

New Prevailing-Wage Risks For Calif. Public Works Projects

Law360, New York (January 24, 2014, 7:00 PM ET) -- California has enacted several statutes, effective Jan. 1, 2014, that will likely increase the exposure of contractors and subcontractors, and the developers and owners for whom they work, to claims for prevailing-wage violations on public works projects.

Developers and owners would be well advised to review their construction contracts to ensure that the new requirements and risks outlined below are addressed in the construction contract, and the risks allocated appropriately.

Under the Prevailing Wage Law, Cal. Labor Code § 1720 et seq., contractors and subcontractors working on public works are required to pay the wages prevailing in the locality, and to comply with several record-keeping and employee work schedule requirements. Violations of the law subject a contractor or subcontractor to claims for unpaid prevailing wages, and a variety of assessments and penalties.

The recently enacted California statutory provisions increase the time period in which the claims for violations of the PWL may be brought, increase the scope of remedies available to private entities seeking to enforce the PWL, establish deadlines for the director of the Department of Industrial Relations to issue coverage determinations as to whether a project qualifies as a public work under the PWL, and generally increase the risk of liability under the PWL.

Assembly Bill 1336 extends the time for the labor commissioner or a private joint labor management committee to bring actions for violation of the prevailing-wage requirements. Under current law, actions to enforce the PWL must generally be commenced within 180 days of completion of the project. The new amendments expand this period to 18 months, and provide for an even longer time period in certain situations.

More particularly, under existing law, the labor commissioner is required to serve a civil wage and penalty assessment alleging prevailing-wage violations within 180 days after a valid notice of completion is recorded for the project, or within 180 days after the acceptance of the project by the public entity, whichever is later.

Similarly, a joint labor management committee seeking to file a lawsuit alleging prevailing-wage violations must do so within the same 180-day time periods. Assembly Bill 1336 amends the law to extend these time periods to 18 months after the recording of a valid notice of completion, or 18 months after the public entity's acceptance of the project, whichever is later.

By extending the time period in which to bring actions, the amendments expand the ability of the labor commissioner and joint committees to bring actions to enforce the PWL, therefore increasing the risk that contractors and subcontractors will be subjected to claims.

Senate Bill 377 extends the 18-month time period even further if certain requirements for providing notice to the labor commissioner are not met. To facilitate enforcement, SB 377 requires a person who records a notice of completion for a public project to provide a copy of that notice to the labor commissioner. It also requires a public entity that accepts a project to provide notice of the acceptance to the labor commissioner, and to give that notice within five days of the acceptance.

If the required notice is not given, the 18-month time period for serving wage and penalty assessments or filing a lawsuit is tolled, and the time does not begin to run until the required notice is given to the labor commissioner. Notably, even though joint labor management committees are not designated recipients of notice, they benefit (in the form of an extended period in which to file a lawsuit) from any failure to give notice to the labor commissioner.

The time period in which to bring claims is also tolled under SB 377 during (1) any period required by the director of the Department of Industrial Relations to issue a coverage determination as to whether the project is a public work within the meaning of the PWL, and (2) any period in which a contractor or subcontractor fails to provide a copy of certified payroll records after a request for such records from the labor commissioner, a joint labor management committee, or a labor compliance program approved by the DIR. A contractor or subcontractor generally has 10 days to respond to such requests.

In response to claimants who had complained that the process for coverage determination decisions by the DIR was open-ended and could go on indefinitely without a decision, possibly prejudicing their claims to recover unpaid wages, SB 377 also establishes deadlines for the DIR to issue coverage determinations.

SB 377 amends Labor Code § 1773.5 and provides that when a request is made for the DIR to determine whether a project that is undertaken by a public entity is covered by the PWL, the DIR is required to issue its determination within 60 days of receipt of the last notice of support or opposition to the determination from an interested party.

This time period may be extended an additional 60 days if the DIR determines that it requires additional time and certifies the reasons why additional time is required to the party requesting the coverage determination. With respect to projects that are ostensibly private but receive public funds and therefore may be covered by the PWL, the DIR has 120 days in which to issue a coverage determination, and this period also may be extended for 60 days if the DIR certifies the reasons for the extension to the requesting party.

