

Prevailing Wage Laws: Q&A On What To Know About Compliance

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Today's construction company owners, managers, and supervisors need to have a clear understanding of the prevailing wage laws. Compliance with these laws is imperative, as the failure to comply can cause severe financial ramifications, and even debarment, for a construction company. This article provides answers to many frequently asked questions about prevailing wage laws, as well as a true example of a prevailing wage violation action I recently handled.

Q: Prevailing Wages: What are They and When do They Apply?

A: The prevailing wage laws are designed to protect union contractors from non-union competitors who under-bid public works projects. The prevailing wage is a minimum wage rate required to be paid to workers under public works construction or service contracts. Several dozen states currently have prevailing wage laws, all with varying requirements and contract thresholds. In addition, the Davis-Bacon Act, McNamara-O'Hara Service Contract Act and Walsh-Healey Public Contracts Act are federal laws that mandate the payment of prevailing wages on certain public works projects throughout the country. A safe rule of thumb is that if the project or services are paid for or supported with public dollars, you need to ask additional questions to ascertain whether the project or service is subject to state and/or federal prevailing wage laws. Failure to do so will be at your peril, and the ramifications may be draconian. Below are answers to the most common questions on the prevailing wage law:

Q: What projects are subject to prevailing wages?

A: Federally and in states with prevailing wage laws, prevailing wages must be paid when there is a contract between a public body and a contractor to perform certain “public works” projects. “Public work” is generally defined as construction, reconstruction, demolition, alteration, custom fabrication, repair work, or maintenance work, including painting and decorating, done under contract and paid for in whole or in part out of the funds of a public body. As you can see, it is generally defined broadly, casting a wide net. In many jurisdictions, prevailing wages are also required not only for state funded projects, but also projects involving municipalities and schools.

Q: Does the amount of the public works contract matter?

A: Yes. Prevailing wages are ordinarily only required when the project or services exceed a certain threshold. Often, those thresholds are quite low. For example, the Davis-Bacon Act applies to contractors and subcontractors performing on contracts in excess of \$2,000, and service contracts of \$2,500 or more.

Q: How do I know whether the contract is subject to prevailing wages?

A: For the most part, public works projects subject to prevailing wages must identify in the contract that prevailing wages are applicable. However, in many states, failure by the prime contractor to identify that the contract is subject to prevailing wages is not a defense. Before signing a contract, it is advisable to perform some due diligence and ask. Although it may often be obvious, that is not necessarily the case with some projects, such as publicly subsidized charter or magnet schools.

Q: Can any contractor perform work on projects or services subject to prevailing wages?

A: Generally, yes. However, certain states require registration prior to commencement of public works projects.

Q: Who sets the prevailing wages?

A: The Department of Labor in the state or U.S. Department of Labor sets the prevailing wages for each classification of laborer, often with a more detailed breakdown by county or region. There are many worker classifications. It can often be challenging to determine which classification a particular employee may fall under. Many audits or wage assessments are the result of improper classification. In many circumstances, contractors try to take advantage of the lower rate for apprentices. In some jurisdictions, the contractor is required to be enrolled in a state or federal apprenticeship program in order to take advantage of those lower wage rates.

Q: What are the consequences of not paying prevailing wages?

A: An employer who violates prevailing wage laws may be guilty of a disorderly person's offense and subject to fines and possibly imprisonment. Generally, a Department of Labor may assess administrative penalties and/or interest. In addition, penalties include the difference between the wages paid to a worker and the appropriate prevailing wage. In many places, a worker paid less than the prevailing wage may bring a civil claim against his or her employer and, if successful, collect wages, costs and attorney's fees. Frequently, each day that an employer pays a worker less than the prevailing wage rate is a separate violation.

Q: What is debarment?

A: Debarment of a contractor may result in certain circumstances when a contractor fails to pay prevailing wages. If a contractor is debarred, it will not be able to bid on or perform work on a public contract for a period of time, often several years. When debarment is sought, it is recommended that contractors seek counsel to request a hearing and represent your interests in a debarment hearing.

Q: Other than improper wages, is there anything else to be concerned about?

A: Investigators are often charged with investigating failure to pay the prevailing wage, include fringe benefits (health insurance, vacation time, etc.). Investigators examine the failure to pay overtime as well. In addition, they are trained to look for misclassification and failure to maintain records, apprenticeship registration and requirements, certified payroll records, registration, etc.

Q: How will I know that my company is the subject of an investigation?

A: Departments of Labor are authorized to investigate wage claims. Frequently, the Department of Labor will request voluminous documents from the contractor, and if the information is not provided, a subpoena will be issued, compelling the production of the materials. In the event that the contractor does not cooperate, it may be debarred.

CLOSING THOUGHT

Prevailing wage violations are a serious issue and can have a devastating effect on the financial stability of a construction company. I recently represented a contractor and demonstrated to the Department of Labor that the Prevailing Wage Act charges brought against the business were unwarranted, as its work providing fiber optic maintenance did not fall within the “covered work” language of the Prevailing Wage Act. Part of the defense was that the investigation was bringing personal hardship on a small family-owned business, and that while the intent of the Prevailing Wage Act is to safeguard the interests of employees on public works projects, this particular audit did not serve that purpose. For construction company owners and managers, knowing the terms of relevant prevailing wage laws, and most importantly, how to comply with those laws, is of utmost importance.