - dba.statelocalwagerates@dol.gov, or
 - U.S. Department of Labor, Wage and Hour Division,
Branch of Wage Surveys
200 Constitution Avenue NW,
Washington, DC 20210

Adoption of State or Local Rates - Criteria

- State or local government survey or other process is open to full participation by all interested parties;
- Wage rate reflects a basic hourly rate and prevailing fringe benefits which each can be calculated separately;
- Laborers and mechanics are classified in a recognized manner within the construction field; and
- Criteria for setting prevailing wage rates are substantially similar to DOL's criteria.

Updating Wage Determinations in Revised Contracts

- After contract award, the contracting agency must include the most recent applicable wage determination modification(s) when:
 - a contract or order is changed to include additional and substantial work not within the scope of work of the original contract, or to require the contractor to perform work for an additional time period.
 - an option to extend the term of a contract is exercised.

Updating Wage Determinations in Ongoing Contracts

- Where contracts require a general commitment to perform necessary construction as the need arises, over a period of time that is not tied to the completion of any particular project, the contracting agency must incorporate the most recent applicable wage determination modification(s) on each anniversary date of the contract's award.

Periodic Rate Adjustments

- Adjustments to non-collectively bargained prevailing wage and fringe benefit rates on general wage determinations based on U.S. Bureau of Labor Statistics Employment Cost Index (ECI) data or its successor data.
- Such rates may be adjusted based on ECI data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication.
- WHD will issue modifications to general wage determinations with such adjusted rates.

Other Wage Determination Provisions

- Use of state highway districts
- Multicounty project wage determinations
- Type of construction
- Multiple wage determinations



Coverage

Site of the Work – Secondary Sites

- Any site where a significant portion of a building or work is constructed for specific use in that building or work, as long as the site is either:
 - established specifically for the performance of the contract or project, or
 - is dedicated exclusively, or nearly so, to the performance of the contract or project for a specific period of time.

Site of the Work – Flaggers

- Workers engaged in traffic control and related activities adjacent or virtually adjacent to the primary construction site are working on the site of the work.

Site of the Work – Drivers

- Drivers who work for construction contractors are covered for any non de minimis time when their work requires them to come on and offsite.

Material Suppliers Exception

- Exception applies if:
 - The firm's only obligation is to deliver supplies or equipment, and
 - Its facilities are not located on the project's primary or secondary construction site, and
 - were either established before opening of bids or contract award, or
 - are not dedicated exclusively, or nearly so, to the performance of the contract.

Portion of a Building or Work

- *Building or work* includes not only construction involving an entire building, structure, or improvement, but also construction activity involving just a portion of a building, structure, or improvement, including the installation of equipment or components.

