

ESSB 5035 - H COMM AMD

By Committee on Labor & Workplace Standards

ADOPTED 04/10/2019

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The legislature finds:

4 (1) That from the shift in the 1980s from criminal to civil
5 penalties for prevailing wage violations that the law needs some
6 enhancements to effectively provide the department of labor and
7 industries with the ability to utilize its civil remedies to both
8 discourage and penalize repeat and willful violations of the law.

9 (2) Revisions to chapter 39.12 RCW are long overdue and are
10 necessary to appropriately address filing and reporting procedures
11 and penalties, which are necessary to strengthen enforcement of and
12 deterrence from repeat and/or willful violations of the chapter.

13 **Sec. 2.** RCW 39.12.010 and 1989 c 12 s 6 are each amended to read
14 as follows:

15 (1) The "prevailing rate of wage" (~~(, for the intents and purposes~~
16 ~~of this chapter, shall be)~~) is the rate of hourly wage, usual
17 benefits, and overtime paid in the locality, as hereinafter defined,
18 to the majority of workers, laborers, or mechanics, in the same trade
19 or occupation. In the event that there is not a majority in the same
20 trade or occupation paid at the same rate, then the average rate of
21 hourly wage and overtime paid to such laborers, workers, or mechanics
22 in the same trade or occupation (~~(shall be)~~) is the prevailing rate.
23 If the wage paid by any contractor or subcontractor to laborers,
24 workers, or mechanics on any public work is based on some period of
25 time other than an hour, the hourly wage (~~(for the purposes of this~~
26 ~~chapter shall be)~~) is mathematically determined by the number of
27 hours worked in such period of time.

28 (2) The "locality" (~~(for the purposes of this chapter shall be)~~)
29 is the largest city in the county wherein the physical work is being
30 performed.

1 (3) The "usual benefits" (~~for the purposes of this chapter~~
2 ~~shall~~) includes the amount of:

3 (a) The rate of contribution irrevocably made by a contractor or
4 subcontractor to a trustee or to a third person pursuant to a fund,
5 plan, or program; and

6 (b) The rate of costs to the contractor or subcontractor, which
7 may be reasonably anticipated in providing benefits to workers,
8 laborers, and mechanics pursuant to an enforceable commitment to
9 carry out a financially responsible plan or program which was
10 communicated in writing to the workers, laborers, and mechanics
11 affected, for medical or hospital care, pensions on retirement or
12 death, compensation for injuries or illness resulting from
13 occupational activity, or insurance to provide any of the foregoing,
14 for unemployment benefits, life insurance, disability and sickness
15 insurance, or accident insurance, for vacation and holiday pay, for
16 defraying costs of apprenticeship or other similar programs, or for
17 other bona fide fringe benefits, but only where the contractor or
18 subcontractor is not required by other federal, state, or local law
19 to provide any of such benefits.

20 (4) An "interested party" (~~for the purposes of this chapter~~
21 ~~shall~~) includes a contractor, subcontractor, an employee of a
22 contractor or subcontractor, an organization whose members' wages,
23 benefits, and conditions of employment are affected by this chapter,
24 and the director of labor and industries or the director's designee.

25 (5) An "inadvertent filing or reporting error" is a mistake and
26 is made notwithstanding the use of due care by the contractor,
27 subcontractor, or employer. An inadvertent filing or reporting error
28 includes a contractor who, in good faith, relies on a written
29 determination provided by the department of labor and industries and
30 pays its workers, laborers, and mechanics accordingly, but is later
31 found to have not paid the proper prevailing wage rate.

32 (6) "Unpaid prevailing wages" or "unpaid wages" means the
33 employer fails to pay all of the prevailing rate of wages owed for
34 any workweek by the regularly established pay day for the period in
35 which the workweek ends. Every employer must pay all wages, other
36 than usual benefits, owing to its employees not less than once a
37 month. Every employer must pay all usual benefits owing to its
38 employees by the regularly established deadline for those benefits.

39 (7) "Rate of contribution" means the effective annual rate of
40 usual benefit contributions for all hours, public and private, worked

1 during the year by an employee (commonly referred to as
2 "annualization" of benefits). The only exemption to the annualization
3 requirements is for defined contribution pension plans that have
4 immediate participation and vesting.

5 **Sec. 3.** RCW 39.12.050 and 2009 c 219 s 3 are each amended to
6 read as follows:

7 (1) Any contractor or subcontractor who files a false statement
8 or fails to file any statement or record required to be filed or
9 fails to post a document required to be posted under this chapter and
10 the rules adopted under this chapter, shall, after a determination to
11 that effect has been issued by the director after hearing under
12 chapter 34.05 RCW, forfeit as a civil penalty the sum of five hundred
13 dollars for each false filing or failure to file or post, and shall
14 not be permitted to bid, or have a bid considered, on any public
15 works contract until the penalty has been paid in full to the
16 director. The civil penalty under this subsection (~~shall~~) does not
17 apply to a violation determined by the director to be an inadvertent
18 filing or reporting error. The burden of proving, by a preponderance
19 of the evidence, that an error is inadvertent rests with the
20 contractor or subcontractor charged with the error. Civil penalties
21 shall be deposited in the public works administration account.

