

Prevailing wage laws: what are they and how are they changing?

USA | May 23 2011

With last November's changes in state politics across the country, and with the recent push for state and local governments to tighten their budgets, it is not surprising that prevailing wage laws are suddenly on lawmakers' radar screens. While it would be impossible to predict the extent to which prevailing laws will change—or whether they will even survive at all—two conclusions are virtually certain: the laws governing the payment of wages on public projects will change, and that change will benefit owners and contractors.

What Are “Prevailing Wages”?

Prevailing wages, in theory, are supposed to be an approximation of the wages paid to workers in various building trades on private projects. Some states, like Ohio, determine prevailing wage rates based on rates set by local collective bargaining agreements. Other states, such as Kentucky, Pennsylvania, and West Virginia, generally base prevailing wage rates on wages paid to the majority of workers employed in each trade in the locality where the work is being performed. Still other public entities—most notably Washington, D.C. and the federal government—have adopted the so-called “50 percent rule,” which sets prevailing wages at the rate paid to at least 50 percent of the workers in the same job classification on similar projects.

In states like Ohio, prevailing wage amounts are likely to be higher than the average rates paid to non-union workers on private projects. That is because, in the case of Ohio, rates negotiated by unions and written into a collective bargaining agreement are typically higher than rates individual workers can negotiate for themselves.

Many states, including Ohio, Kentucky, and West Virginia, permit prevailing wages to be paid through a combination of actual wages and fringe benefits. In those states, the actual wages paid plus the value of the fringe benefits provided to workers must equal or exceed the prevailing wage requirement.

What Do Prevailing Wage Laws Require?

Prevailing wage laws generally require all workers on public works projects to be paid no less than the prevailing wage. The laws apply to public improvement projects for both new construction and renovation. “Public improvement” is a broad term and generally includes almost all types of structures or public works, including buildings, roads, sewers, ditches, and sewage and water treatment plants.

Some public works projects are exempt from prevailing wage requirements. In Ohio, federally-funded projects, school projects, some county hospital projects, certain water and soil conservation projects, and others are exempt. A recent Ohio Supreme Court decision also excluded from the prevailing wage requirement most private projects supported with public funds. In Pennsylvania, maintenance work on public projects is excluded. West Virginia's law excludes work performed under a rehabilitation or training program.

About half the states impose a monetary threshold for public works projects that are subject to prevailing wage. Current thresholds for the states in the region Dinsmore & Shohl primarily serves are as follows:

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Therefore, workers on a new public works project in Ohio costing under \$78,248 do not need to be paid prevailing wage.

How Are Prevailing Wage Laws Enforced?

Usually, an investigation into non-compliance with prevailing wage laws begins with the filing of a complaint by a worker who believes he or she has not been paid the proper prevailing wage rate. Each state has its own enforcement division. In Ohio, for example, prevailing wage laws are enforced by the Ohio Department of Commerce's Division of Labor & Worker Safety. That Department can enforce a known violation that comes to its attention or perform a random audit and enforce violations resulting from that audit.

Ohio's procedure for investigating prevailing wage violations is typical of other states. Once a complaint is filed, an investigator will be assigned to the case to investigate the claim and make a recommendation as to whether the alleged violation was committed. If a violation is found, the investigator will send a letter to the purported violator with a statement of the amount the violator owes in back wages for each of its unpaid or underpaid employees. If the alleged violator is a subcontractor, then the contractor will also receive a copy of this pre-determination letter, or "recommendation" of violation.

An alleged violator may appeal the "recommendation" to the Department of Commerce, which will then schedule a hearing. If no appeal is taken, the Department of Commerce will adopt the recommendation as a final determination that the contractor or subcontractor has violated Ohio's prevailing wage law. At the point, the Department sends notices of the violation to all affected employees of the violating party, stating that the employee has the right to sue on its own behalf to collect the back wages plus a 25 percent penalty. Alternatively, the employee may assign the right to file an action to the Department of Commerce, which will file the suit on the employee's behalf.

Ultimately, a violator is responsible for 100 percent of the unpaid portion of the required prevailing wage, plus up to a 100 percent penalty—25 percent of which goes to the employee and, if the action was brought by the Department of Commerce, 75 percent to the Department. The employee can also seek recovery of his or her attorneys' fees.

Significantly, a contractor is liable not only for its own violations but also for the violations of its subcontractors—regardless of how careful the contractor was in hiring the subcontractor and auditing the subcontractor's records. In fact, an underpaid employee of a subcontractor may sue either its employer (the violating subcontractor), or the contractor who hired the subcontractor, or both parties.

Intentional violations of prevailing wage law carry stiff penalties, especially in Ohio. For a first finding of an intentional violation, a contractor or subcontractor will be prohibited from contracting with any public authority for the construction of a public improvement for one year. A second intentional violation within five years will result in a three-year debarment. In addition, violations of the prevailing wage law can result in criminal charges.

