



Prevailing Wage Compliance – Practical Advice for City Officials

League of California Cities Annual Conference

September 13, 2018



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Presentation Agenda

1. Overview of Prevailing Wage Laws
2. Prevailing Wage on Private Projects
 - No Public Funds
 - Public Subsidy
 - Third Party Funding
3. Exceptions
4. Affordable Housing



Overview of Prevailing Wage Laws



What Are Prevailing Wages?

- Minimum wage on public works projects based on worker classifications
 - Completely separate from public bidding rules
 - Applies to “public works” of \$1,000 or more
- The Director of the Department of Industrial Relations determines the prevailing rate of wages.
 - <http://www.dir.ca.gov/public-works/publicworks.html>
 - Monitored by Division of Labor Standards Enforcement (Labor Commissioner)
- Must consider collectively bargained rates in determining prevailing wage



Recent Changes to the Law

- Main Changes:
 - SB 7 - Charter Cities
 - SB 854 – Contractor Registration
 - SB 96 – Penalties/Small Project Exception

**The types of projects that are subject to prevailing wages have not been significantly expanded*



Prevailing Wage Overview

- ***What is a “Public Work”?***
 - Generally (Labor Code § 1720(a))
 - Construction (includes work performed during design and preconstruction including inspection and land surveying work), alteration, demolition, installation or repair work, as well as maintenance
 - Done under contract
 - Paid for in whole or in part out of public funds



Prevailing Wage Overview

- Additional Prevailing Wage Requirements
 - ***Certified Payroll Records*** - Contractors are required to maintain and furnish certified payroll records directly to DIR at least monthly in the format prescribed by the Labor Commissioner. (Lab. Code, §§ 1771.4(a)(3), 1776.)
 - ***Hours of Work*** - Contractors must comply with straight time and overtime rules established by DIR. (Lab. Code, § 1810 *et seq.*)



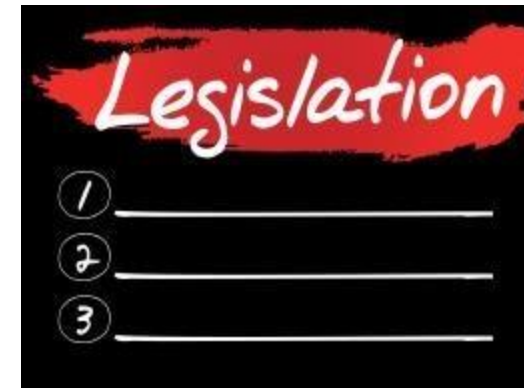
Prevailing Wage Overview

- Additional Prevailing Wage Requirements Cont'd
 - **Apprenticeship Standards** - Contractors must employ apprentices or obtain an exemption from DIR on public works projects. (Lab. Code, §§ 1771.4(a)(3), 1776.)
 - **Contractor Registration** - Contractors must be registered with DIR prior to execution of a contract to perform public works. (Lab. Code, §§ 1725.5, 1771.1.)



SB 96 Overview:

- Adopted as part of a budget trailer bill
 - Became effective on July 1, 2017
- Unregistered Contractors
 - Agencies subject to \$100/day fine for hiring or permitting unregistered contractors to perform work
 - Maximum fines up to \$10,000 per project
- PWC-100 (Notice to DIR)
 - Must file within 30 days, *but not later than the start of work*
 - \$100/day fine for failing to file
 - Maximum fines up to \$10,000 per project



SB 96 Overview:

- Small Contract Exemption:
 - ≤\$25,000 for construction, alteration, demolition, installation and repair
 - ≤ \$15,000 for maintenance
- Stop Orders
 - DIR may order unregistered contractors to stop working on project
- Subcontractor Listing
 - Must now include subs' registration numbers



Comparison

Prior Law/SB 854

1. Notice w/in 5 days
2. No fines for PWC-100
3. \$1,000 threshold for registration and notice
4. No stop orders
5. Listed subs must be registered

SB 96

1. Notice w/in 30 days
2. \$100/day fines (\$10k maximum)
3. \$25,000/\$15,000 threshold
4. Stop orders
5. Sub listing must include registration number



Overview and General Rules for Private Projects

- Determining whether prevailing wage requirements apply to a private development project requires the same analysis as a publicly-owned project.
- The caveat is the existence of several private project specific exceptions to prevailing wage requirements in the law. These exceptions either limit or entirely eliminate the application of prevailing wage law to the project.



Overview and General Rules for Private Projects

- Nothing in prevailing wage law limits its application exclusively to contracts awarded by public agencies. The same rules applicable to a public agency also apply to private entities.
- Labor Code Section 1784
 - Passed as part of AB 1939 and effective as of January 1, 2015.
 - Created a statutory right of action by contractors against private entities contracting for public works.



