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# COUNTY ADVISORY BULLETIN

CAB

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## **REVISIONS TO THE PREVAILING WAGE LAW**

### **INTRODUCTION**

The threshold for the payment of prevailing wages on public improvement projects has been increased from \$4,000 to \$50,000 for new construction projects and from \$4,000 to \$15,000 for other public improvement projects. The last adjustment to the prevailing wage threshold was in 1976 when it was increased from \$2,000 to \$4,000. The new law was sponsored by Representative Ross Boggs (D-Andover), who chairs the House Commerce and Labor Committee and was instrumental in the passage of the bill. The new law takes effect June 21, 1994.

The law also authorizes the director of the Department of Industrial Relations to adjust the thresholds biennially, based on changes in construction costs. The new law also includes a qualified exemption of petition ditch projects and soil and water conservation district projects from the prevailing wage law. The exemption for these drainage projects was inserted at the request of Senator Bob Cupp (R-Lima) with the support of CCAO.

This CAB explains the new categories of construction work and the procedure for adjusting thresholds. This CAB also explains new exemptions to the law, new penalties and procedures for conducting investigations, hearings and appeals.

### **PREVAILING WAGE THRESHOLDS (ORC 4115.03(B)(1)(2))**

Prior law required construction of any public improvement where the estimated cost exceeded \$4,000 and was performed by other than full-time employees who had completed their probationary period in the classified service of a county to comply with the prevailing wage law. Prior law defined construction as any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating of any public improvement if the overall project cost was more than \$4,000.

The new law redefines construction by establishing two separate categories of construction. It also sets different threshold amounts for each category. The categories are:

1. New construction of any public improvement, if the cost exceeds \$50,000 and is performed by other than full-time employees who have completed their probationary periods in the classified service of the county. The law only requires that county employees who have not completed their probationary periods be paid at the prevailing wage rate. It appears that the intent of this provision is to prohibit counties from avoiding the prevailing wage law by hiring short term employees. In most counties the probationary period of employees is 90 - 120 days unless modified by a collective bargaining agreement. This \$50,000 threshold will be adjusted every two years.

2. Any reconstruction, enlargement, alteration, repair, remodeling, renovation or painting of any public improvement, if the cost exceeds \$15,000 and is performed by other than full-time employees who have completed their probationary period in the classified civil service of a county. This \$15,000 threshold will also be adjusted every two years.

"Improvement and decorating" are removed from the scope of the law while "remodeling and renovation" are added. This change in wording does not exempt additional categories of improvements from the law, as the new words are more all inclusive.

Rules adopted by the Department of Industrial Relations prior to the enactment of HB 350 defined construction to include, but not be limited to, dredging, shoring, demolition, drilling, blasting, excavating, clearing, cleanup, landscaping, scaffolding, installation and any other change to the physical structure of a public improvement (OAC 4101:9-4-02(D)). The prevailing wage law will continue to apply to these activities but the administrative rules will have to be rewritten to distinguish between new construction and reconstruction, enlargement, alteration, repair, remodeling, renovation or painting.

#### **BIENNIAL ADJUSTMENTS TO THE THRESHOLDS (ORC 4115.034)**

Beginning January 1, 1996, and on the first day of January every two years thereafter, the director of Industrial Relations must adjust the threshold levels. The director must adjust both thresholds based on the average increase or decrease in the Bureau of the Census implicit price deflator for construction during the immediately preceding two year period. No increase or decrease for any year may exceed 3% of the existing threshold.

#### **PROHIBITION AGAINST SUBDIVISION OF ONE PROJECT INTO COMPONENT PARTS (ORC 4115.033)**

The new law prohibits the county from subdividing any project into component parts or projects the cost of which is less than the threshold for the purpose of circumventing the prevailing wage law. Public improvement projects may be treated as separate projects provided they are conceptually separate and unrelated to each other or encompass

independent and unrelated needs of the public authority.

### **QUALIFIED EXEMPTION FOR SOIL AND WATER CONSERVATION DISTRICT AND PETITION DITCH PROJECTS (ORC 4115.03(C))**

Prior law, unchanged by HB 350, defines public improvement to include all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works and all other structures or works constructed by the county or by a person under contract with the county. If a county rents or leases a newly constructed structure within six months after completion of construction, then all work performed on that structure to suit it for occupancy by a county is a public improvement for purposes of the prevailing wage law.

The new law excludes from the scope of the prevailing wage law improvements constructed under a contract with a soil and water conservation district and single county, joint county and interstate petition ditch projects performed under ORC Chapters 6131, 6133 and 6135 respectively, if the following conditions are met:

1. No less than 75% of the project is located on private land, and
2. No less than 75% of the cost of the improvement is paid for by private property owners.

