

PREVAILING WAGE LAWS: SUBTLE TRAP FOR DEVELOPERS AND CONTRACTORS

Insights

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A California law that historically has not received much attention has become the subject of intensifying enforcement efforts recently. This law requires that the “prevailing wage” be paid to employees on a public works project. The “prevailing wage” approximates the wage paid by contractors to employees under union contracts for various types of construction and maintenance work in a geographical area. Prevailing wage rates are established by the California Department of Industrial Relations, and they must be paid on qualifying jobs regardless of whether the employees are union-represented.

It is not always simple to determine just what a “public work” is, however. Generally, public works are projects that are paid for, in whole or in part, by use of public funds. They can include construction, alteration, demolition, installation, and repair work. An obvious example would be the construction of a community center at a city park. However, under certain circumstances, public works may also include: irrigation, utility, street, and sewer work; carpet-laying; refuse hauling; and even maintenance contracts. Even privately owned, constructed, and operated buildings may be considered a public work if the majority of the space is leased and used by the state or other governmental entity, which includes cities, counties, districts, public housing authorities, public agencies of the state, and assessment or improvement districts.

Also, privately-owned buildings that are constructed or renovated with public funds are considered public works. Developments that are supported by repayment credits, loans of public funds to be repaid on a contingent basis, or

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the waiver or reduction by a government entity of fees, rents, interest, or insurance or bond premiums may also qualify. In addition, certain tax credits or redevelopment incentives offered by a city or redevelopment agency to attract a privately-owned project to a certain location may also bring that project within the scope of the prevailing wage law.

This law is enforced by the Division of Labor Standards Enforcement ("DLSE"). If a violation is believed to occur, the DLSE will issue a Civil Wage and Penalty Assessment ("CWPA"). Notably, once a CWPA is issued, it is up to the employer to prove that the basis for the CWPA is incorrect. That's right - the employer is deemed guilty until proven innocent. Alternatively, aggrieved workers may elect to sue in the courts, and some attorneys have been aggressively recruiting workers on public works projects to file these types of lawsuits. Either way, liability may be imposed long after the work has been bid and the contractors have been paid based on cost models that assumed prevailing wages did *not* apply. In addition to any penalties assessed by the DLSE, the difference between what wage was paid and the prevailing wage that should have been paid, multiplied by the number of hours worked by the number of workers on the project, can be substantial.

It is essential, therefore, that a developer or contractor determine before bidding a project whether that project will qualify as a public work. Also, subcontractors on the project must be diligently monitored to ensure that they comply with their prevailing wage obligations. Knowing whether prevailing wages will apply at the outset of a project will avoid some nasty surprises later on.

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