



Public Sector Client Bulletin



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Ohio's Prevailing Wage Law Guidelines for Public/Private Partnerships

Ohio Governor Ted Strickland and the Ohio Department of Commerce released a set of guidance documents on September 9, 2008 that detail the administration's goals in enforcing prevailing wage laws for public/private partnerships in Ohio (Ohio Revised Code Chapter 4115). These documents were prepared to "clarify the Department of Commerce's position on when prevailing wage applies to construction projects where there is a combination of public and private funding."

In addition to construction projects, the guidelines also address development projects, infrastructure improvements, the installation of equipment and environmental remediation.

The documents provide a roadmap of when prevailing wage applies and add clarity, through a series of examples, to particular circumstances where application of prevailing wage might have previously been ambiguous. Specifically, the administration highlights the impact of public dollars on:

- Infrastructure improvements on public land adjacent to private development;
- Infrastructure improvements on private land;
- Remediation of environmental hazards (including asbestos and brownfield remediation);

- Installation of machinery and equipment; and,
- Multiple-building sites (including corporate campuses).

The Department of Commerce will interpret and apply the prevailing wage laws to such circumstances to determine the impact of public funding on a project based on the timing between the application for public dollars and the identification of a private developer or end-user. Ultimately, the Department of Commerce is committed to providing an early determination to requesting entities, "as to whether prevailing wage applies to a given project." This determination will be made within 30 days of the request.

The guidelines and frequently asked questions attached will be helpful to entities engaging in private projects with public funding components. Continuing questions are inevitable, however, and the Governor's administration may be modifying their approach in the near future.

For more information, contact Gregory J. Lestini at 614.227.4893 or glestini@bricker.com.

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Governor Ted Strickland

and

Ohio Department of Commerce

Prevailing Wage Guidelines

Released September 9, 2008

Public/Private Partnership Prevailing Wage Guidelines

Ohio law requires that the “prevailing wage” be paid when public funds are used to pay for all or part of a construction project as long as the overall project costs exceed a statutorily set threshold. O.R.C. 4115.032 and 4115.034. 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, even an otherwise privately-financed project, prevailing wage must be paid to the workers on that project. O.R.C. 4115.03.

Ohio law also makes it clear that publicly-supported projects must not be subdivided into a publicly-supported project (triggering prevailing wage) and a privately-financed project (on which prevailing wage would not be paid) unless the projects are “conceptually separate and unrelated to each other” or “encompass independent and unrelated needs.” O.R.C. 4115.033. 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, without any specific guidance from the Commerce Department, it has been unclear to affected parties whether publicly-supported environmental remediation or access roads which 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.

As a result, public authorities, contractors, workers, and developers have faced uncertainty and inconsistency as to whether certain projects require the payment of prevailing wage. The following guidelines are designed to clarify the Department of Commerce’s position on when prevailing wage applies to construction projects where there is a combination of public and private funding. Finally, these guidelines are subject to clarification and updating as additional questions in this area arise. Stakeholders are encouraged to make suggestions which would improve these guidelines.

Key Principles

In determining when prevailing wage is triggered on privately-funded construction activity as a part of a “public improvement project,” the following principles, along with any other relevant information, will be applied by the Department to all commitments of public funds after October 15, 2008:

- 1) When the primary purpose for publicly-supported construction activity is to facilitate the use of privately-funded construction within six months of the completion of the public construction, all such construction will be presumed to comprise a single “public improvement project” subject to prevailing wage.

- 2) The primary purpose for publicly-supported construction activity will be presumptively established by the facts and circumstances at the time public funds are committed by the public entity.

Several common scenarios illuminate the question of when the law requires the payment of prevailing wage when privately-funded construction activity is part of a public improvement project. The following section identifies several of these common scenarios and seeks to explain, through discussion and examples, the application of the law and the above guiding principles in these scenarios.

Because the Department of Commerce understands that the application of the prevailing wage is inherently fact-specific, the Department will issue an early determination to any public authority seeking one regarding the applicability of prevailing wage to any project.

