

## Working Prevailing Wage In A Different State?

*By Philip Ely, Advantage Resource Inc.*

Kentucky contractors who do not typically contract out-of-state work may not realize the significant wage, hour, and overtime differences that can exist once one crosses state lines. Just because a company is based in Kentucky (or Ohio, or West Virginia, etc.), does not exclude them from the wage, hour, and overtime laws of the state where a project resides. The project's funding authority determines the rules and regulations to which the contractor must adhere.

If the out-of-state project is subject to prevailing wage, there are even more regulatory differences to consider. In total, 32 states have their own prevailing wage regulations, all of which differ from the federal prevailing wage (Davis Bacon Act/Davis Bacon Related Acts, Service Contract Act) statutes and from each other. Since Prevailing Wage errors are most often expensive lessons to learn, it is well worth any time spent understanding some of the key differences from state to state. This is especially true since some items have to be addressed before a company's employee ever steps foot on the project site.

In **Kentucky**, overtime rules vary significantly from the traditional "over 40 hours a week". On Prevailing Wage projects, there are daily non-overtime limits, where any laborer, workman, or mechanic is limited to eight (8) hours per day before overtime rates apply. This may be extended to ten (10) hours per day if the employee and employer enter into an agreement in writing prior to work taking place. Kentucky is also one of a few states to have a "seven consecutive day" law. An employee who works all seven days of a workweek, who then exceeds forty total work hours on the seventh day, shall have all hours worked on the seventh day classified as overtime.

Kentucky calculates the overtime premium due in a manner differently than the traditional "time and a half". For employees working at two or more rates in any workweek, the overtime premium is based on the weighted average of the straight time hourly rates paid. In other words, the total straight time wages is divided by the total number of hours worked. This "blended rate" or "regular rate" is then multiplied by one-half (1/2) to calculate the correct overtime premium, which is then added to the base hourly straight time rate for the specific hours identified as overtime, yielding the correct hourly rate. In a Prevailing Wage context this is especially important, since Certified Payrolls must show the overtime premium has been applied to the correct hour.

**Ohio** Prevailing Wage Code requires all contractors and subcontractors to furnish each employee not covered by collective bargaining agreement a written notification of the job classification to which the employee is assigned, the prevailing wage determined to be applicable to that classification (separated into hourly rate of pay and fringe payments), and

the identity of the Prevailing Wage Coordinator appointed by the public authority. The same notification shall be furnished to each affected employee every time the job classification of the employee is changed. This Prevailing Wage Notification has to be provided to the employee before the employee begins work on a specific public work project.

Ohio also requires the prevailing wage rate paid for a legal day's work to not be less at any time during the life of a public work contract than the prevailing wage rate of wages payable to the same trade within that locality. This means that wage and fringe requirement rates can change mid-project, and if they do, an updated Prevailing Wage Notification will be required.

Ohio also has specific requirements regarding the calculation of Overtime Premiums, in that for every hour an employee works which requires payment of the prevailing wage which takes place after the first forty hours worked, the employee shall be paid the basic hourly rate times one and one-half. Additionally, some public works are explicitly excluded from certain Ohio prevailing wage statutes, such as public improvements undertaken by the state's board of education.

In **West Virginia**, contractors from out of state should be aware of the West Virginia Jobs Act, which can require a certain percentage of a company's employees working on a public improvement project to be residents of the "local labor market". The "local labor market" is specifically defined to include counties within West Virginia and other counties within certain proximity to the state's borders.

Also, the WV Department of Labor does not require the submittal of weekly certified payroll records (although the federal government, the general contractor, or the public authority may). However, the WVDOL may request them as part of any prevailing wage investigation, as they generally contain the same recordkeeping information required to be maintained by the contractor.

In **Indiana**, prevailing wage is called the "Common Construction Wage". On Indiana wage determinations, worker classifications are subdivided by class as "Skilled", "Semi-skilled", and "Unskilled". Depending on bid specifications, the defining class factor may be determined by an employee's registration in a bona fide apprenticeship program, or the employee's total amount of cumulative experience in the construction trades, or the classes may not be explicitly defined in the project bid documents at all. Also, Common Construction Wage provisions may not apply to contracts let by the Indiana Department of Transportation (INDOT) for the construction of highways, streets, and bridges, with other state laws applicable to state highway projects.

**Tennessee** recently modified their state's Prevailing Wage

Act effective January 1, 2014. The state amended language requiring prevailing wage on “state construction projects” to “state highway construction projects”, effectively repealing prevailing wage requirements on state building projects.

In *Missouri*, prevailing wage rates for State Highway and Transportation Commission projects are published in a General Wage Order. Also published are Annual Wage Orders, which provides rates on other public construction projects. In each of these wage determinations are specific schedules, by county and worker class, for the payment of Overtime and the payment of Holidays.

While prevailing wage laws are generally consistent in requiring the payment of prevailing wage rates at the “site of the project”, Missouri also requires the payment of prevailing wage rates for the transportation of materials and supplies to or from the site of construction by the employees of the construction contractor or subcontractor.

Additionally, Missouri is one of a few states requiring a contractor’s employees to complete a ten-hour OSHA construction safety program (“OSHA 10”) course no later than 60 days from beginning work at a public works construction project site.

*Illinois* prevailing wage rates are defined in two separate laws: the Illinois Prevailing Wage Act, and in the Illinois Procurement Code.

Illinois Procurement Code requires the payment of prevailing wage to service employees working on state contracts. “Services” includes janitorial cleaning services, window cleaning services, food services, security services, and printers. Wage determinations are published no less than annually, and may include minimum requirements for base wage rate, health & welfare, pension, and vacation fringe benefits.

The Prevailing Wage Act applies to laborers, workers, and mechanics employed by or on behalf of any public bodies engaged in public works, which includes any equipment maintenance, repair, assembly, or disassembly. Wage determinations stipulate the payment of wage premiums for hours worked over eight (8) in one day, hours worked on Saturdays, and hours worked on certain predefined holidays.

Similar to Ohio, Illinois also requires that the prevailing wage rate paid for a legal day’s work be at least equal to the locality’s latest wage determination, meaning that wage and fringe requirement rates can change mid-project. The time involved for a worker to transport materials or equipment to and from a public works job site is subject to prevailing wage, while the same such transportation by suppliers or sellers would not be covered.

Contractors from out of state should also be aware of the Employment of Illinois Workers on Public Works Act. This Act essentially requires that during periods of excessive state unemployment, at least 90% of an entity’s employees on a state public works project be Illinois residents, with certain exceptions based on expertise or skill level.

The biggest difference in Illinois, however, is the recent passing of an amendment to the Illinois Prevailing Wage Act known as Public Act 098-0482. Effective January 1, 2014, this amendment redefines “prevailing rate of wages” to be “the hourly cash wages plus annualized fringe benefits...” Annualization of all fringe benefits is a major shift in fringe benefit calculation, the ramification of which is beyond the scope of this article. It is imperative, however, for any contractor working in Illinois to understand the significance of benefits annualization before working on a state prevailing wage project.

Wage, hour, and overtime laws vary from state to state, and compliance can be tough. Add in the state-to-state differences on Prevailing Wage, and compliance becomes even more difficult. With differences in employee wage notification requirements, overtime hour identification and premium calculation process, fringe benefit calculations, special pay scales for holiday and weekend pay, or the hiring of local labor, compliance really should be addressed on the front end of any project. It is the contractor’s responsibility to know these differences, to adjust accordingly, and to ensure compliance with the regulations in effect.

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