22 To the extent that a contractor or subcontractor has not paid
23 wages at the rate due pursuant to RCW 39.12.020, and a finding to
24 that effect has been made as provided by this subsection, such unpaid
25 wages (~~shall~~) constitute a lien against the bonds and retainage as
26 provided in RCW 18.27.040, 19.28.041, 39.08.010, and 60.28.011.

27 (2) If a contractor or subcontractor is found to have violated
28 the provisions of subsection (1) of this section for a second time
29 within a five year period, the contractor or subcontractor (~~shall~~
30 ~~be~~) is subject to the sanctions prescribed in subsection (1) of this
31 section and shall not be allowed to bid on any public works contract
32 for one year. The one year period (~~shall~~) runs from the date of
33 notice by the director of the determination of noncompliance. When an
34 appeal is taken from the director's determination, the one year
35 period (~~shall~~) commences from the date (~~of the final determination~~
36 ~~of the appeal~~) the notice of violation becomes final.

37 The director shall issue his or her findings that a contractor or
38 subcontractor has violated the provisions of this subsection after a
39 hearing held subject to the provisions of chapter 34.05 RCW, unless a

1 notice of violation is not timely appealed. A notice of violation not
2 timely appealed is final and binding, and not subject to further
3 appeal.

4 **Sec. 4.** RCW 39.12.065 and 2009 c 219 s 4 are each amended to
5 read as follows:

6 (1) Upon complaint by an interested party, the director of labor
7 and industries shall cause an investigation to be made to determine
8 whether there has been compliance with this chapter and the rules
9 adopted hereunder, and if the investigation indicates that a
10 violation may have occurred, the department of labor and industries
11 may issue a notice of violation for unpaid wages, penalties, and
12 interest on all wages owed at one percent per month. A hearing shall
13 be held following a timely appeal of the notice of violation in
14 accordance with chapter 34.05 RCW. The director shall issue a written
15 determination including his or her findings after the hearing unless
16 a notice of violation is not timely appealed. A notice of violation
17 not timely appealed is final and binding, and not subject to further
18 appeal. A judicial appeal from the director's determination may be
19 taken in accordance with chapter 34.05 RCW, with the prevailing party
20 entitled to recover reasonable costs and attorneys' fees.

21 A complaint concerning nonpayment of the prevailing rate of wage
22 shall be filed with the department of labor and industries no later
23 than (~~thirty~~) sixty days from the acceptance date of the public
24 works project. The department may not charge a contractor or
25 subcontractor with a violation of this section when responding to a
26 complaint filed after the sixty-day limit. The failure to timely file
27 such a complaint (~~shall~~) does not prohibit the department from
28 investigating the matter and recovering unpaid wages for the
29 worker(s) within two years from the acceptance of the public works
30 contract. The department may not investigate or recover unpaid wages
31 if the complaint is filed after two years from the acceptance of a
32 public works contract. The failure to timely file such a complaint
33 also does not prohibit a claimant from pursuing a private right of
34 action against a contractor or subcontractor for unpaid prevailing
35 wages. The remedy provided by this section is not exclusive and is
36 concurrent with any other remedy provided by law.

37 (2) To the extent that a contractor or subcontractor has not paid
38 the prevailing rate of wage under a determination issued as provided
39 in subsection (1) of this section, the director shall notify the

1 agency awarding the public works contract of the amount of the
2 violation found, and the awarding agency shall withhold, or in the
3 case of a bond, the director shall proceed against the bond in
4 accordance with the applicable statute to recover, such amount from
5 the following sources in the following order of priority until the
6 total of such amount is withheld:

7 (a) The retainage or bond in lieu of retainage as provided in RCW
8 60.28.011;

9 (b) If the claimant was employed by the contractor or
10 subcontractor on the public works project, the bond filed by the
11 contractor or subcontractor with the department of labor and
12 industries as provided in RCW 18.27.040 and 19.28.041;

13 (c) A surety bond, or at the contractor's or subcontractor's
14 option an escrow account, running to the director in the amount of
15 the violation found; and

16 (d) That portion of the progress payments which is properly
17 allocable to the contractor or subcontractor who is found to be in
18 violation of this chapter. Under no circumstances shall any portion
19 of the progress payments be withheld that are properly allocable to a
20 contractor, subcontractor, or supplier, that is not found to be in
21 violation of this chapter.

22 The amount withheld shall be released to the director to
23 distribute in accordance with the director's determination.

