

Prevailing Wage Law: Compliance and Critical Updates

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- ◆ CMAA – SAN DIEGO CHAPTER



Introduction to Panelists

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Outline - Purpose

- ◆ Prevailing Wage Law - Goals
- ◆ Statutory Framework
- ◆ Recent Changes
- ◆ Skilled and Trained Workforce
- ◆ AB 1701
- ◆ Case Studies: When Does Prevailing Wage Law Apply?
- ◆ Questions

Prevailing Wage Law - Goals

◆ General Objectives:

- Protect employees from substandard wages that might be paid if contractors “could recruit labor from distant cheap-labor areas”
- To permit union contractors to compete with nonunion contractors
- To benefit the public through the superior efficiency of well-paid employees
- To compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees
- (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976)

Statutory Framework

- ◆ Prevailing Wage Law is governed by Labor Code (LC) sections 1720 through 1815.
- ◆ Important Provisions:
 - Labor Code section 1771: Defines application of Prevailing Wage Law.
 - Does not apply to public works projects of \$1,000 or less.
 - Applicable only to work carried out “under contract.”
 - Not applicable to work carried out by public agency’s own forces.
 - Federally funded project?

Statutory Framework

- ◆ What is “public work”?
 - Labor Code section 1720(a)(1) defines public work as “[c]onstruction, alteration, demolition, installation, or repair work **done under contract and paid for in whole or in part out of public funds....**”
 - Compare Public Contract Code definition: “[c]onstruction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work **involving any publicly owned, leased or operated facility.**” (Public Contract Code section 22002(c).)
 - DLSE will not apply Public Contract Code definition to prevailing wage determinations.

Statutory Framework

- ◆ What is “public work”?
 - **Private Contracts** (Labor Code section 1720.2)
 - Public Work also includes work done under a private contract (i.e., public agency is not a party) when the following conditions apply:
 - » The property is privately owned, but more than 50% of the assignable square footage of the property is leased to a public agency; and
 - » The lease is entered into before construction begins; OR
 - » Construction is performed in accordance with plans/specs/criteria “furnished by” public agency and lease is entered into during or upon completion of construction.

Statutory Framework

- ◆ What is “public work”?
 - Maintenance works is public work. Labor Code section 1771 (“this section is applicable to contracts let for maintenance work”)
 - “Maintenance” is defined as “repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or reality as fixtures.” 8 Cal. Code. Reg. § 16000.

Statutory Framework

- ◆ Labor Code section 1772 – “Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon a public work.”
- ◆ Labor Code section 1774 – “The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.” (Emphasis added.)
- ◆ The DIR maintains a web site at www.dir.ca.gov which has the latest rates.
- ◆ Federal rates are published intermittently by Federal Department of Labor. The rates may be found on the Department of Labor web site at www.wdol.gov.

Statutory Framework

- ◆ Who is a Subcontractor - The Materialman Exception
 - **Materialman Exemption – what it used to be:**
 - The materialman is selling supplies to the general public;
 - The plant must not be established specially for the particular project; and
 - The plant is not located at the site of work.
 - ***After Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan (2014) 229 Cal.App.4th 192:***
 - Offsite fabrication is not covered by the prevailing wage law if (i) it takes place at a permanent offsite manufacturing facility; and (ii) the location and existence of that facility is determined wholly without regard to the particular public works project.

Statutory Framework

- ◆ Hauling Services To and From Public Works Project Site – Are Prevailing Wages Required?
 - Hauling refuse from a public works site to an outside disposal location?
 - Hauling materials (e.g., soil, concrete, gravel, rock) from a public works site to an outside location for purposes of resale?
 - Hauling materials from a public works site to an outside location for purposes of disposal?

(Williams v. SnSands Corp. (2007) 156 Cal.App.4th 742)

Statutory Framework

- ◆ *Section 1773.2:*
 - *The body awarding any contract for public work, or otherwise undertaking any public work, **shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.***
 - *In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, **include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request.** The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.*

Statutory Framework

- ◆ Public Agency's Liability For Failing To Designate Project As "Public Work"
 - Labor Code section 1781
 - Public Agency may be liable for contractor's increased costs, e.g., labor cost increases and penalties
 - Liability triggered when:
 - there is no "public work" designation in the bid specification or contract documents
 - the work is found to be a "public work" after public agency accepts contractor's bid

Statutory Framework

◆ Important Provisions

- Section 1775: Penalties for violations
 - *Not more than* \$200 for each calendar day (or portion thereof), for each worker paid less than prevailing wages.
 - » Mitigating Factors:
 - Good faith mistake and promptly corrected.
 - No prior record of failing to pay prevailing wages.