### **PENALTIES FOR FAILURE TO COMPLY WITH THE PREVAILING WAGE LAW (ORC 4115.10)**

The prevailing wage law prohibits any person, firm, corporation or public authority that constructs a public improvement with its own forces from paying any employee less than the prevailing wage rate. The law also prohibits any employer from deducting the cost of food, sleeping accommodations, transportation, tools and other items necessary for performance of the work from the employees' wages unless an agreement has been entered into between the employer and the employees and the agreement has been submitted and approved by the public authority.

Any employee who is paid less than the prevailing rate of wages may recover lost wages through (1) a suit brought by the employee, (2) a suit brought by the director through a wage assignment by the employee or by (3) the director following a determination that there has been a violation of the law. Prior law permitted an employee to recover twice the difference between the prevailing wage rate and the amount paid to the employee. The new law provides that an employee is entitled to the difference between the prevailing wage rate and the amount paid and an additional 25% of that difference. The employer or county must additionally pay a penalty equal to 75% of the difference between the prevailing wage rate and the amount paid to the employee. It should be noted that under this provision of law counties can be held fiscally liable for the penalty if it is found that the county contributed to the violation or the prevailing wage coordinator did not diligently monitor the project. The director must deposit all monies received by the department into

a Penalty Enforcement Fund which the new law creates. The director is authorized to use the additional money for enforcement of the prevailing wage law. The new law also authorizes the director to contract with registered public accountants to perform audits of public and private employers to assist the department in the enforcement of the law.

The following table illustrates the differences in the disposition of funds and penalties under prior law and the new law assuming a hypothetical prevailing wage rate of \$25.00 per hour (including fringe benefits) and an actual rate of pay of \$15.00 per hour (including fringe benefits).

	PREVAILING WAGE RATE	AMOUNT ACTUALLY PAID	ADDITIONAL AMOUNT DUE EMPLOYEE	TOTAL HOURLY RATE WITH PENALTY	PENALTY PAID TO DEPARTMENT FOR ENFORCEMENT
PRIOR LAW	\$25 (basic hourly rate and fringe benefits)	\$15	\$20 = (\$25-\$15) x 2 (twice difference between prevailing wage rate and amount paid to employee)	\$35 (\$15 + \$20)	-0-
NEW LAW	\$25 (basic hourly rate and fringe benefits)	\$15	\$12.50 = (\$25-\$15) + 25% times \$10 (difference between fixed rate and amount actually paid plus an additional 25% of that amount)	\$27.50 (\$15 + \$12.50)	\$7.50 = (\$25-\$15 times 75%) 75% of difference between prevailing wage rate and amount actually paid to employee)

For purposes of calculating prevailing wages the law defines the prevailing wage rate to be the basic hourly rate and all fringe benefits. This includes any employer contribution to a trust fund, plan or program on behalf of the employee, health insurance, pension benefits, supplemental occupational disability insurance and unemployment insurance, life insurance, non-occupational disability and sickness insurance, accident insurance, vacation and holiday pay, certain training programs and other bona fide fringe benefits. Benefits to employees that are required by federal, state or local law such as workers' compensation, unemployment compensation, Medicare and Medicaid are not included within the calculation of fringe benefits. The penalty amount that is paid, 25% to the employee and 75% to the state, is not a deductible business expense to the employer for purposes of calculating income taxes.

## **INVESTIGATIONS, HEARINGS AND APPEALS (ORC 4115.13)**

Current law, unchanged by the new law, requires the director to investigate any alleged violation of the prevailing wage law on his own initiative or within five days of the filing of a complaint. The director, his representative and a hearing examiner appointed by the director, may hold hearings. The hearings are held in the county in which the violation is alleged to have been committed or, under a new provision of law, may be held in Franklin County at the option of the alleged violator. After providing notice to all interested parties, the hearing examiner conducts a hearing and makes findings of fact and recommendations to the director. The director must make a decision based on findings of fact and send the decision to all affected parties.

The new law adds the following provisions for the handling of investigations and appeals.

1. At the conclusion of the investigation the director must decide whether an intentional violation of the law was committed. An intentional violation of the law is defined under ORC 4115.13(H) as:

a. An intentional failure by the contractor or subcontractor to submit the reports required by law or knowingly submitting false or erroneous reports.

b. An intentional misclassification of employees for the purpose of reducing wages.

c. An intentional misclassification of employees as independent contractors or as apprentices.

d. An intentional failure to pay the prevailing wage.

e. An intentional failure to comply with the allowable ratio of apprentices to skilled workers.

f. Intentionally allowing an officer of a contractor or subcontractor who is known to be prohibited from participating in a public contract to perform work on a public improvement.

2. If the director finds that the alleged violation was intentional, then he must provide notice by certified mail of that recommendation to the contractor, subcontractor or officer.

3. The notice must also state that the contractor, subcontractor or officer has 30 days from the date the notice was received to file an appeal of the recommendation with the department.