Interpretation & Application

- 1) **Early Determination.** Any political subdivision or state officer, board or commission may request, and the Department of Commerce will provide within 30 days, a determination as to whether prevailing wage applies to a given project. The Department will make that determination based upon information provided at the time of the submission and the project developer may rely on that determination as long as there are no fundamental substantive changes with respect to the use of public funds in support of the project after the determination is provided. The Prevailing Wage Request Form is available at <http://www.com.ohio.gov/laws/>.
- 2) **Outreach and Training.** In the 30 days following the issuance of these guidelines, the Department will engage in a concerted outreach and training program aimed at informing state and local government entities, developers and other affected business entities, and worker organizations about these guidelines.
- 3) **Common Scenarios.** When public funds are used to support . . .
 - a) When public funds are used to support **. . . infrastructure improvements on public land or easements granted to a public authority,** that construction is covered by prevailing wage, but *privately-funded construction or renovation on adjacent private land is presumptively not covered by prevailing wage.* Public roads and sidewalks are presumed to have a range of public purposes independent of any support or assistance they may provide to private construction on adjacent land and therefore those roads and sidewalks are presumptively separate projects from the adjacent private construction.
 - **Example:** Company Z wants to build a new headquarters building, but will only do so if the local municipality agrees to build a new public road which will facilitate access to the building. Even though the new road is helpful to Company Z, its

construction (which is subject to PW) does not trigger PW for the construction of the headquarters because the primary purpose for the public road is for public traffic use (including access to the Company Z's new headquarters). PW would not apply to the construction of the headquarters.

- **Example:** Developer Y is developing an office park that will utilize public streets, water and sewage hookups but in order to meet tenant timelines, has arranged with City X to build the streets and requisite utility hookups and be repaid by City X for those costs. Developer Y must pay PW for the construction of the streets and utility hookups, but adjacent private construction by companies Z and ZZ would not be subject to PW requirements.
- **Example:** City X has an easement from Company Z to build sidewalks on Company Z's property. The sidewalk construction is subject to payment of PW, but that construction does not subject Company Z's entire private development to PW.
- **Example:** City X has established a TIF to obtain revenue to reconstruct a local road and add a turn lane in an old commercial portion of the City. Several new businesses have agreed to locate along the newly renovated commercial strip. While the public roadway improvements using TIF revenue would be subject to PW, just like any other public expenditure on a public infrastructure improvement, the new commercial construction would not be subject to PW unless there were other direct public contributions to any of that construction.

b) When public funds are used to support **. . . infrastructure improvements on private land** which are provided within six months of privately-funded construction or renovation activity, the publicly-supported infrastructure improvements that primarily facilitate use of privately-funded construction are presumptively part of the same project as the private construction, making the entire project subject to prevailing wage.

- **Example:** The State of Ohio pays for a rail spur from the main rail line onto the private property of Company Z, leading up to Company Z's warehouse constructed within six months of the rail spur. The rail spur is presumptively part of the same project of the construction of the warehouse, making the entire project subject to PW.
- **Example:** City X provides for the demolition of the existing structure on the property as well as the sewer and water infrastructure under Company Y's property to support Company Y's new building which is under construction. All construction is subject to payment of PW.
- **Example:** Company Y is considering moving its manufacturing plant to Arizona. City X agrees to build a new access road to replace the crumbling one built with the plant

in 1998 if Company Y agrees to stay in City X. The construction of the access road with public funds would be subject to PW, but that would have no retroactive effect on the private construction of the plant 10 years ago without PW.

- c) When public funds are used to support . . . remediation of environmental hazards when a developer or end-user has been identified at the time public funds are committed, the remediation and renovation or construction on that site for that developer or end-user are presumed to be all one project, triggering PW for the entire project.
- **Example:** If City X provides Developer Y funds for asbestos removal from a building with the understanding that Developer Y will renovate the building into condominiums, the remediation of the asbestos and renovation of the building are presumptively deemed to be a single project for which Developer Y will have to pay PW.
 - **Example:** City X decides to remediate a brownfield in hopes of attracting development on that site, but has no identified developer or end-user for the site. Three months after the remediation has begun, using public funds (and the payment of PW), a developer steps forward to build a new warehouse on that site for Company Y. Even though only three months have passed, Company Y's warehouse is presumptively a separate project from the remediation because Company Y's interest in the site was not known at the time public funds were committed to the project. As long as no other public support is provided in conjunction with the construction of the warehouse, PW would not apply.
- d) When public funds are used to support . . . remediation of environmental hazards when no developer or end-user has been identified at the time public funds are committed, the remediation is subject to prevailing wage but any future construction on that site is presumptively not subject to prevailing wage.
- **Example:** If the State of Ohio uses Clean Ohio money to remove contaminated soil from a corner lot in City X's business district, but has no developer or end-user identified for the lot, the soil clean-up is subject to PW. When City X persuades a national retailer to build a warehouse on the lot, that construction would not be subject to PW.
 - **Example:** In the situation above, if City X or the State were to provide funds to help support the construction of the new store, the construction of that store would be subject to PW, but not because of the public funds provided for the removal of the storage tank.
- e) When public funds are used to support . . . machinery and/or equipment being installed in a newly constructed or remodeled private structure, the machinery or equipment

which exist to facilitate use of the newly constructed building are presumptively deemed part of that new structure and therefore, the building and the machinery or equipment being installed within in it are considered to all be part of a single project subject to PW. O.R.C. 166.01(N), 166.02(E) and OAC 4101:9-4-19(B). Publicly-funded machinery or equipment that is not clearly associated with privately-funded construction or renovation of a building will trigger PW for its installation, but will not trigger PW for the building in which it is being installed.