Prevailing Wage On Private Projects

SCENARIO #1: NO PUBLIC FUNDING



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Scenario #1: No Public Funding

- **FACTS:** Private developer constructs public improvements on private property which are then dedicated to the public agency for public use. The agency contributes no public funds for the public improvement work.
- **QUESTION:** Is this a public work subject to prevailing wage requirements?



Scenario #1: No Public Funding

- ANSWER: It depends.
- ANALYSIS:
 - This is not a public work under Labor Code section 1720(a)(1) because there is no public funding.
 - However, Labor Code section 1720(a)(3) may still apply. Section 1720(a)(3) defines public work to also mean “[s]treet, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof...”



Scenario #1: No Public Funding

- **CASE STUDY:**
 - *City of Clovis Sewer Improvements Project, Public Works Case No. 2001-041.*
 - City required a private developer to construct off-site sewer improvements according to city-approved plans as a condition of the city's approval of the construction of a residential subdivision. There was public funding thus triggering prevailing wage under Section 1720(a)(1), but DIR chose to also indicate Section 1720(a)(3) applied.



Scenario #1: No Public Funding

- CASE STUDY CONT'D:
 - DIR relied on the following facts in determining 1720(a)(3) applied:
 - City had approval authority over plans.
 - City had approval authority over Developer's contracts for the sewer improvement work.
 - Liquidated damages clause in favor of the City in the event sewer improvement work completion was delayed
 - City would take ownership of the improvements following completion.



Scenario #1: No Public Funding

- Other Statutory Grounds For Applying Prevailing Wage to Private Contracts Where No Public Funding Exists
 - Labor Code section 1720.2 – Tenant Improvement Work if: (1) private property where 50% of sq. ft. is leased to the public agency upon completion of the work and (2) lease entered into prior to construction or the work was done per agency approved plans.
 - Labor Code section 1720.6 – Renewable Energy Work if: (1) work done on public property and (2) at least 50% of energy will be purchased by agency or improvements are intended to reduce agency's energy costs.



Prevailing Wage On Private Projects

SCENARIO #2: PUBLIC SUBSIDY



Scenario #2: Public Subsidy

Paid for in whole or in part out of public funds means:

1. Payment of money
2. Performance of work by city
3. Transfer of asset at less than fair market value
4. Fees, etc., that are paid, reduced, waived, or forgiven
5. Contingent loans
6. Credits against repayment obligations



Scenario #2: Public Subsidy

- **FACTS:** Private developer constructs public improvements on private property which are then dedicated to the public agency for public use. The agency contributes public funds for the public improvement work.
- **QUESTION:** Is this a public work subject to prevailing wage requirements?



Scenario #2: Public Subsidy

- ANSWER: Yes, the project is likely subject to prevailing wage requirements.
- ANALYSIS:
 - This is likely a public work under Labor Code section 1720(a)(1) because it will involve construction done under contract and is paid for at least in part out of public funds.
 - Labor Code section 1720(a)(3) may also apply.
 - NOTE: As a general rule, once a project is deemed a “public work,” the entire project (both public and private improvements) becomes subject to prevailing wage requirements.



Scenario #2: Public Subsidy

- CASE STUDY NO. 1– Whole Project Becomes Subject to Prevailing Wage:
 - *Oxbow Carbon & Mineral, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538.
 - City leased facility to company, which used facility for storage. Change in the law required facility to be upgraded (roof and conveyors). City agreed to pay for the conveyors only.
 - Developer argued that only the conveyors were subject to prevailing wage requirements.



Scenario #2: Public Subsidy

- CASE STUDY NO. 1 CONT'D– Whole Project Becomes Subject to Prevailing Wage:
 - Court held the construction of both the conveyors and roof were subject to prevailing wage requirements because they were part of a single integrated project to make the facility usable again.
 - Once the determination is made that any component of a project is a public work the entire project is subject to prevailing wage law requirements absent any exceptions.



Scenario #2: Public Subsidy

- CASE STUDY NO. 2 – Creative Contracting is not a Failsafe:
 - *Hensel Phelps Const. Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020.
 - District contracted with developer whereby the developer constructed a waterfront hotel on land the developer leased from Port.
 - Lease of land included \$46.5 million subsidy, taken as a 100% rent credit for first two years, and 60% credit in subsequent years.



Scenario #2: Public Subsidy

- CASE STUDY NO. 2 CONT'D– Creative Contracting is Not a Failsafe:
 - Two years later after completion of construction, contractor's union requested prevailing wage determination.
 - Developer argued that the construction of the hotel was not “done under contract” because the lease was not a construction contract.
 - Court disagreed noting that the purpose of the lease and subsidies was to construct the hotel.
 - Developer's contractor ordered to pay more than \$8 million in back wages and penalties.