Statutory Framework

♦ Important Provisions

- Section 1775: Prime contractors' liability for subcontractors' failure to pay prevailing wages.
 - Not liable for penalties *unless*: (1) prime contractor had knowledge of the failure; or (2) prime contractor fails to comply with all of the following:
 - » Include in the subcontract copies of Labor Code sections 1771, 1775, 1776, 1777.5, 1813 and 1815.
 - » Monitor pay by subcontractor to its employees via periodic review of certified payroll.
 - » Upon becoming aware of a subcontractor's violation, take prompt corrective action (including withholding of sufficient amounts from subcontractor to cover unpaid wages).
 - » Obtain affidavit of compliance from subcontractor prior to making final payment.
 - DLSE has 15 days from receipt of a complaint alleging a subcontractor's violation to notify prime contractor.

Statutory Framework

- ◆ Important Provisions
 - Section 1776: **Maintenance requirements regarding payroll records;**
corresponding penalties

Statutory Framework

- ◆ Important Provisions
 - Section 1776: Maintenance requirements regarding payroll records; **corresponding penalties**
 - Enforcement of compliance: A contractor or subcontractor has 10 days in which to comply with a written notice requesting certified payroll records.
 - Penalty: \$100 per calendar day for each worker until strict compliance.

Statutory Framework

♦ Important Provisions

- Section 1777.5: Apprentice requirements.
- Section 1813: Penalty/forfeiture of \$25 for each worker, for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day or 40 hours in any one calendar week in violation of the Prevailing Wage Law.
- Section 1815: Overtime. Work performed by employees in excess of 8 hours in one day or 40 hours in one week shall be paid for overtime (for any time in excess of 8 hours in one day) at not less than 1 ½ times the basic rate of pay.

SB 854 - DIR's Precautionary Notice to Awarding Bodies

- ◆ Precautionary Legal Notice to Awarding Bodies from the Labor Commissioner
 - SB 854 includes new or revised statutory obligations for “awarding bodies” (as defined in Labor Code Section 1722). These new and revised obligations are found in the following sections of the Labor Code:
 - 1771.1(b) – **Duty to include notice** of contractor and subcontractor registration requirement in all bid and contract documents, and **duty not to accept bid or enter into a contract** without proof of the **contractor's current registration** pursuant to Section 1725.5.

SB 854 - DIR's Precautionary Notice to Awarding Bodies

- ◆ 1771.4(a)(1) – **Duty to specify in bid and contract documents that the project is subject to compliance monitoring and enforcement by the Department of Industrial Relations.**
- ◆ 1771.4(a)(2) – **Duty to post** or require the prime contractor to post job site notices, as prescribed by regulation
- ◆ 1773.3 – **Duty to provide notice** to the Department of Industrial Relations of any public works contract **within five days of the award** [using the online **PWC-100 form**].
- ◆ This informational notice is being provided to ensure that awarding bodies are aware of the potential legal consequences arising from a failure to satisfy their own unique statutory obligations found in Article 2 of the Public Works Chapter. Article 2 is comprised of Labor Code Sections 1770 through 1782, and includes the new and revised obligations listed above.

SB 854 - DIR's Precautionary Notice to Awarding Bodies

- ♦ The Labor Commissioner wants to remind all awarding bodies that Article 2 also includes Labor Code Section 1777, which was enacted in 1937 and remains the law today. **Section 1777 establishes a criminal penalty (misdemeanor) against "any officer, agent, or representative of the state or of any political subdivision who willfully violates any provision" of Article 2.**
- ♦ The availability of a criminal penalty applies to a broad group of entities and individuals because:
 - The definition of "awarding body" found at Labor Code Section 1722 includes the "department, board, authority, officer, or agent awarding a contract for public work," and
 - The term "political subdivision" as defined in Labor Code Section 1721 "includes any county, city, district, public housing authority, or public agency of the state, and any assessment or improvement districts."

Contractor Rights

- ◆ Labor Code section 1784 - Contractor's Right to Sue for Failure to Disclose Prevailing Wage Obligation
 - A contractor may recover increased costs from the awarding body, typically the owner/developer of a project, if the awarding body failed to disclose in writing the contractor's obligation to pay prevailing wages on a project.
 - Recent bill extended a contractor's right to recover increased costs from the "hiring party" if the obligation to pay prevailing wages was not disclosed.
 - Hiring party means the entity with whom the contractor that is seeking recovery has a direct contractual relationship.

