

Questions & Answers about Ohio's Prevailing Wage Law and the Commerce Department's New Guidance re: Public Investment in Private Projects

What does Ohio's prevailing wage law require?

Ohio law requires public authorities to pay the workers on most of their construction projects the local "prevailing wage". As long as the cost of the public authority's project exceeds a threshold amount (adjusted the first of January in every even-numbered year), and the type of project is not specifically exempted by law, the prevailing wage requirement is triggered. The amount is currently \$73,891 for construction projects and \$22,166 for reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting projects.

How long has Ohio law included a prevailing wage requirement?

Prevailing wage has been part of Ohio law for 77 years – the state enacted its first prevailing wage law in 1931.

What is the purpose of prevailing wage laws?

Because governments are such large purchasers of construction services, without a requirement that governments pay the wage generally paid to local workers in the area, government construction based simply on the lowest bid for that volume of work could artificially reduce the wage scale in the local community, disrupting the local economy. Proponents and opponents of prevailing wage laws strongly disagree about their effect. Proponents insist that they improve construction quality, provide stability against the seasonal nature of construction work and result in long-term cost savings. Opponents maintain that they drive up construction costs and interfere with free market operations for the provision of construction services. More than 30 states have prevailing wage laws enacted as long ago as 1897 and as recently as 1975.

What makes a project subject to the prevailing wage requirement?

The prevailing wage obligation is triggered any time a "public authority" (basically, any sort of public entity) provides financial or in-kind support to a construction project which exceeds the cost threshold mentioned above. Accordingly, prevailing wage must be paid to construction workers on such projects when the public authority pays for all or a portion of the project or provides a grant or loan for the project, issues bonds to pay for it, donates or loans public property to the project, or leases public property to the project at below market rate. Tax abatements, tax credits, job training grants, or

the lease or sale of property at market rate do not trigger prevailing wage because they are not actual public contributions to a privately-funded construction project.

Does the law require the payment of prevailing wage when public funding or land supports a privately funded construction project?

Yes. Although the vast majority of projects triggering the prevailing wage law are traditional public construction (e.g. – roads) and public works projects (e.g. – sewers), whenever a public entity contributes funding or other direct support (e.g. – public land) to a project, prevailing wage must be paid to the workers on that project.

Can a public entity avoid the prevailing wage requirement by sub-dividing projects into separate components to get below the threshold trigger or to claim that its funding is only supporting one component of a project (for which prevailing wage is triggered) but not another component of that project (for which prevailing wage would not be triggered)?

No. Ohio law says that a construction project cannot be broken down into component parts or separate projects unless the projects are “conceptually separate and unrelated to each other, or encompass independent and unrelated needs of the public authority.” O.R.C. 4115.033.

Why is the Department of Commerce issuing this guidance?

The Department of Commerce is responsible for enforcing the prevailing wage law. There has been confusion, inconsistency, and, in some cases, misapplication of the law in the specific circumstance of publicly-supported construction activity which facilitates privately-funded construction activity. In particular, in recent years there has been no clear approach used by the Department when determining whether publicly-funded construction activity is so intertwined with private construction activity that the activity constitutes a single “project” (triggering prevailing wage) and when they are sufficiently “separate and unrelated” that they constitute separate projects, one publicly supported (which triggers prevailing wage) and one privately financed (which does not trigger prevailing wage). In particular, it has been unclear whether publicly supported environmental remediation or access roads to facilitate private construction, or publicly paid for machinery or equipment to be installed in a new privately-constructed facility, are all part of one project or are separate projects.

The Department’s Division of Labor and Worker Safety currently has a number of pending complaints before it stemming from the lack of clarity in this area. So that it can apply a consistent approach to these questions, and so that businesses and workers

can know how the Department will approach its enforcement duties in this area, the Department has decided to issue new guidelines explaining how it will interpret and apply the law in set of circumstances. This will allow businesses to make more informed choices about their investment decisions.

What if a public authority is uncertain as to whether prevailing wage applies to a project?

Any public authority may seek and obtain from the Department of Commerce, within 30 days, a determination as to whether the prevailing wage applies in any set of circumstances. The Prevailing Wage Request Form is available at <http://www.com.ohio.gov/laws/>.

Does the law require payment of prevailing wage if public funds are raised via “tax increment financing (TIF)”?

Again, prevailing wage is triggered when public funds are provided to pay for or help pay for a project. How any public authority obtains the funds used to pay for or support a construction project is irrelevant to the determination of whether the prevailing wage law applies. Accordingly, the question of whether the public funds are raised via TIF, property taxes, income taxes or by some other means in no way impacts the application of the prevailing wage law. The only relevant question is whether public support is provided to a project.

Will this new guidance result in expansion of prevailing wage in Ohio?

For the most part, no, but in two areas in which the Department believes the law was being misapplied in the past, proper application of the law will result in more projects triggering prevailing wage. In particular, the guidelines make clear that when public entities pay for the asbestos or brownfield remediation so that a known developer or end user can renovate or build on that site, the remediation and the renovation or construction are not “separate or unrelated” and therefore are all part of a single “project” subject to the prevailing wage law. Similarly, when a public entity provides the funding for machinery or equipment to be installed in a new plant or business facility under construction, the machinery or equipment and the building in which they reside are not “separate or unrelated” and therefore are all part of a single “project” subject to prevailing wage.

Won't these new guidelines drive up developer costs and interfere with job growth or retention?

Paying workers a fair wage is an important part of avoiding a "race to the bottom" approach to economic development. Paying prevailing wage in a few limited circumstances in which it was sometimes paid and sometimes not paid in the past – in accordance with Ohio law -- may or may not result in a shift in how some public economic development funds are used but is not likely to have a substantial impact on the private construction ultimately undertaken in Ohio. Some developers may determine that they don't want to accept public funds to avoid triggering the prevailing wage law, but that will simply leave those funds for other developers to use. The prevailing wage law is good public policy and the Strickland Administration is committed to properly enforcing this and all other laws for which it is responsible.