- **Example:** The State of Ohio provides \$500,000 for M&E to be installed in a newly-constructed manufacturing plant. The machinery is deemed to be part of the plant's construction, therefore triggering PW for the overall project.
- **Example:** Company Z builds a new manufacturing plant in City X with private funds. Two years later, Company Z's business is struggling and the State of Ohio provides public funds to replace a key machine at Company Z's plant. The installation of the machine, itself, would trigger PW for the actual installation activity but there would be no effect on Company Z's original construction of its plant without PW.

4) **Multiple buildings.** When multiple buildings are being constructed on the same general site, if one privately-funded building is sufficiently benefited by public funding to trigger prevailing wage, all other privately-funded construction on that site within six months of the construction triggering prevailing wage will also be subject to prevailing wage if that construction is similarly benefited by the public funding. Privately-funded construction on that site, not within six months of the publicly-funded construction subject to prevailing wage or not similarly benefited by the contribution of public funds, is presumptively independent from the activity for which public funds were provided and therefore, not subject to prevailing wage.

- **Example:** If Company Z accepts a loan from Public Entity Y for new construction on Company Z's South Campus and, at the same time, Company Z begins an addition on its Headquarters Building on its North Campus, construction of the South Campus building would be subject to PW, but the main campus construction, which is not benefited by the loan in support of the South Campus construction, would not be subject to PW.
- **Example:** If Company Z accepts a technology grant from Public Entity Y specifically for a state-of-the-art piece of equipment and renovations are necessary to install the equipment, and the construction costs exceed the PW threshold, all renovations associated with the installation of the new equipment are subject to payment of PW. If, in that scenario, Company Z begins construction on another building unrelated to the renovations, then presumably the new construction would not be subject to PW.
- **Example:** If the State of Ohio provides funds to construct all of the access roads on Company Y's planned multi-building corporate campus, all of the buildings would be similarly benefited by the public funds expended to build the internal private roads on

the campus and therefore all of the buildings constructed within six months of the public investment in the internal road system would be subject to PW.

- **Example:** If City X builds a small tourist booth next to the Applebee's in the parking lot of a new privately developed retail shopping center, the public construction on that general site in no way triggers PW for any of the other purely private construction on that site because that construction is not similarly benefited by the public investment in the tourist booth.
- **Example:** If City X agrees to pave the joint parking lot of Company Y and Company Z (to which PW would apply) in order to discourage Company Z from relocating to another city or state, and 3 months later, Company Y decides to expand its offices on that site, Company Y's construction would presumptively not trigger PW. Even though Company Y is benefited by the new parking lot, because Company Y did not seek the paving of the parking lot and was presumptively not similarly benefited by that publicly-funded construction activity.

- 5) **Public Contributions.** Prevailing wage is triggered when there is an actual public contribution to a privately-funded construction project. Accordingly, prevailing wage is triggered when the relevant public entity provides a construction, machinery or equipment grant or loan, issuance of bonds, donation or loan of public property, or a lease or sale of public property at below market rate. Prevailing wage is not triggered by a tax abatement or credit, a job training grant, or a lease or sale of property at market rate.
- 6) **Timing.** The above principles will be applied to all commitments of public support to private projects on or after October 15, 2008. Expectations established prior to the announcement of these principles will be respected. Accordingly, applications for public funds filed with the State of Ohio before October 15 will utilize any pre-existing interpretations of the application of the prevailing wage law upon which applicants may have relied. For all public contribution commitments to private projects made prior to October 15, 2008, prevailing wage will apply in accordance with any express representations in that regard made by the State of Ohio. If no such representations were made, prevailing wage will apply in accordance with the express or implied intent of the public entity providing the funds, as determined by the Ohio Department of Commerce. In the absence of evidence of the intent of the public entity providing the funds to the initiative, the above principles will be applied. A public entity will have been deemed to have committed public funds to a project when it offers those funds, in writing, to a private entity and those funds cannot, unless rejected or returned by the private entity, be used for another project. A legislative earmark for a specific project, as opposed to a general programmatic appropriation, will be deemed a commitment of public funds.

September 9, 2008

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.