Enforcement Tools

- ◆ Labor Code §§1777.1 and 1777.7 - Committee on Labor and Employment: Public works: apprenticeship program
 - The Labor Commissioner or his/her designee may issue a civil wage and penalty assessment to contractors who knowingly violated provisions regulating the employment of apprentices on public works projects
 - Division of Labor and Standards Enforcement to provide notice to the contractor within 15 days of receipt of a complaint that their subcontractor knowingly violated the apprenticeship provisions.

Tracking Public Works

- ◆ Labor Code §1741.1 - Prevailing wage.
 - The body awarding a contract for public work must furnish, within 10 days after receipt of written request from the Labor Commissioner, a copy of the valid notice of completion for the public work, or a document evidencing the awarding body's acceptance of the public work on a particular date, whichever occurs later, in accordance with the specified provisions.
 - Designed to trigger limitations period for action.

Expanding Definition of Construction

- ◆ Labor Code section 1720 - Prevailing Wage; Post-construction Work
 - Recently expanded the definition of the word “construction” under Prevailing Wage Law to include post-construction work.
 - Expressly states that post-construction work includes, without limitation, “all clean up work at the job site.”

Accounting for Delay in Determination

- ◆ Public Works Coverage Determinations
 - Recently amended Labor Code § 1773.5 requires DIR Director to issue public works determinations within 60 days of receiving last letter re project, within 120 days for private projects receiving public funds

Allowing for Enforcement

- Labor Code § 1741.1 tolls the statute of limitations for wage penalty assessments or lawsuits during DIR determination.
- § 1741.1 also tolls statute of limitations for wage penalties or lawsuits during any delay by contractor or subcontractor to provide certified payroll following a request.
- § 1741.1 also requires notice of completion to be sent to the Labor Commissioner when filed with the office of a county recorder

Impact

◆ § 1741.1 means:

- Obtain confirmation from the owner or awarding body as to whether the project is a public work subject to PWL.
- Provide certified payroll promptly in response to a request by the Labor Commissioner, a joint labor-management committee or labor compliance program; monitor subs for same.
- Monitor determinations closely

Compliance Focus

- ◆ DLSE Tools To Crack Down On Compliance
 - More time to bring back wage & benefit actions
 - Greater access to personal identifying information on certified payroll reports for matching workers & reported wages and benefits
 - Requires orders or injunctive relief & awards of back wages, interest, attorneys fees and potentially liquidates damages in private actions

Compliance Focus

- ◆ More Time & Money
 - Labor Code § § 1741 and 1771.2 give Labor Commissioner and LMCs 18 months after later of notice of completion is filed or project is accepted to bring an action for back wages and benefits (previously 180 days).
 - § 1771.1 requires courts to award back wages, interest, liquidated damages and attorneys fees in private actions, and may award penalties

Compliance Focus - Record Submission

◆ More Information

- Labor Code § 1776 requires that in producing payroll records requested by LMCs, only the SSN is redacted, and for those produced for a Taft-Hartley trust fund request, the last four SSN digits must be provided

Prevailing Wage Expansion

- ◆ Labor Code amendments have expanded application of prevailing wage requirements
 - AB 852 - Expands the application of prevailing wage law to the construction, alteration, demolition, installation or repair under private contract for general acute care hospitals (except rural general acute care hospitals with no more than 76 beds) when project is funded in whole or in part with revenue bonds issued on or after January 1, 2016.

Prevailing Wage Expansion

- ◆ Recent Labor Code amendments have expanded application of prevailing wage requirements
 - SB 350 - Expands definition of "public work" to include work on projects involving California's electric transmission system pursuant to the Clean Energy and Pollution Reduction Act of 2015. Such projects are now subject to prevailing wage law.

Prevailing Wage Expansion

- ◆ Recent Labor Code amendments have expanded application of prevailing wage requirements
 - AB 199 - Private Residential Projects. Current law exempts private residential projects built on private property from certain requirements for projects that are defined as “public works,” including the payment of prevailing wages, unless the project is built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority.

Prevailing Wage Expansion

- ◆ Recent Labor Code amendments have expanded application of prevailing wage requirements
 - SB 35 - Affordable Housing. Requires cities and counties to offer developers an expedited review process for affordable housing projects. However, prevailing wages would be required on those projects.

