

# Prevailing Wage

## As Recent Cases Show, Non-compliance Penalties Are Severe

By *KEVIN V. MALTBY, Esq.*

As home improvement construction begins to slow, contractors may turn to public works projects or state-funded contracts in order to keep working. But contractors must maintain strict compliance with the Mass. Prevailing Wage Program because offenses are extremely costly and offenders are likely to be caught.

In fact, each incident of employee wage underpayment or submission of false certification or employee classification is a separate and distinct violation of the law. For example, if a state project took 50 weeks to complete, and the employer submitted false certifications for each week, that would constitute a minimum of 50 violations that the attorney general could prosecute.

The Mass. Prevailing Wage Program is run by the Mass. Division of Occupational Safety, which in turn issues prevailing wage schedules to cities, towns, counties, districts, authorities, and agencies of the Commonwealth for construction projects and several other types of public work. The Office of the Attorney General is empowered with the authority to enforce the prevailing wage program and compliance with its rules and regulations.

While the notion of working on state contracts is enticing because a contractor will surely be paid, the prevailing wage program can be a perilous journey if a contractor or employer does not comply with the state law. When awarded a public works project, a contractor must keep a record of each individual employed on the project, including their name, address, and occupational classification.

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In addition, a contractor must keep records of the hours worked by, and the wages paid to, each employee. A contractor, subcontractor, or public body is required to preserve its payroll records for a period of three years from the date of completion of the public works contract. In addition, the contractor is required to make available to the attorney general or his representative, upon his

request, a copy of that record, signed by the employer or his authorized agent under the threat of penalties of perjury.

In addition, the contractor must properly classify each employee under prevailing wage. Numerous cases and appeals have been filed regarding the classification of workers. For example, the classification of carpenter draws images of an individual working with wood, installing and constructing cabinets or framing walls. However, the classification can also include workers who install and bolt free-standing wardrobes and athletic lockers onto concrete bases and also those who bolt heavy-duty corridor lockers to wood bases.

standing wardrobes, the employee's classification changes from laborer to carpenter. In so doing, the labor has also changed in accordance with the prevailing wage schedule, and the employer may have violated the prevailing wage program by paying that employee the laborer's rate instead of the carpenter's rate.

Rate fixing and shaving is a very tempting proposition for employers in light of growing

willful or non-willful violation. Massachusetts law provides that any employer, contractor, or subcontractor who willfully violates the prevailing wage program will be punished by a fine of not more than \$25,000 and/or imprisonment for not more than one year for a first offense. A subsequent willful offense is subject to a fine of not more than \$50,000 and/or imprisonment for not more than two years.

For a non-willful violation, the penalty includes a fine of not more than \$10,000 and/or imprisonment for up to six months for the first offense and a fine of up to \$25,000 and/or imprisonment of not more than one year. The penalty may also include a requirement that the employer pay restitution to employees for underpayment or misclassification, and the attorney general may issue enough citations to preclude the contractor from submitting bids for or otherwise doing public works projects again.

While state or municipal contract work may be lucrative and rewarding, the prevailing-wage law does not make exceptions for violators. It is advisable for contractors to seek the advice of counsel in the event that the attorney general commences an investigation or the contractor believes he may be in violation.❖

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Employers may classify certain individuals as laborers instead of carpenters because they are simply hauling debris, cleaning the site, or hauling material to the site. If an employee/laborer picks up a hammer or wrench and begins bolting free-

costs and expenses associated with materials, and this is a way for contractors to increase profits on a prevailing wage job. For example, a contractor may classify all of its workers at a laborer's rate of \$28 per hour when the employees are actually performing carpentry work and should be paid at the prevailing wage rate of \$35 per hour. During the course of the job, the \$7 difference between the two rates will certainly add up and increase the employer's profit margin. Since the attorney general keeps a watchful eye on the conduct of contractors working on state and municipal contracts, this activity will surely lead to an inquiry by the Office of the Attorney General.

Depending on the nature of the violation, a contractor may face a civil citation, criminal penalties, or a requirement that restitution be paid to the aggrieved parties. Typically, the prevailing-wage violation would first be analyzed in terms of a