Prevailing Wage On Private Projects

SCENARIO #3: THIRD PARTY PAYMENTS



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Scenario #3: Third Party Payments

- **FACTS:** Private developer constructs public improvements on private property which are then dedicated to the public agency for public use. The improvements must be of sufficient capacity to accommodate subsequent developments in the immediate area. The agency contributes no public funds for the public improvement work but does obligate other developers to share in the cost.
- **QUESTION:** Is this a public work subject to prevailing wage requirements?



Scenario #3: Third Party Payments

- ANSWER: It depends.
- ANALYSIS:
 - Primary issue is whether the funds from other developers used to fund the public improvement work is ever held in the public coffers.
 - Sometimes the agency will take a role in administering the private funds, which means the monies from the private developers may pass through the agency's coffers. This can trigger application of prevailing wage.



Scenario #3: Third Party Payments

- CASE STUDY NO. 1: Community Facilities District Bond Financing
 - *Azusa Land Partners v. Department of Industrial Relations* (2011) 191 Cal.App.4th 1
 - Mello-Roos Bond proceeds are used to finance public improvements. Property owners pay the debt service through a special tax.
 - Bond proceeds pass through city coffers, which authorizes expenditures and controls disbursement.
 - What if the financing does not pass through city coffers?



Scenario #3: Third Party Payments

- CASE STUDY NO. 2: Repair Work Paid For With Insurance Proceeds
 - Key Question: Whose insurance performs the work?
 - Work directly performed by a contractor's insurance company is not subject to prevailing wages
 - Work performed by city's insurance company is publicly funded if:
 - City pays for premiums, or
 - Proceed are paid to the city before being paid to a contractor.
 - (*Rebuilding of the Agricultural Commissioner Office Building, Public Works Case No. 2007-011.*)
 - Tip: *Make sure the insurance payment includes sufficient funds to cover prevailing wage costs*



Exceptions to Prevailing Wage Requirements on Private Projects



Exception No. 1: Private Residential Projects Lab. Code, § 1720(c)(1)

- RULE: A private residential project built on private property is not subject to prevailing wage requirements unless the project is built pursuant to an agreement with a state agency, redevelopment agency, successor agency or local public housing authority.
- QUESTION: What if a **city** subsidizes a private residential development project?



Exception No. 1: Private Residential Projects Lab. Code, § 1720(c)(1)

- ANSWER: The private residential project is not subject to prevailing wage.
- ANALYSIS:
 - Where funding is through a development agreement with a city, the exception applies. The exception would be meaningless if city funding still resulted in a prevailing wage requirement. *Mayfield Place Housing Project*, Public Works Case No. 2016-033.
 - Note that DIR initially determined the exception does not apply if there is any city funding, but the court overruled. *South Gate Senior Villas*, Public Works Case No. 2013-024.



Exception No. 1: Private Residential Projects Lab. Code, § 1720(c)(1)

- Tips:
 - Cities can take advantage of this exception when negotiating a DA or DDA for new housing developments
 - Be cautious about other potential triggers – e.g., funding through a state contract



Exception No. 2: Public Improvement Work as a Condition of Approval Lab. Code, § 1720(c)(2)

- RULE:
 1. If a private developer is required to perform public improvement work as a condition of regulatory approval, and
 2. The city contributes no more money to the overall project than is required to perform this public improvement work and maintains no proprietary interest in the overall project,
 3. Then only the public improvement work is subject to prevailing wage requirements.
- QUESTION: Is **all** of the public improvement work subject to prevailing wages?



Exception No. 2: Public Improvement Work as a Condition of Approval Lab. Code, § 1720(c)(2)

- ANSWER: Yes.
- ANALYSIS:
 - Prevailing wage is applied on a *per-project* basis. If part of the project is paid for out of public funds, then the entire project is subject to prevailing wages. This exception limits prevailing wages to only public improvement work.



Exception No. 2: Public Improvement Work as a Condition of Approval Lab. Code, § 1720(c)(2)

- CASE STUDY:
 - *Azusa Land Partners v. Department of Industrial Relations* (2011) 191 Cal.App.4th 1
 - CFD proceeds used to finance public improvements, but did not cover the cost of all public improvements required for the project.
 - Developer argued that 1720(c)(2) exception meant that only the improvements paid for with CFD funds are subject to prevailing wage.
 - Court disagreed and concluded the exception under 1720(c)(2) applies more narrowly than the Developer represented – the exception applies to prevent prevailing wage from apply to the *private* improvement work, but does not parse out the *public* improvement work.



Exception No. 3: Costs Normally Borne By the Public Lab. Code, § 1720(c)(3)

- **RULE:** Reimbursements to a private developer for costs that would normally be borne by the public will not subject an otherwise private development project to the prevailing wage law.
- **QUESTION:** When does this exception apply?