The investigation of prevailing wage violations and the enforcement of prevailing wage rights differ from state to state. In Kentucky, for example, a violating contractor and subcontractor may be liable for a civil monetary penalty of \$100 to \$1,000 per violation, but not for the complaining workers' attorneys' fees. Pennsylvania imposes a penalty on contractors and subcontractors only for intentional violations of the law, and does not impose liability on a contractor for its subcontractors' violations. West Virginia, like Ohio, imposes a penalty of up to 100 percent of the underpaid amount, but does not impose liability on a contractor for its subcontractors' violations.

What Changes Can We Expect?

Citing higher construction costs for prevailing wage projects, state lawmakers and business organizations are calling for changes in prevailing wage laws to ease the financial burden on state and local governments and to encourage development of public projects that otherwise were stalled because of higher costs. Regardless of whether the higher costs are real or perceived, those calling for reform are being heard. Legislation is now pending in Ohio, Kentucky, West Virginia, and Pennsylvania (as well as other states) to change those states' prevailing wage laws. Here's how:

Ohio

House Bill 153, Ohio's "budget bill" introduced this year, proposes the following changes to Ohio's prevailing wage law:

- Raise the threshold for local government projects from \$78,258 for new construction and \$23,447 for renovations to \$5 million for all construction, meaning that a local government project would be subject to prevailing wage only if the cost of the project exceeds \$5 million.
- Retain the original new-construction and renovation thresholds for projects involving roads, streets, alleys, sewers, ditches, and other works connected to roads or bridges.
- Exempt projects that are neither constructed by a public authority nor constructed for the benefit of a public authority, even if the improvement uses or receives financing, grants, or in-kind support from a public authority.
- Exempt projects undertaken by or for state colleges and universities.
- Modify enforcement procedures, most significantly by eliminating the ability of the prevailing party to receive attorney fees except in cases where an action brought against a contractor lacked foundation.

Both houses of the Ohio legislature, as well as Ohio's new governor, are Republican, so passage of the bill appears likely.

Kentucky

Senate Bill 145 was introduced in 2009 to exempt all public school facilities from prevailing wage requirements. That bill was not voted on, but recent newspaper editorials and chamber of commerce policy position statements have renewed the call to reform Kentucky's prevailing wage law. House Bill 327 was introduced in March, 2011, and would increase the minimum threshold for projects subject to prevailing wage requirements from \$250,000 to \$1 million. That bill is pending.

West Virginia

Three bills introduced in January, 2011 would significantly change West Virginia's prevailing wage law:

- House Bill 2092 would require the payment of prevailing wages only when the cost of the public project exceeds \$200,000. West Virginia currently has no minimum threshold for prevailing wage projects.
- House Bill 2094 would exempt from prevailing wage requirements construction performed on behalf of any county or municipal governmental authority if the construction project cost is under \$200,000. While the monetary threshold proposed by House Bill 2094 is similar to that in House Bill 2092, House Bill 2094 would apply only to county and municipal projects.

- House Bill 2736 would exempt from prevailing wage requirements construction performed on behalf of certain educational institutions, including county boards of education.

Similar bills have been introduced in prior years with no success, and West Virginia's political landscape did not change in the last election, so passage of these three bills appears unlikely for now.

Pennsylvania

At least seven bills introduced this year in Pennsylvania would significantly change that state's prevailing wage law:

- Senate Bill 792 and House Bill 1135 would impose a four-year moratorium on the enforcement of Pennsylvania's prevailing wage law, extending from June 30, 2011 through June 30, 2015.
- Senate Bill 795 would exempt political subdivisions from all prevailing wage requirements unless the political subdivision specifically "opts in."
- Senate Bill 796, in contrast to Senate Bill 795, would keep political subdivisions subject to prevailing wage requirements but permit them to "opt out" of those requirements by ordinance or resolution.
- Senate Bill 821 would increase the minimum threshold for projects subject to prevailing wage requirements from \$25,000 to \$200,000.
- House Bill 709 would exempt school districts from prevailing wage requirements unless the school district specifically "opts in."
- House Bill 1190 would exempt from prevailing wage requirements all projects in "keystone opportunity zones," which are specific commercial or industrial areas with reduced or no tax burden for property owners.

As with West Virginia, prevailing wage reform bills have been introduced before in Pennsylvania with little success. Republicans in Pennsylvania, however, retained control of the state senate and took control of both the state house and governorship. Passage of prevailing wage reform in Pennsylvania, therefore, appears more likely this year.

There is no question that changes in prevailing wage laws are coming. Some states, such as Michigan and New Jersey, recently considered or are currently considering a full repeal of their respective prevailing wage laws. While a repeal is unlikely in Ohio, Kentucky, West Virginia, or Pennsylvania, proposed changes are still significant enough to make the bills in those states potentially controversial. Stay tuned to see whether those bills are successful.