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Prevailing Wage Law in Ohio

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Summary of Contents

I. Who is Entitled to be Paid at Prevailing Wage Rates?

A. Laborers and Mechanics

All employees performing construction work on the project, and whose classifications are set forth in the applicable prevailing wage determination, must be paid the applicable prevailing wage rate. The statute specifically provides that prevailing wages are to be paid to "laborers, workers, or mechanics upon public works." Ohio Rev. Code Ann. § 4115.05. The section provides:

> The prevailing rate of wages to be paid for a legal day's work, as prescribed in section 4115.04 of the Revised Code to laborers, workers, or mechanics upon public works shall not be less at any time during the life of the contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings, between employers and bona fide organizations of labor. . . .

Ohio Rev. Code § 4115.05.

Next, in describing how the prevailing wage rate is to be determined, Ohio law describes the requirement in connection with the rate paid to "laborers, workers, or mechanics, upon any material to be used in or in connection with a public work," as not less the rate paid to those persons who "work in the same trade same trade or occupation in the locality within the state where such public work is being performed and where the material in its final or completed form is to be situated, erected, or used." *Id.*

The regulations define "laborer," "workman," or "mechanic" as follows:

> [A] person who performs manual labor, or labor of a particular occupation, trade or craft, or who uses tools of a particular occupation, trade or craft, or who otherwise performs physical work in such occupation, trade or craft which is approved in writing by the director through issuance of prevailing wage rate schedules for such occupations, trades or crafts.

Ohio Admin. Code § 4101:9-4-02(R).

The laborers, workers and mechanics must be classified correctly to correspond with the appropriate job and wage rate list on the prevailing wage determination. When it is unclear which classification under which an employee should be placed because the work to be performed by that employee fits the description of more than one occupation, the administrative regulations to Ohio's prevailing wage law direct that, "the proper occupation should be determined by looking to past industry practices in the locality concerning which occupation has traditionally done said work." Ohio Admin. Code § 4101:9-4-10(H). For instance, in a case involving disputed employee classifications, an Ohio court determined that employees installing process piping should be classified as general laborers and not pipefitters, since members of the laborers union had done the vast majority of this type of installation work in the past in that locality. *Pipe Fitters Union Local 392 v. Kokosing Constr. Co.*, Nos. C-950220+, 1996 WL 482932 (Hamilton Cty. Aug. 23, 1996).

The regulations provide that employees with multiple job functions (or those performing work in more than one occupation) must be compensated at least at the rate specified for each occupation for the time actually worked in that task. Ohio Admin. Code § 4101:9-4-15. Therefore, each employee is not required to maintain one specific classification throughout the entire project. Rather, some employees may perform work for the project for given periods of time under one occupation classification, then begin a new task under which he or she can be classified under a different occupation (E.g., During one shift, Employee A works 4 hours performing the work of a heavy equipment operator, and 4 hours performing the work of a laborer).

B. Supervisors/Foreman Exception

Owners, partners, supervisors, and working foremen who devote more than 20 percent of their time during a work week to prevailing wage work—i.e., work that falls into one of the prevailing wage occupational classifications—must be treated as a regular employee and be paid at the applicable prevailing wage rate for the work performed. Ohio Admin. Code § 4101:9-4-02(K).

C. Owner/Operator Exception

The prevailing interpretation of Ohio prevailing wage law is that independent contract who is a sole proprietor or owner/operator is not required to pay him/herself the prevailing wage rate. *Int'l Union of Operating Engineers v. Dan Wannemacher Masonry Co*., 36 Ohio St. 3d 74 (1988)(Ohio law: holding that sole proprietor is not required to receive prevailing wage rate); see also *In the Matter of H.P. Connor and Company, Inc*., 87-DBA-67, WAB Case No. 90-07, 1989 WL 407482 (ALJ 1989). .

The critical questions will surround whether the individual claiming this exception qualifies as a bona fide independent subcontractor.

The United States Department of Labor, however, has taken the enforcement position that sole proprietors must pay themselves the prevailing wage rate. This policy is important for contractors who subcontract with sole proprietors, as they may be responsible for the sole proprietor's failure to pay him/herself the prevailing wage.

G. Truck/Delivery Drivers

The general rule has been that drivers who delivery materials to and from a covered job site is not entitled to the prevailing wage rate unless the driver is performing work directly on the site. That is, if the driver stops the vehicle, exits, and unloads the material him/herself, then the driver must be paid the prevailing wage rate for the time spent performing the unloading. On

the other hand, drivers moving materials within the confines of the covered project site would be entitled to prevailing wage rate for the duration of that work.

Historically, the Ohio Department of Commerce has followed the federal court "*Midway*" decision in discerning to what extent drivers may or may not be entitled to the prevailing wage. *Building and Construction Trades Department v. United States Department of Labor Wage Appeals Board*, 932 F.2d 985 (D.C. Cir. 1991)(known as the "Midway" decision); *see also L.P. Cavett Company v. Unites States Dept. of Labor*, 101 F.3d 1111 (6th Cir. 1996). Contractors should be cautioned, however, that the Midway decisions interprets the federal Davis-Bacon Act, not Ohio law. Furthermore, the United States Department of Labor's Cleveland office has taken a position that the Midway decision has been modified by subsequent commentary in the federal regulations.

For those contractors performing work on ODOT projects, take not that ODOT has issued "guidelines" regarding prevailing wages for drivers. *See* <http:// www.dot.state.oh.us/Divisions/EqualOpportunity/DBE/Trucking%20Guidelines.PDF> (last visited, February 7, 2012).

