

# **\*\*\*DRAFT - NOT FOR FILING\*\*\***

## **4101:9-4-02 Definitions.**

The following definitions are provided for the purposes of clarifying the meaning of certain terms as they appear in sections 4115.03 to 4115.16 of the Revised Code and division-level 4101:9 rules of the Administrative Code.

- (A) "Apprentice" means any employee who is enrolled or indentured per trade occupation as a member of a bona fide apprenticeship program, or a person in the first ninety days of probationary employment as an apprentice in such an apprenticeship program who has been certified by the Ohio apprenticeship council or registered with the Ohio apprenticeship council through those states with which Ohio holds reciprocal apprenticeship agreements to be eligible for probationary employment as an apprentice.
- (B) "Basic hourly rate of pay" means that portion of the prevailing wage, excluding fringe benefits, paid directly to the employee before deductions.
- (C) "Bona fide apprenticeship program" means a comprehensive training program registered with the Ohio apprenticeship council or certified by those with which Ohio holds reciprocal apprenticeship agreements.
- (D) "Business association" means a business in any form including, but not limited to, a sole proprietorship, partnership, limited liability company, or corporation.
- (E) "Classification" means the level of experience within an occupation, trade or craft.
- (F) "Common labor" means the classification for unskilled employees.
- (G) "Construction" means:
  - (1) Any new construction of any public improvement which meets the definition and thresholds set forth in either division (B)(1) or (B)(3) of section 4115.03 of the Revised Code.
  - (2) Any reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting of any public improvement which meets the definition and thresholds set forth in either division (B)(2) or (B)(4) of section 4115.03 of the Revised Code.
  - (3) "Construction" includes, but is not limited to, dredging, shoring, demolition, drilling, blasting, excavating, scaffolding, installation and any other change to the physical structure of a public improvement.
- (H) "Contractor" means any business association that is involved in the actual construction of a public improvement. Contractor may include an owner, developer, recipients of publicly issued funds, and any person to the extent he actively participates in whole or in part in the actual construction of a public improvement by himself, through the use of employees, or by awarding and managing subcontracts to subcontractors as defined in paragraph (HH) of this rule. Contractor may also include any business association that administers, manages, conducts, and oversees actual construction of a public improvement by directing contractors and subcontractors on a specific project.
- (I) "Commerce" means the Ohio department of commerce.
- (J) "Director" means the director of the Ohio department of commerce, or the director's designee.
- (K) "Employee" means any person in the employment of an employer who performs labor or work of the type performed by a laborer, workman, or mechanic in the construction, prosecution, completion or repair of a public improvement and includes owners, partners, supervisors, and working foremen who devote more than

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twenty per cent of their time during a work week to such labor or work for the time so spent. Employee does not include an individual who is a sole proprietor. Employee also does not include full-time employees of a public authority who have completed their probationary periods in the classified civil service of the public authority, except such persons are employees if performing work outside the classification specifications of the civil service position for which the probationary period has been served. Employee does not include any person in a program administered by a public authority approved at the discretion of the director in writing prior to work on any project or program, including, but not limited to, local workfare or community action programs.

(L) "Employer" means any public authority, contractor, or subcontractor.

(M) "Enforceable commitment" means a legally binding obligation of an employer.

(N) "Fringe benefits" means:

- (1) Medical or hospital care or insurance to provide such;
- (2) Pensions on retirement or death or insurance to provide such;
- (3) Compensation for injuries or illnesses resulting from occupational activities if it is in addition to that coverage required by Chapter 4121. and 4123. of the Revised Code;
- (4) Supplemental unemployment benefits that are in addition to those required by Chapter 4141. of the Revised Code;
- (5) Life insurance;
- (6) Disability and sickness insurance;
- (7) Accident insurance;
- (8) Vacation and holiday pay;
- (9) Defraying of costs for apprenticeship or other similar training programs which are beneficial only to the employees affected;
- (10) Other bona fide fringe benefits.

None of the benefits enumerated in this rule may be considered in the determination of prevailing wages if federal, state, or local law requires contractors or subcontractors to provide any such benefits.