Public Building Or Public Work

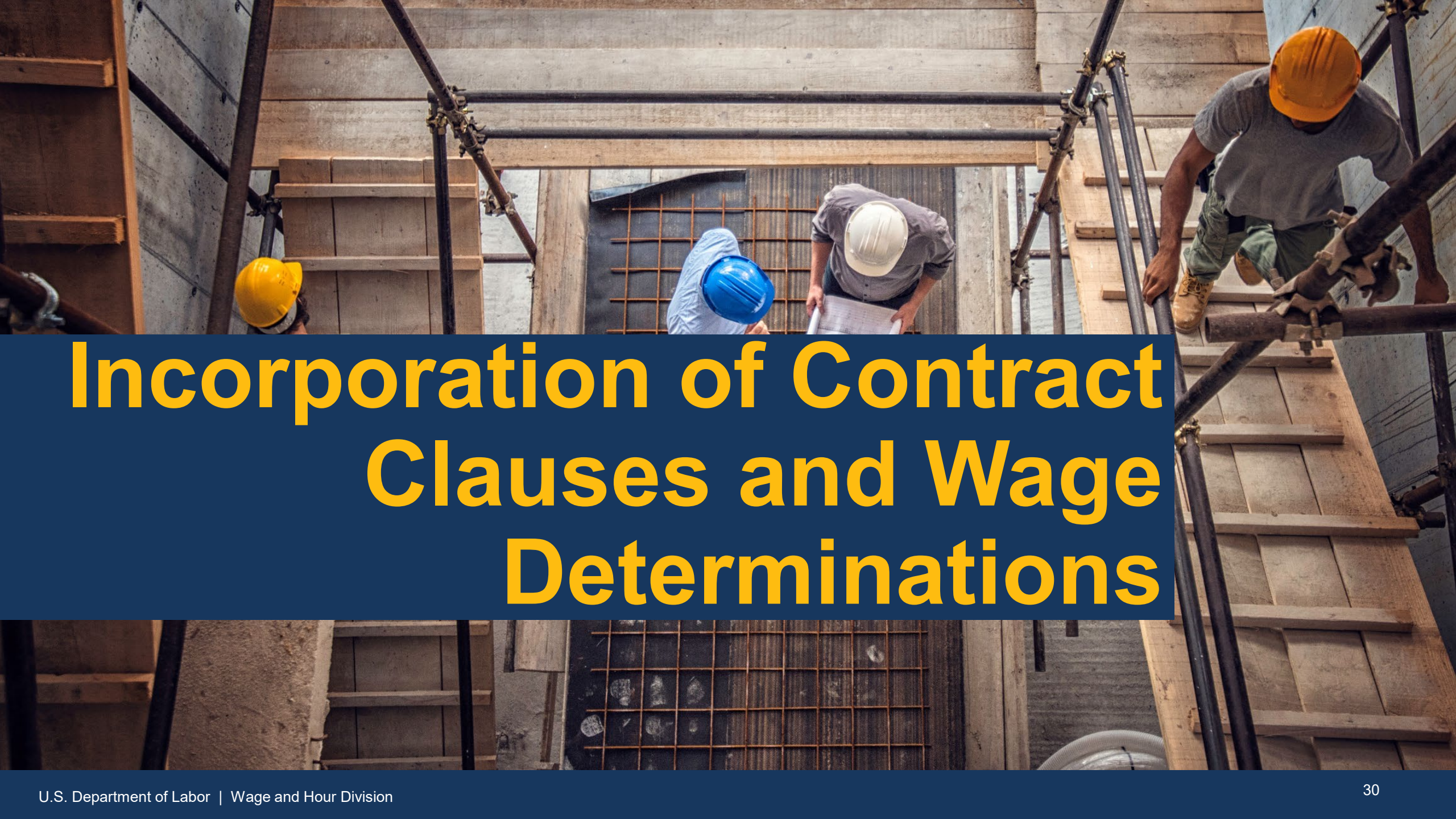
- Construction of a portion of a building or work carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public is still considered a public building or public work, even when the entire building or work would not be considered a public building or work.

Prime Contractor

- *Prime contractor* is broadly defined as any person or entity that enters into a covered contract with an agency, including non-profit organizations, owners/developers, borrowers or recipients, project managers, or single-purpose entities.
- *Prime contractor* also includes the controlling shareholder or member of any entity holding a prime contract, the joint venturers or partners in any entity holding a prime contract, and any contractor that has been delegated the responsibility for overseeing all or substantially all of the construction anticipated by the prime contract.

Other Coverage Provisions

- Demolition
- Green energy projects
- Survey crews



Incorporation of Contract Clauses and Wage Determinations

Incorporation by Reference

- Contract clauses and wage determinations are equally effective if they are incorporated by reference, although agencies are still required to insert the contract clauses in full for any contract not subject to the FAR.

Clauses Included by Operation of Law

- Regardless if the contracting agency fails to incorporate the contract clauses and wage determination(s) into a prime contract, the clauses and wage determination(s) will still be considered part of that contract and will be effective as a matter of law.
- Where the clauses and applicable wage determinations are effective by operation of law, contracting agencies must compensate the prime contractor for any increase in wages in accordance with applicable law.

Flow-Down of Clauses – Prime Contractors

- Prime contractors are responsible for flowing down both the contract clauses and the applicable wage determinations to their subcontracts.
- The prime contractor must cover any unpaid wages or other liability for any subcontractor violations.
- Prime contractors may be debarred for disregarding their obligations.

Flow-Down – Upper Tier Contractors

- Upper-tier subcontractors may also be held liable for back wages owed to the workers.
- Upper-tier subcontractors may also be debarred for disregarding their obligations.

A construction site at sunset. A large crane is visible in the upper right, with its hook and cables hanging down. Three workers wearing hard hats (one blue, one yellow, one white) are silhouetted against the bright orange and yellow sky. The foreground shows a concrete slab with a grid of rebar and some construction materials. The overall scene is a wide-angle shot of a building under construction.

Payment of Prevailing Wages

Apprentices

- The required ratio and rates have changed when a contractor is working in a locality other than the locality in which its apprentices' program(s) is registered.
- The ratios and wage rates applicable in the approved apprenticeship program for the locality in which the construction is being performed will apply.
- If there is no approved program in the locality, the ratio and wage rate specified in the contractor's registered program must be observed.