Exception No. 3: Costs Normally Borne By the Public Lab. Code, § 1720(c)(3)

- ANSWER: It's not entirely clear - there are no DIR determinations or relevant cases
- ANALYSIS:
 - The difference between the exception for “condition of approval work” and this exception is who normally bears the cost. A developer normally bears the cost if the work is a condition of approval. If the developer would not normally bear the cost, then this exception applies.



Exception No. 3: Costs Normally Borne By the Public Lab. Code, § 1720(c)(3)

- **EXAMPLE:**

- **FACTS:**

- A developer is required to construct public improvements as a condition of approval of the developer's project. The public agency does not reimburse for this work at all.
 - The developer subsequently agrees to construct other public improvements that are not required as a condition of approval. The City will reimburse the developer for this work.

- **QUESTION:**

- What part of the private development project (including both the public and private improvement work) is subject to prevailing wage requirements?

- Normally, the City would construct the off-site improvements and developers would pay a fee to the City for use of those improvements.
 - The off-site improvement is still subject to prevailing wage because the City pays the cost of the work.
 - BUT, because there is no subsidy of a developer's costs, the other public improvements are not subject to prevailing wage



Exception No. 3: Costs Normally Borne By the Public Lab. Code, § 1720(c)(3)

- EXAMPLE CONT'D:

- ANALYSIS:

- General rule is that the entire private development project becomes subject to prevailing wage requirements.
 - Under Section 1720(c)(2), the private improvement work is excepted from prevailing wage requirements but we would not be able to parse out the public improvement work.
 - Under Section 1720(c)(3), however, only the non-condition of approval public improvement work that is being paid for by the public agency is subject to prevailing wage requirements. The public improvement work the developer is undertaking as a conditional of approval, but receiving no reimbursement from the public agency for is excepted.



Exception No. 4: *De Minimis* Public Subsidy Lab. Code, § 1720(c)(3)

- RULE: The public funds paid by a city will not trigger prevailing wage if they are considered *de minimis* in the context of the cost of the entire project.
- QUESTION: What constitutes *de minimis*?



Exception No. 4: *De Minimis* Public Subsidy Lab. Code, § 1720(c)(3)

- ANSWER: Generally, less than 2% of the entire project cost.
- ANALYSIS:
 - DIR has made *de minimis* findings where subsidy was 1.75%, 1.64%, and 1.1%.
 - Governor Brown vetoed Legislative definition of *de minimis* stating:
 - “Longstanding practice has been to view the subsidy in context of the project and use 2% as a general threshold for determinations. There has been no showing that the current practice is unreasonable.”



Special Rules for Affordable Housing



Affordable Housing Exceptions Labor Code § 1720(c)(5)

The following are exempt from prevailing wage even if there is a public subsidy:

1. Sweat-equity projects
2. Certain not-for-profit emergency or transitional housing for homeless persons
3. Homebuyer assistance programs (mortgage, down payment or rehab assistance for single-family homes)
4. Below-market interest rate loans if at least 40% of units are restricted to 80% median income for at least 20 years



Affordable Housing Exceptions

LIHTC Projects

- No statutory exception for new low-income housing tax credit projects
 - *State Building and Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289 - the provision of state low income-housing tax credits to a developer does not constitute the payment of public funds.
 - DIR has applied analysis to federal tax credits as well.
 - Likely would also apply to new markets tax credits.
- Tip: Because LIHTC projects are not prevailing wage, cities may be able to use “private residential project” exemption to provide additional incentives to LIHTC projects.



Affordable Housing New Prevailing Wage Rules

- SB 35
 - Cities who fail to meet RHNA requirements cannot impose CUP or other discretionary review of affordable housing projects.
 - *Developers may only use streamlined review process if agree to pay prevailing wages on entire project.*
- SB 540
 - Cities may form “workforce housing opportunity zones” and planning grants are available.
 - *Developers are exempt from environmental review in zones if certify to paying prevailing wages.*



Affordable Housing New Prevailing Wage Rules

- AB73
 - Cities may form “housing sustainability districts” – by-right affordable housing districts – and access state funding.
 - Cities must adopt an ordinance requiring developers to pay prevailing wages on all projects in district.



Affordable Housing New Prevailing Wage Rules

- Takeaways:
 - In planning for use of housing package tools, cities will have to consider prevailing wage issues.
 - The housing package is first legislation to require prevailing wage as a quid pro quo for other benefits.
 - AB 73 is the only instance where a city would be required to adopt a local rule imposing prevailing wage laws on private developments.
 - Private residential projects would otherwise be exempt under 1720(c)(1) – could cities encourage more housing through other procedures that leverage this exemption?



Summary



Summary

- Closing Tips:
 - Private projects may be subject to prevailing wages
 - Include prevailing wage protections in city agreements related to private projects
 - Do not represent that a project or work is not subject to prevailing wages
 - No need to file DIR notification when providing subsidies to private projects





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