(O) "Fringe benefits credit" means payment made by an employer on behalf of an employee for fringe benefits. The amount of a contribution made by the employee to a fringe benefit, as described in rule 4101:9-4-07 of the Administrative Code, shall not constitute a fringe benefits credit.

(P) "Good faith" in the context of section 4115.10 of the Revised Code means:

- (1) An honest intention to abstain from taking any unconscientious advantage of another, together with the absence of all information, notice, benefit or knowledge of facts and circumstances that render a transaction unconscientious; or
- (2) An action that is honest in fact when viewed in light of the totality of the relevant and material

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circumstances.

- (Q) "Institution" means any society or corporation of a for-profit, not-for-profit, public or private character established or organized for any charitable, educational or other beneficial purpose.
- (R) "Interested party," with respect to a particular contract for construction or renovation of a public improvement, means:
- (1) Pursuant to division (F)(1) of section 4115.03 of the Revised Code, any person who submits a bid for the purpose of securing the award of the contract;
  - (2) Any person acting as a subcontractor of a person described in division (F)(1) of section 4115.03 of the Revised Code;
  - (3) Any bona fide organization of labor which has as members or is authorized to represent employees of a person described in division (F)(1) or (F)(2) of section 4115.03 of the Revised Code and which exists in whole or in part for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees. For the purpose of this section, "bona fide" means an organization of labor, the charter, constitution, bylaws or other formative document of which is active and in good standing and requires the organization to act in the interests of its members.
  - (4) Any association having as members any of the persons mentioned in division (F)(1) or (F)(2) of section 4115.03 of the Revised Code.
- (S) "Laborer, workman, or mechanic" means a person who performs manual labor, or labor of a particular occupation, trade or craft, or who uses tools of a particular occupation, trade or craft, or who otherwise performs physical work in such occupation, trade or craft which has been approved in writing by the director through issuance of prevailing wage rate schedules for such occupations, trades or crafts. Laborer, workman, or mechanic, does not include a person that performs activities that do not involve actual construction on the project, such as:
- (1) Consultants that perform land use planning, construction planning, zoning representation, survey work, architectural work, interior design work, professional engineering work, and landscape architectural costs for a project; or
  - (2) Persons whose primary function is to take measurements, accumulate data, and make recommendations on how to rectify imperfections or imbalances in installed equipment or systems.
- (T) "Legal day's work" means that portion of any twenty-four-hour time period during which an employee may work consistent with all applicable state or federal laws.
- (U) "Locality" means the county in Ohio wherein the physical work upon any public improvement is being performed.
- (V) "Materialman" means any supplier or furnisher of materials to be used in the construction of any public improvement.
- (W) "Nonpublic user beneficiary" means any nongovernmental person who is the recipient of funds generated by the issuance of public obligations for such person's construction, use, occupancy, or enjoyment of a public improvement.

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- (X) "Occupation," "trade" or "craft" means the functional nature of work performed by an individual. The director may use the U.S. department of labor's "Dictionary of Occupational Titles" as a guide in determining an occupation, trade or craft.
- (Y) "Person" means any individual, institution, business association, or governmental agency.
- (Z) "Prevailing wage" means the sum of the following:
- (1) The basic hourly rate of pay;
  - (2) The rate of contribution irrevocably made by an employer to a trustee or to a third person pursuant to a fund, plan, or program which is communicated in writing to the employees affected prior to completion of any project to which sections 4115.03 to 4115.16 of the Revised Code apply;
  - (3) The rate of costs to the employer which may be reasonably anticipated in providing fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program which is communicated in writing to the employees affected prior to completion of any project to which sections 4115.03 to 4115.16 of the Revised Code apply.
- (AA) "Prevailing wage rate schedule" means the determination of the department of the prevailing rates of wages to be paid to employees in applicable occupations and the ratios of helpers, apprentices, trainees, serving laborers, and assistants to skilled workers; it includes any subsequent modifications, corrections, escalations or reductions to any wage rates or ratios.
- (BB) "Public authority" means any officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor, or any institution supported in whole or in part by public funds. Sections 4115.03 to 4115.16 of the Revised Code and division 4101:9 of the Administrative Code apply to expenditures of such institutions made in whole or in part from public funds.
- (CC) "Public improvement," subject to the exceptions set forth in division (B) of section 4115.04 of the Revised Code, means:
- (1) All buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works which are:
    - (a) Constructed by a public authority of the state or any political subdivision, including, but not limited to, a municipality thereof;
    - (b) Constructed by any person for a public authority of the state or a political subdivision, including, but not limited to, a municipality thereof, pursuant to a contract with such public authority;
    - (c) Constructed pursuant to any statute of the Revised Code requiring payment of prevailing wage; or
    - (d) Constructed in whole or in part from public funds by an institution supported in whole or in part by public funds; or
    - (e) Constructed by a public authority using public funds dedicated for the construction of a public improvement and in which the public authority maintains a possessory or property interest in the completed project.
  - (2) All work performed on a newly constructed structure or work to suit it for occupancy by a public authority