Annualization

- The annualization requirement is now included in the regulations.
- An exception will be granted for benefits that are not continuous in nature and do not compensate both private and DBRA-covered work.
- Defined contribution pension plans are not required to seek an exception if they meet the required criteria and provide for immediate participation and essentially immediate vesting.

Administrative Fees

- A contractor may take credit for payments made to third parties for costs that are directly related to the administration and delivery of bona fide fringe benefits.
- A contractor cannot take credit for its own administrative expenses incurred in connection with the provision of fringe benefits, even when the contractor pays another entity to perform such tasks in whole or in part.



Recordkeeping

Basic Records Requirements

- Contractors must now maintain workers' last known phone numbers and email addresses as part of their required records.
- Contractors are also required to maintain contracts, subcontracts, and related documents.

Length of Record Retentions

- All required records must be maintained for at least 3 years after all work on the prime contract has been completed.
- This requirement also applies to subcontractors, even though the subcontractor's work may be finished prior to the completion of the prime contract.

Certified Payrolls - Signatures

- Must be signed with a handwritten signature or a legally valid electronic signature.
- Valid electronic signatures include any electronic process that indicates acceptance of the certified payroll record and includes an electronic method of verifying the signer's identity.

Certified Payrolls – Submission Methods

- Contracting agencies and prime contractors can permit or require contractors to submit their certified payrolls through an electronic system, if:
 - the electronic system requires a legally valid electronic signature;
 - other methods are permitted where a contractor may not be able to use or access the electronic system; and
 - the electronic system allows the contractor, the contracting agency, and the Department to access the certified payrolls upon request for at least 3 years after the work on the prime contract has been completed.

Required Record Disclosures

- A contractor's failure to make the required records available to WHD within the requested timeframe will prevent that contractor from using those records as evidence in a hearing under 29 CFR part 6.
- A reasonable request from the contractor or person for an extension of the time to submit records will be considered.



Anti-Retaliation

Prohibited Actions

- It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for engaging in protected activity.

Protected Activities

- Workers or job applicants are protected from retaliation for:
 - notifying any contractor of any conduct which the worker reasonably believes constitutes a DBRA violation;
 - filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting on behalf of themselves or others any DBRA right or protection;
 - cooperating in any investigation or other compliance action, or testifying in any DBRA proceeding, or;
 - informing any other person about their rights under the DBA, Related Acts, or 29 CFR parts 1, 3, or 5.

Retaliation Remedies

- WHD may require contractors to provide appropriate relief to affected worker(s) and job applicant(s) or take appropriate remedial action, or both.

Retaliation Remedies - Examples

- Examples of such remedies include, but are not limited to:
 - employment, reinstatement or front pay in lieu of reinstatement, and promotion, together with back pay and interest;
 - restoration of prior conditions and privileges of the worker's employment or former employment;
 - removal of warnings, reprimands, or similar references; or
 - the provision of a neutral employment reference.



Enforcement Mechanisms

Withholding

- Ability to cross-withhold is strengthened
- Cross-withholding even when the contract is not with the same agency that awarded or assisted the prime contract on which the violations occurred
- Funds withheld for DBRA wage underpayments have priority over other competing claims

Debarment

- The standard for DBA and Related Act debarments is now the same.
- Debarment is for 3 years with no early removal from the exclusion list for both DBA and Related Act.

A photograph of three construction workers on a rooftop at sunset. They are wearing hard hats and safety vests. One worker is pointing towards a crane that is lowering a hook. They are holding blueprints. The background shows a cityscape under a colorful sky.

Resources

WHD Resources

- Wage Determinations: <https://sam.gov>
- Wage and Hour Division: <http://www.dol.gov/agencies/whd/government-contracts>
- WHD Protections for Workers in Construction under the Bipartisan Infrastructure Law: <https://www.dol.gov/agencies/whd/government-contracts/protectations-for-workers-in-construction>
- Resource Book: <http://www.dol.gov/agencies/whd/prevaling-wage-resource-book>
- Office of the Administrative Law Judges Law Library: <https://www.dol.gov/agencies/oalj/topics/libraries/LIBDBA>
- Prevailing Wage Topic videos: <https://www.dol.gov/agencies/whd/government-contracts/construction/presentations>

OFCCP Resources

- OFCCP holds those who do business with the federal government (contractors and subcontractors) responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran. In addition, contractors and subcontractors are prohibited from discharging or otherwise discriminating against applicants or employees who inquire about, discuss or disclose their compensation or that of others, subject to certain limitations.
- Further information on OFCCP is available at https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/factsheets/FACT_Workplace_Aug2016_ENGESQA508c.pdf.

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