Skilled & Trained Workforce Relevant Legislation

- ◆ AB-566- School facilities: leasing property: construction contracts (2015-2016)
- ◆ SB-693 Public contracts: skilled and trained workforce.(2015-2016)
- ◆ SB-418 Public contracts: skilled and trained workforce.(2017-2018)
- ◆ AB-3018: penalties for failure to meet skilled and trained requirements.(2019)
- ◆ Codified in Public Contract Code (2600-2603)

Skilled and Trained Workforce (Public Contract Code 2600-2603)

- ◆ A “**Skilled and trained workforce**” means a workforce that meets all of the following conditions:
- ◆ (1) Graduated from an apprenticeship program for the applicable occupation that was approved by the chief or located outside California and approved for federal purposes pursuant to the apprenticeship regulations adopted by the federal Secretary of Labor.
- ◆ (2) Has at least as many hours of on-the-job experience in the applicable occupation as would be required to graduate from an apprenticeship program for the applicable occupation that is approved by the chief.
- ◆ (3) Is a registered apprentice in a California approved apprenticeship program.

Skilled & Trained Workforce (Public Contract Code 2600-2602)

As of	Percentage
January 1, 2017	30%
January 1, 2018	40%
January 1, 2019	50%
January 1, 2020*	60%

- (A) For work performed on or after January 1, 2017, at least 30 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation. This requirement shall not apply to work performed in the occupation of teamster.
- (B) For work performed on or after January 1, 2018, at least 40 percent of the skilled journeypersons employed to perform work on the contract or project by every contractor and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation. This requirement shall not apply to work performed in the following occupations: acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or waterproofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher. (SB 418)

Skilled & Trained Reporting Requirements

♦ Monthly Reporting Requirements:

- (2) The contractor, bidder, or other entity will provide to the public entity or other awarding body, on a monthly basis while the project or contract is being performed, a report demonstrating compliance with this chapter.
 - (b) If the contractor, bidder, or other entity fails to provide the monthly report required by this section, or provides a report that is incomplete, the public agency or other awarding body shall withhold further payments until a complete report is provided.
 - (c) If a monthly report does not demonstrate compliance with this chapter, the public agency or other awarding body shall withhold further payments until the contractor, bidder, or other entity provides a plan to achieve substantial compliance with this chapter, with respect to the relevant apprenticeable occupation, prior to completion of the contract or project.

Recent Legislation - AB 3018

Section 2602 of the Public Contract Code is amended to read:

(b) If the contractor, bidder, or other entity fails to provide the monthly report required by this section, or provides a report that is incomplete, the public agency or other awarding body shall withhold further payments until a complete report is provided.

c) If a monthly report does not demonstrate compliance with this chapter, the public agency or other awarding body shall **withhold** *do both of the following:*

(1) Withhold further payments until the contractor, bidder, or other entity provides a plan to achieve substantial compliance with this chapter, with respect to the relevant apprenticeable occupation, prior to completion of the contract or project.

(2) Forward a copy of the monthly report to the Labor Commissioner for issuance of a civil wage and penalty assessment in accordance with Section 2603.

Recent Legislation - AB 3018 (Cont.)

SEC. 2.

Section 2603 is added to the Public Contract Code, to read:

2603.

- ♦ *(a) If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor failed to use a skilled and trained workforce in accordance with this chapter, the contractor or subcontractor responsible for the violation shall forfeit, as a civil penalty to the state, not more than five thousand dollars (\$5,000) per month of work performed in violation of this chapter. A contractor or subcontractor that commits a second or subsequent violation within a three-year period shall forfeit as a civil penalty to the state the sum of not more than ten thousand dollars (\$10,000) per month of work performed in violation of this chapter*

Recent Legislation - AB 3018 (Cont.)

(c) The amount of any monetary penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation. The Labor Commissioner shall consider, in setting the amount of a monetary penalty, all of the following circumstances:

- ◆ (1) Whether the violation was intentional.
- ◆ (2) Whether the contractor or subcontractor has committed other violations of this chapter or of the Labor Code.
- ◆ (3) Whether, upon notice of the violation, the contractor or subcontractor took steps to voluntarily remedy the violation.
- ◆ (4) The extent or severity of the violation.

Recent Legislation - AB 3018 (Cont.)

(f) If a subcontractor is found to have violated this chapter, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of the subcontractor's failure to comply with this chapter or unless the prime contractor fails to comply with any of the following requirements:

- ◆ *(1) The contract executed between the contractor and the subcontractor for the performance of work on the project shall include a copy of this chapter.*
- ◆ *(2) The contractor shall continually monitor the subcontractor's use of a skilled and trained workforce.*
- ◆ *(3) Upon becoming aware of a failure of the subcontractor to use a skilled and trained workforce, the contractor shall take corrective action, including, but not limited to, retaining funds due to the subcontractor for work performed on the project until the failure is corrected.*
- ◆ *(4) Prior to making the final payment to the subcontractor for work performed on the project, the contractor shall obtain a declaration signed under penalty of perjury from the subcontractor that the subcontractor has met the requirements of this chapter.*