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when a public authority rents or leases such a structure or work within six months after completion of such construction.

- (3) Any construction where the federal government or any of its agencies furnishes all or any part of the funds used in constructing such improvement except where the federal government or any of its agencies provides the funds by loan or grant and prescribes predetermined minimum wages to be paid to employees in the construction of such projects or where federal statute or regulation explicitly preempts the application of state prevailing wage law. Loan or grant does not include federal government insurance of state financing on the project nor a loan guarantee of private funds. To be predetermined the rates must be set according to the procedures of the U.S. department of labor, prior to the beginning of construction, and specifications of the project must reference the application of federal wage requirements.
- (DD) "Rate of contribution" means the hourly credit of the amount irrevocably made by an employer to a fund, plan or program pursuant to division (E)(2) of section 4115.03 of the Revised Code.
- (EE) "Rate of costs" means the hourly credit of the amount reasonably anticipated to be paid by an employer in providing fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program pursuant to division (E)(3) of section 4115.03 of the Revised Code.
- (FF) "State" means the state of Ohio or any of its instrumentalities or political subdivisions, and, unless exempted or excepted by the Revised Code, the departments, agencies, boards, or commissions thereof.
- (GG) "Structures and works" means, to the extent not specifically stated in the definition of public improvement, all construction activity, including, but not limited to, improvements of all types, such as bridges, dams, plants, highways, parkways, streets, streetscapes, subways, tunnels, mains, power lines, pumping stations, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals.
- (HH) "Subcontractor" means any business association hired by a contractor to perform construction on a public improvement or any business association hired by such subcontractor, or any subcontractor whose subcontract derives from the chain of contracts from the original subcontractor.
- (II) "Supported in whole or in part by public funds" means any payment or partial payment directly or indirectly from funds provided by loans, grants, taxes, or any other type of payment from public funds of the federal government or of the state as defined in division 4101:9 of the Administrative Code.
- (JJ) "Sufficient evidence" shall, for the purpose of section 4115.16 of the Revised Code, mean that each element of the complaint shall be supported by prima facie evidence.
- (KK) "Third person" means a person responsible for safeguarding contributions to a fund, plan, or program pursuant to division (E)(2) of section 4115.03 of the Revised Code or fringe benefits provided pursuant to division (E)(3) of section 4115.03 of the Revised Code, or both. A third person must act in a fiduciary capacity and must assume the usual fiduciary responsibilities imposed upon trustees by applicable state or federal law.
- (LL) "Trainee" is one who is employed pursuant to and individually registered in a program which has received prior approval by the employment and training administration (ETA), U.S. department of labor. Each occupation in which trainees are to be trained must be one commonly recognized throughout the construction industry.

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(MM) "Trustee" means a person responsible for safeguarding contributions to a fund, plan, or program pursuant to division (E)(2) of section 4115.03 of the Revised Code or fringe benefits provided pursuant to division (E)(3) of section 4115.03 of the Revised Code, or both. A trustee must act in a fiduciary capacity and must assume the usual fiduciary responsibilities imposed upon trustees by applicable state or federal law.

The terms used in these rules are to be construed according to the purposes of the prevailing wage law, general principles of Ohio law, custom and usage in the construction industry, the context of their usage, and the use of similar words therein.