4. If a timely appeal of the recommendation is filed by the contractor, subcontractor or officer, the department has 60 days from the filing of the appeal to schedule a hearing.

5. If the contractor, subcontractor or officer fails to file a timely appeal, then the department

must adopt the recommendation as a finding of fact.

6. If the contractor, subcontractor or officer fails to file a timely appeal to the recommendation of the department, then they have 60 days from the time the recommendations are adopted as findings of fact to appeal the findings to the common pleas court of the county in which the violations are alleged to have been committed, or to Franklin County, at the option of the alleged violator.

The law prohibits any contractor or subcontractor from contracting directly or indirectly with a public authority for the construction of a public improvement if the department has made findings of fact and a decision that the contractor, subcontractor or officer has intentionally violated the prevailing wage law. A contractor, subcontractor or officer may appeal the decision within 60 days to the common pleas court of the county in which the first hearing involving the violation was heard. In order to appeal a decision of the department to the court, a contractor or subcontractor must file a bond with the court for the amount of restitution should the decision of the department be upheld.

Continuing law also provides that the director may order an employer to make restitution to employees if underpayment results from misinterpretation of the statute or an erroneous preparation of payroll documents. Employers who make restitution to employees under these circumstances are not subject to penalties or further proceedings.

In determining whether a contractor or subcontractor has intentionally violated the prevailing wage law the director may consider as evidence the following facts:

1. The fact that the department, prior to the commission of the violation under consideration, issued notice to the contractor or subcontractor of the same or similar violation. The law provides that commission of the same or similar violation at a subsequent time does not create a presumption that the subsequent violation was intentional.

2. The fact that, prior to the commission of the violation, the contractor or subcontractor used reasonable efforts to learn the correct interpretation of the prevailing wage law from the department or the public authority. However, the new law specifies that a violation is presumed not to be intentional where a contractor or subcontractor complies with a decision of the department following a request that the director decide on certain contract disputes or on novel or unusual situations under the prevailing wage law.

The new law provides that statements of the contractor, subcontractor or officer and findings of fact are not admissible as evidence in a criminal action against them.

### **FILING OF COMPLAINTS BY INTERESTED PARTIES (ORC 4115.16)**

Continuing law allows an interested party to file a complaint with the director alleging a

violation of the prevailing wage law. If, after conducting an investigation, the director determines that no violation has occurred an interested party may appeal the decision to the common pleas court of the county where the violation is alleged to have occurred. The amended law also provides that an interested party may appeal a decision of the director that a violation was not intentional. Continuing law (ORC 4115.03(F)) defines an interested party with respect to a particular public improvement to mean:

1. Any contractor who submits a bid to secure award of a contract to construct a public improvement.
2. Any subcontractor of a contractor who submits a bid.
3. Any bona fide labor organization which represents employees of a contractor or subcontractor and that exists partly or wholly for the purpose of negotiating with employers concerning employment conditions of employees.
4. Any association that represents contractors or subcontractors that have submitted a bid on a particular public improvement project.

Continuing law permits a court to award court costs and attorneys fees to the prevailing party if the court finds that no violation has occurred and the action was unreasonable or without foundation, even if the action was not brought in bad faith. However, court costs and attorney fees may not be awarded to the department or a public authority. The amended law eliminates frivolous actions from those for which a court is permitted to award court costs and attorney fees.

### **VIOLATION LIST OF DEBARRED CONTRACTORS (ORC 4115.133)**

Continuing law requires the department to file a list of contractors and subcontractors who have been prosecuted and convicted of violating the prevailing wage law with the Secretary of State. The new law adds officers of contractors and subcontractors to those entities that must be added to the list if they have been convicted of a violation or have been found to have intentionally violated the law. Contractors who have been found to violate the law are not to be included on the list until the expiration of all appeals or the date of the final judgement of a court.

### **SUSPENSION OF AUTHORITY TO CONTRACT OR PERFORM WORK**

The law generally prohibits any contractor, subcontractor or officer that has been convicted of a violation or has intentionally violated the prevailing wage law from contracting with a public authority for construction of a public improvement or performing any work on such an improvement. The new law imposes an initial suspension for a period of one year instead of two years under prior law. The suspension begins on the date of the expiration of the applicable period for filing an appeal or on the date of the final judgement of the

court. If a contractor, subcontractor or officer is found to have intentionally violated the law another time within five years of an earlier suspension, then that contractor, subcontractor, or officer is prohibited from contracting or performing work for a period of three years from the date of expiration of all appeals or final judgement of a court.

Continuing law prohibits a public authority from awarding a contract for a public improvement to any contractor or subcontractor whose name appears on the Secretary of State's list of debarred contractors. The new law adds officers of contractors or subcontractors to the list of debarred entities. The amended law also provides that filing of the notice of a conviction or a finding with the Secretary of State constitutes notice to all public authorities.