24 (3) A contractor or subcontractor that is found, in accordance
25 with subsection (1) of this section, to have violated the requirement
26 to pay the prevailing rate of wage (~~((shall be))~~) is subject to a civil
27 penalty of not less than (~~((one))~~) five thousand dollars or an amount
28 equal to (~~((twenty))~~) fifty percent of the total prevailing wage
29 violation found on the contract, whichever is greater, interest on
30 all wages owed at one percent per month, and (~~((shall))~~) is not (~~((be))~~)
31 permitted to bid, or have a bid considered, on any public works
32 contract until such civil penalty has been paid in full to the
33 director. If a contractor or subcontractor is found to have
34 participated in a violation of the requirement to pay the prevailing
35 rate of wage for a second time within a five-year period, the
36 contractor or subcontractor (~~((shall be))~~) is subject to the sanctions
37 prescribed in this subsection and as an additional sanction (~~((shall))~~)
38 is not (~~((be))~~) allowed to bid on any public works contract for two
39 years. Civil penalties shall be deposited in the public works
40 administration account. If a previous or subsequent violation of a

1 requirement to pay a prevailing rate of wage under federal or other
2 state law is found against the contractor or subcontractor within
3 five years from a violation under this section, the contractor or
4 subcontractor shall not be allowed to bid on any public works
5 contract for two years. The two-year period runs from the date of
6 notice by the director of the determination of noncompliance. When an
7 appeal is taken from the director's determination, the two-year
8 period commences from the date the notice of violation becomes final.
9 A contractor or subcontractor (~~shall~~) is not (~~be~~) barred from
10 bidding on any public works contract if the contractor or
11 subcontractor relied upon written information from the department to
12 pay a prevailing rate of wage that is later determined to be in
13 violation of this chapter. The civil penalty and sanctions under this
14 subsection (~~shall~~) do not apply to a violation determined by the
15 director to be an inadvertent filing or reporting error. The burden
16 of proving, by a preponderance of the evidence, that an error is
17 inadvertent rests with the contractor or subcontractor charged with
18 the error. To the extent that a contractor or subcontractor has not
19 paid the prevailing wage rate under a determination issued as
20 provided in subsection (1) of this section, the unpaid wages
21 (~~shall~~) constitute a lien against the bonds and retainage as
22 provided herein and in RCW 18.27.040, 19.28.041, 39.08.010, and
23 60.28.011.

24 (4) The director may waive or reduce a penalty or additional
25 sanction under this section including, but not limited to, when the
26 director determines the contractor or subcontractor paid all wages
27 and interest or there was an inadvertent filing or reporting error.
28 The director may not waive or reduce interest. The department of
29 labor and industries shall submit a report of the waivers made under
30 this section, including a justification for any waiver made, upon
31 request of an interested party.

32 (5) If, after the department of labor and industries initiates an
33 investigation and before a notice of violation of unpaid wages, the
34 contractor or subcontractor pays the unpaid wages identified in the
35 investigation, interest on all wages owed at one percent per month,
36 and penalties in the amount of one thousand dollars or twenty percent
37 of the total prevailing wage violation determined by the department
38 of labor and industries, whichever is greater, then the violation is
39 considered resolved without further penalty under subsection (3) of
40 this section.

1 (6) A contractor or subcontractor may only utilize the process
2 outlined in subsection (5) of this section if the department of labor
3 and industries has not issued a notice of violation that resulted in
4 final judgment under this section against that contractor or
5 subcontractor in the last five-year period. If a contractor or
6 subcontractor utilizes the process outlined in subsection (5) of this
7 section for a second time within a five-year period, the contractor
8 or subcontractor is subject to the sanctions prescribed in subsection
9 (3) of this section and may not be allowed to bid on any public works
10 contract for two years.

11 NEW SECTION. Sec. 5. A new section is added to chapter 39.12
12 RCW to read as follows:

13 (1) Each contractor, subcontractor, or employer shall keep
14 accurate payroll records for three years from the date of acceptance
15 of the public works project by the contract awarding agency, showing
16 the employee's full name, address, social security number, trade or
17 occupation, classification, straight and overtime rates, hourly rate
18 of usual benefits, and hours worked each day and week, including any
19 employee authorizations executed pursuant to RCW 49.28.065, and the
20 actual gross wages, itemized deductions, withholdings, and net wages
21 paid, for each laborer, worker, and mechanic employed by the
22 contractor for work performed on a public works project.

23 (2) A contractor, subcontractor, or employer shall file a copy of
24 its certified payroll records using the department of labor and
25 industries' online system at least once per month. If the department
26 of labor and industries' online system is not used, a contractor,
27 subcontractor, or employer shall file a copy of its certified payroll
28 records directly with the department of labor and industries in a
29 format approved by the department of labor and industries at least
30 once per month.

31 (3) A contractor, subcontractor, or employer's noncompliance with
32 this section constitutes a violation of RCW 39.12.050.

33 NEW SECTION. Sec. 6. This act takes effect January 1, 2020."

34 Correct the title.

EFFECT: (1) Amends the waiver reporting requirement to require
that the Department of Labor and Industries submit a report of
waivers upon request, instead of "regularly" and upon request.

(2) Adds burden of proof language to the provision addressing failure to pay prevailing wages due to an inadvertent error. (Specifies the same burden of proof as for filing a false statement or failing to file due to an inadvertent error.)

(3) Corrects a grammatical error.

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