II. Project Labor Agreements

A. What is a Project Labor Agreement?

A Project Labor Agreement or "PLA" is a job-specific agreement entered into by between an owner/public authority and a union or group of unions that imposes labor conditions on a particular construction project that are similar to the terms of a typical collective bargaining agreement. Individual contractors who are successful bidders on the project are then required to become signatory to the PLA. This requirement is usually set forth in a project bid specification.

Thus, although certain public works projects are specifically exempt from State prevailing wage requirements (such as school construction), the public authority may nonetheless choose to enter into a project labor agreement in connection with the project that imposes certain requirements including payment of wages at the prevailing wage rate (i.e., the applicable union wage rate).

B. Common PLA Terms

PLA's typically contain the following types of terms and conditions:

- Union security clauses
- Provisions establishing standard work rules
- Prevailing wage rates
- Provisions prohibiting strikes, lockouts, slowdowns, and work stoppages during construction
- Requirement that all labor be obtained from applicable union hiring halls
- Grievance and arbitration of disputes
- Payment into union fringe benefit funds

- Requirement that contractors become signatory to applicable union collective bargaining agreements for the duration of the project or beyond.

C. Are Project Labor Agreements Enforceable?

Yes. In 1999, the State General Assembly enacted a law which was designed to prohibit public authorities from entering into certain restrictive project labor agreements. Ohio Rev. Code Ann. § 4116; Am.H.B. No. 101 of the 123rd General Assembly, effective October 11, 1999. More particularly, the law stated that public authorities could not require contractors on public improvement projects to: (1) enter into agreements with any labor organization (i.e., become signatory to a local collective bargaining agreement for the duration of the project or beyond), or (2) Enter into any agreement requiring employees of the contractor to, as a condition of employment, become a member of or affiliated with a labor organization or to pay dues or fees to a labor organization. The law went into effect without being signed by Governor Taft, who voiced concerns about the constitutionality of the law.

Union organizations challenged the law, and ultimately the Ohio Supreme Court held the law to be unconstitutional in *Ohio State Building & Construction Trades Council v. Cuyahoga County Board of Commissioners*, 98 Ohio St. 3d 214, 2002 Ohio 7213 (2002). The Court held that the law was preempted by the National Labor Relations Act and the 1959 Landrum-Griffin Act. *Id*. at 217.

D. Interaction Between PLAs and Prevailing Wage

A PLA will typically include a provision that requires contactors to pay employees the prevailing wage rate. Such a requirement in a PLA, however, does not incorporate the entirety of the requirements of Chapter 4115 into the CBA. This means that the enforcement

mechanisms and state oversight by the Ohio Department of Commerce do not apply to the prevailing wage requirements of a PLA.

Notwithstanding, the most cautious approach for a contractor working under a PLA with prevailing wage requirements is to follow the general requirements regarding wage rates, overtime, apprentice rates and ratios and fringe benefits. It is likely that a court interpreting the terms of a PLA would look to Chapter 4115 of the Ohio Revised Code and the administrative regulations to interpret the meaning of the PLA for purposes of compliance. Of course, the fact that a PLA does not, but its own terms, incorporate the enforcement mechanisms and regulatory scheme of Chapter 4115 may serve as a basis to argue that the requirements are different.

E. Pros and Cons of PLAs for Contractors

There is usually very little downside to a Union contractor in becoming signatory to a PLA, as the PLA typically would not impose any greater obligations that the contractor has already agreed to comply with in its collective bargaining agreements. When PLAs involve several trades and unions, even the union contractor must take note, however, of the differences between the PLA terms and their collective bargaining agreements. Conflicting terms may include the types of fringe benefit plans that contractor is required to contribute to, terms regarding hours of work and overtime, work rules and grievance procedures. The union contractor should determine in advance, based on language in the PLA and the collective bargaining agreement, which terms will prevail when the language conflicts or creates an ambiguity.

For a non-union contractor, becoming signatory to a PLA brings with a host of new obligations and compliance requirements. It should not be entered into lightly!

For unions, the PLA typically results in more union work, as union contractors are typically better suited to comply with the terms. Union-friendly PLAs will typically include direct benefits to the union, such as payment of union dues even by non-union contractors and payment into union funds on behalf of employees who will never become vested in the fund.

For project owners, the benefit of a PLA is primarily political. Unions usually favor PLAs; non-union contractors and trade groups usually do not. The most significant benefit to the owner, however is the labor unrest *quid pro quo*: Require a PLA and receive in exchange assurance from labor unions of no labor unrest.

F. Tips for Dealing with PLAs

- READ the project labor agreement or have your counsel review.
- A PLA is an enforceable contract. Make sure you understand all the essential terms.
- Before you sign, point out and ask for clarification on ambiguities, inconsistencies and conflicting terms. Unfortunately, PLAs are often drafted by haphazard and uninformed cutting and pasting from other documents.
- Once you know what you're signing, weigh the risks: Is the value of the job worth the additional costs and conditions?
- Be wary of other documents and agreements (such as fringe benefit trust agreements) that are incorporated into the PLA but are not provided to you to review. You may be agreement to more than you think!
- Be wary of obligations that survive the expiration of the PLA. You may be required to recognize a union or become signatory to certain collective bargaining agreements beyond the scope of the project. Once you voluntarily recognize a labor union, you cannot terminate the relationship at will.

- PLAs should be negotiable before the bid documents are released (and sometimes after). Take the initiative to propose alternate terms.