

Virginia Introduces Prevailing Wage Requirements, Modifies Wage Theft Statute

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Wage and Hour

Virginia has adopted a prevailing wage statute and amended its Wage Theft Law. Contractors risk significant liability and penalties for noncompliance.

Prevailing Wage Statute

Like its federal counterpart, the Davis-Bacon Act, Virginia's prevailing wage statute, Virginia Code §2.2-4321.3, requires contractors and subcontractors working on state public projects to pay prevailing wage rates to any "mechanic, laborer, or worker" providing labor or services "in connection with" the public project. However, prevailing wages on public contracts with a locality (*e.g.*, any county, city, town, school division, or other political subdivision) are not required, unless the locality has adopted an ordinance requiring bidders or contractors to do so.

The prevailing wage statute does not apply to public contracts for public works valued at \$250,000 or less. For contracts in excess of \$250,000, contractors must comply with several mandates in the law.

The statute defines a "prevailing wage rate" as the product of (1) the geographic area where work on an applicable public project is to be performed and (2) the class of mechanics, laborers, or workers to which the rate applies. It tasks the Virginia Commissioner of Labor and Industry with determining prevailing wage rates based upon rates set by the U.S. Secretary of Labor pursuant to the Davis-Bacon Act. For reference, the Virginia Department of Labor and Industry (DOLI) provides the latest prevailing wage rates at <https://www.doli.virginia.gov/prevailing-wage-law/>, under the "Virginia Prevailing Wage Rates" tab.

The prevailing wage statute also comes with certification requirements. When awarded a contract subject to the statute, a contractor must certify, under oath to the Commissioner of Labor and Industry, the pay scale the contractor will use for each craft or trade employed under the public contract. The sworn certification must include:

1. The hourly amounts to be paid, including wages and benefits;
2. An itemization of amounts paid in wages in each particular benefit; and
3. A list of the names and addresses of any third-party fund, plan, or program to which benefit payments will be made on behalf of employees.

In addition, the statute requires contractors to preserve records relating to the wages paid to and hours worked by each mechanic, laborer, and worker, as well as a daily and weekly work schedule for each worker including each worker's job classification. Contractors must preserve these records for a minimum of six years and must make them available to DOLI within 10 days of a DOLI request for the records. Moreover, contractors must certify that the records reflect the actual hours worked by each employee and the actual amount paid to each employee.

Additionally, a contractor must post the general prevailing wage rate for each craft and classification on the public project in prominent and easily accessible places at the worksite or at places where the contractor pays the employees their wages. The contractor also must certify compliance to DOLI within 10 days of issuing the posting.

Contractors risk significant liabilities for noncompliance. Any contractor who compensates a covered employee at a rate less than the prevailing wage rate will be liable to the employee for the payment of outstanding wages due, plus interest at an annual rate of eight percent accruing from the date the wages were due.

Further, the contractor will be disqualified from bidding on public contracts until the contractor pays any owed restitution.

Where the contractor's violation is determined to be willful, criminal liability attaches; the contractor will be guilty of a Class 1 misdemeanor.

Moreover, violation of the statute will provide an interested party (including a bidder, offeror, contractor, subcontractor, or operator) standing to challenge or protest a bid specification, project agreement, or other public contract that violates the statute.

Wage Theft Law

The Virginia Wage Theft Law, which became effective on July 1, 2020, provides that, in the event a general contractor knew or should have known that its *subcontractor or supplier* was not paying its employees all wages owed, the employees of the subcontractor or supplier may bring lawsuits against the general contractor to hold the general contractor jointly and severally liable for the wage payment violations of its subcontractors or suppliers. The General Assembly has enacted amendments the Wage Theft Law to afford some relief from this provision.

First, a general contractor will not be held jointly and severally liable for wage payment violations by suppliers that exclusively furnish materials.

Second, under the amended law, a written certification by a subcontractor stating that (1) the subcontractor has paid its employees all wages due for the work performed on the project and (2) to the subcontractor's knowledge, all sub-subcontractors have also paid their employees all wages due will be evidence of the general contractor's compliance with the Wage Theft Law.

Additionally, where the subcontractor falsifies its certification, the general contractor may hold the subcontractor civilly liable. As a general matter, contractors should pursue these certifications from their subcontractors to limit potential risks.

Contractors must ensure compliance with both the new prevailing wage statute and the amended Wage Theft Law, both of which impose potentially significant liability and penalties for noncompliance.

As a good business practice, general contractors should impose contractual obligations on their subcontractors to comply with these, as well as other applicable federal and state statutes, and require certification of their compliance to the general contractor.

Please contact a Jackson Lewis attorney with any questions about these changes in

Virginia or any other legal issues.

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