

Determination of the Prevailing Wage Rate

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The complexities of determining whether the prevailing wage law applies to a particular project, or to a specific worker on such project do not demark the end of the potential pitfalls waiting to ensnare the unwary. Perhaps more difficult, and certainly more litigated, is the question, *what is the prevailing wage rate that must be paid?* The statute and regulations seem disarmingly simple. But applying them in the real world often produces complex, document intensive quandaries. While many issues potentially impacting liability for prevailing wage violations have yet to be addressed by the courts, the following discussion is presented from a plaintiff's perspective, meaning the most aggressive interpretation of the statute and regulations is offered, which if followed will produce the most conservative, lowest risk of getting embroiled in costly litigation.

The Prevailing Wage Rate is defined as “the sum” of (1) the basic hourly rate of pay, and (2) any hourly fringe benefit credit permitted under the statute and regulations.¹ Each of these items is further defined. The “basic hourly rate of pay” (BHR) refers to the wages actually paid to the worker.² The hourly fringe benefit credit (FBC) quantifies and allocates among the employees, the employer's cost in providing qualified fringe benefits to its workers, such as health and retirement benefits.³ The sum of the BHR and FBC paid must meet or exceed the total prevailing wage rate (total PWR) posted by commerce (also called “scheduled rates”) for the particular work being performed.⁴

As the amount of FBC decreases to zero from the scheduled rates posted by commerce, the amount of BHR paid as wages must increase to meet or exceed the total PWR. Where no FBC applies, the total PWR must be paid as wages (i.e. BHR).⁵ However, the opposite is not true. Contractors frequently claim FBC in excess of the scheduled rates, and set off the excess FBC against BHR, thus paying wages lower than the wage rates posted by commerce. Paying less than the scheduled BHR results in underpayments (violations) regardless of the sum of the contractor's claimed wages and FBC.

Other wage-related compliance issues include the prohibition against kickbacks,⁶ the permissibility of deductions from gross wages,⁷ and use of the proper trade classification for the type of work being performed.⁸ Because each trade has a different total PWR, and the

¹ R.C. 4115.03(E); O.A.C. 4101:9-4-02(Y).

² O.A.C. 4101:9-4-02(B).

³ R.C. 4115.03(E)(2), (3); O.A.C. 4101:9-4-06.

⁴ R.C. 4115.031.

⁵ R.C. 4115.11.

⁶ R.C. 4115.10(D).

⁷ O.A.C. 4101:9-4-07.

⁸ R.C. 4115.05; O.A.C. 4101:9-4-15.

applicable trade is functionally based on the type of work being performed, care must be taken to ensure the proper trade classification is selected. A mechanical or electrical contract, for example, cannot be lawfully executed using only laborers, and no plumber/pipe fitters or electricians. Misclassifying workers into lower paying trades results in underpayments.

Contractor reliance on FBC to satisfy its prevailing wage obligations affords significantly more risk of potential violations and litigation. For one, the claimed fringe benefit must be “bona fide.”⁹ And it must be provided through a third party trust, or “pursuant to a plan or program.”¹⁰ This means there must be a written description of the terms of the fringe benefits and function of the plan. If the benefits are self-funded (or provided directly by the contractor) they may not be provided at the sole discretion of the employer. Rather, the fringe benefit must be provided pursuant to an “enforceable commitment,”¹¹ meaning the contractor assumes a legally enforceable contractual obligation to provide the benefit.¹²

Fringe benefits that do not meet these basic standards may not be relied on for FBC to satisfy the contractor’s prevailing wage obligations. Additionally, though the list of the different types of allowable fringe benefits in the statute is not exhaustive,¹³ the further one strays from the list, the more suspect the claimed fringe benefit becomes. Claiming a uniform, cell phone or vehicle use “fringe benefit” is an invitation to be sued. Bonuses are frequently claimed for FBC, and also usually result in problems because they fail to satisfy the statutory requirements highlighted above.

Another source of frequent problems with fringe benefits is the calculation of the hourly FBC. Assuming the fringe benefit otherwise qualifies for credit, calculation of the hourly FBC the contractor may claim is strictly regulated.¹⁴ The rate of FBC is presumed not to exceed the rates posted by commerce in the applicable prevailing wage rate schedule (scheduled rates).¹⁵ And the hourly FBC must be computed using one of the formulae set forth in the regulations.¹⁶ Only employer payments towards fringe benefits may be factored into the calculation of FBC.¹⁷ If the FBC claimed by a contractor cannot be substantiated (including verification of the amount claimed) no FBC may be taken.¹⁸ Additionally, if any portion of the payments claimed as FBC

⁹ R.C. 4115.03(E), .05.

¹⁰ R.C. 4115.03(E)(2) and (3).

¹¹ R.C. 4115.03(E)(3).

¹² O.A.C. 4101:9-4-02(M).

¹³ R.C. 4115.03(E).

¹⁴ O.A.C. 4101:9-4-06.

¹⁵ O.A.C. 4101:9-4-04, 05.

¹⁶ O.A.C. 4101:9-4-06(D), (E).

¹⁷ O.A.C. 4101:9-4-02(O).

¹⁸ O.A.C. 4101:9-4-06(F).

benefits, or may be used by the contractor, it is said to be “recaptured,” in which case no FBC will be allowed for those payments.¹⁹

Commerce determines the prevailing wage rate for each trade on a county-by-county basis.²⁰ The rates, both BHR and FBC, are derived exclusively from the applicable collective bargaining agreement covering the trade work involved and the location of the project.²¹ The contracting public authority is required to obtain a fresh prevailing wage rate determination from commerce before it advertises for bids, and must include notice to prospective bidders that prevailing wage requirements apply to the project.²² If contracts are not awarded, or construction started, within 90 days of this pre-bid determination by commerce, a redetermination must be obtained from commerce before contracts (and construction) lawfully may be executed.²³ Finally, should the scheduled rates for a particular trade change during the course of the project, the new wage rates govern prospectively from their effective date.²⁴

¹⁹ O.A.C. 4101:9-4-04(A).

²⁰ R.C. 4115.04; O.A.C. 4101:9-4-09.

²¹ O.A.C. 4101:9-4-09.

²² R.C. 4115.04(A).

²³ R.C. 4115.05.

²⁴ R.C. 4115.05. Please note that under the Davis Bacon Act, interim rate changes do not affect contractors’ wage obligations because the rates, once set at the commencement of the project, are fixed for its duration.