Skilled & Trained Workforce Exemptions

- ♦ The contractor or subcontractor **need not** meet the apprenticeship graduation requirements of paragraph (2) if, during the calendar month, the contractor or subcontractor employs skilled journeypersons to perform **fewer than 10 hours of work on the contract or project.**
- ♦ (6) A subcontractor need not meet the apprenticeship graduation requirements of paragraph (2) if both of the following requirements are met:
 - (A) The subcontractor was not a listed subcontractor under Section 4104 or a substitute for a listed subcontractor.
 - (B) The subcontract does not exceed one-half of 1 percent of the price of the prime contract.

AB 1701 - General Contractor Wage Liability

- AB 1701 makes a general contractor jointly liable for the unpaid wages, fringe benefits, or other benefit payments or contributions of every worker on or connected to the project.
- Deadlines to Enforce AB 1701:
 - Actions to enforce a claim under AB 1701 must be made within one year of the earliest of the following:
 - Recordation of the notice of completion of the direct contract;
 - Recordation of the notice of cessation of the work covered by the direct contract; or
 - Actual completion of the work covered by the direct contract. (Labor Code section 218.7, subd. (d).).

The Mechanics of AB 1701

◆ Who Is Liable?

- Direct contractors on contracts entered on or after January 1, 2018.

◆ Who Can Bring a Claim?

- The Labor Commissioner may bring an administrative action or civil lawsuit against general contractors.
- Unions owed fringe benefits, and joint labor management cooperation committees, may also bring an action under the law.
 - *Individual employees may not bring a claim on their own behalf.*

Best Practices Under AB 1701

- ◆ Ensure strong indemnity language in all subcontracts, including supply contracts;
- ◆ Requiring all subcontractors at every tier to be bonded;
- ◆ Obtaining personal guarantees;
- ◆ Monitoring subcontractors and suppliers, including demanding payroll records and proof of payment prior to issuing payments; and,
- ◆ Withholding subcontract payments pending confirmation of proper payment of wages and fringe benefits.

Application of Prevailing Wage Law

- ◆ Case Study: Off-Site Fabrication of HVAC Materials
- ◆ Key Facts:
 - Prime Contractor enters into contract for public work with public agency.
 - Prime contract specifies the payment of prevailing wages per Labor Code.
 - Prime Contractor enters into subcontract with HVAC Subcontractor for HVAC portion of the work.
 - HVAC Subcontractor has performed off-site fabrication in its own shop for 20 years for both private and public projects.
 - The shop was not established for this particular project.
 - HVAC Subcontractor does not sell to the general public.

Application of Prevailing Wage Law

- ◆ Key Facts (cont'd):
 - HVAC Subcontractor's employee files a complaint with the DLSE alleging he was not paid prevailing wages for shop fabrication work.
 - DLSE issues a Civil Wage and Penalty Assessment on the Prime Contractor and the HVAC Subcontractor alleging violation of Prevailing Wage Law in connection with shop fabrication work.
- ◆ What is the result?

Application of Prevailing Wage Law

- ◆ Case Study: Off-Site Fabrication of HVAC Materials (cont'd)
- ◆ Answer: No. Prevailing Wage Law does not apply.
- ◆ Why?: Because the materialman exemption applies.
 - Materialman Exemption applies when:
 - The plant is not located at the site of work; and
 - The plant must not be established specially for the particular project.
 - **NOTE:** Whether the materialman is selling supplies to the general public is no longer a factor.

Application of Prevailing Wage Law

- ◆ Case Study: Installation of Smart Classroom Technology (“SCT”)
- ◆ Key Facts:
 - SCT is an interactive multi-media system comprised of data video projectors, speakers, whiteboard displays and keyboard.
 - School District hired SCT Installer to install an SCT system at an elementary school
 - The SCT system (including installation) was financed by public funds (bond proceeds).
 - The SCT systems can be removed from one classroom and moved to another (i.e., temporarily attached to walls, ceilings, etc.).
 - Is SCT Installer’s work subject to prevailing wage requirements?

Application of Prevailing Wage Law

- ◆ Case Study: Installation of Smart Classroom Technology (“SCT”)
- ◆ Answer: Yes. Prevailing Wage Law does apply.
- ◆ Why?: “Because SCT is affixed to the ceilings and walls of classrooms with screws and other means of attachment, the work described above constitutes “installation” under Labor Code section 1720(a)(1).”

Prevailing Wage Law

Questions?

Thank you!

◆ Please feel free to contact us any time for guidance.

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