Appeals of the DIR's determination must be filed within 30 days, and the DIR director has 120 days from the date of the last notice or support to reach a decision on the appeal, which again may be extended by 60 days. Finally, SB 377 states that the DIR shall have quasi-legislative authority to make coverage determinations, which should have the effect of reducing the ability of a court to reverse the determination in a later judicial proceeding.

Assembly Bill 1336 also amends Labor Code § 1771.2 and expands the remedies available to a joint labor management committee in a civil lawsuit alleging violations of the PWL. Previously, only the labor commissioner in an administrative proceeding was entitled to obtain liquidated damages and civil penalties against a party that had failed to comply with prevailing-wage requirements. Under AB 1336, joint labor management committees are authorized to recover liquidated damages, civil penalties and equitable relief in a civil lawsuit.

AB 1336 provides that in a civil suit, the court “shall award restitution to an employee for unpaid wages, plus interest ... from the date the wages became due and payable, and liquidated damages equal to the amount of unpaid wages owed.”

Liquidated damages are available only if the complaint meets special pleading requirements as to the amounts owed, and the defendant fails to either (1) pay the wages owed, (2) deposit the amount owed to the court to be held in escrow, or (3) provide proof to the court that it has obtained an adequate surety to cover the damages within 60 days of filing of the complaint.

In addition, the court in its discretion may award the joint committee civil penalties, which are authorized under Labor Code § 1775. Penalties range from \$40 to \$200 and apply for each calendar day for each employee who is paid less than the prevailing wage.

Finally, in a civil suit, the court is required to award a prevailing joint labor management committee its reasonable attorneys' fees and expert's fees. The statute does not allow a defendant contractor or subcontractor to recover its attorneys' fees (or experts' fees) in the event it prevails in the action.

Two other recently enacted bills also demonstrate California's increasing emphasis on prevailing wages. First, Senate Bill 7 seeks to induce charter cities to require contractors to pay prevailing wages on local projects. SB 7 was apparently enacted to counter the California Supreme Court's ruling in *State Building & Construction Trades Council of California, AFL-CIO v. City of Chula Vista*, 54 Cal. 4th 547 (2012), which held that charter cities retain control over the wages paid to workers on their locally funded projects, and hence that such projects are not subject to the PWL.

SB 7 seeks to counter the decision by preventing charter cities from receiving or using state funds for construction projects if the charter city has an ordinance or charter provision that authorizes contractors to not pay prevailing wages on local projects, or if the city has awarded a contract for construction in the last two years without requiring the contractor to comply with prevailing-wage requirements. Although SB 7 directly affects only charter cities rather than contractors and subcontractors, it illustrates the increasing scope of projects to which prevailing-wage rules may apply.

Second, Senate Bill 54 imposes requirements as to prevailing wages on certain private projects, regardless of whether public funds are used. SB 54 was enacted in an attempt to ensure that parties constructing or performing work on projects involving “chemical manufacturing and processing facilities that generate, store, treat, handle, refine, process and transport hazardous materials” do not create safety hazards by employing unskilled or untrained workers to perform the work.

To accomplish this purpose, the statute requires that owners who are “contracting for the performance of construction, alteration, demolition, installation, repair or maintenance work” on such facilities must ensure that the outside contractors use a “skilled and trained workforce.” A skilled and trained workforce is defined in the statute as a workforce in which all of the workers are registered apprentices or skilled journeypersons paid at least prevailing wages.

Taken together, these new statutory provisions reflect California's increasing emphasis on the payment of prevailing wages, and its enhanced efforts to encourage enforcement of the PWL. The new provisions both expand the ability of the labor commissioner and joint labor management committees to bring enforcement actions, and give joint labor management committees greater incentives to do so by expanding the range of remedies available to them.

As a result, contractors and subcontractors should expect to face increasing prevailing-wage enforcement efforts, both in the form of administrative actions by the labor commissioner, and civil lawsuits brought by joint labor management committees.

Contractors, subcontractors, owners and developers should take steps to ensure they are aware of the potential for prevailing-wage coverage on the projects on which they perform work, and be increasingly vigilant in their prevailing-wage compliance efforts. Developers and owners would also be well advised to review their construction contracts to ensure that the new requirements and risks outlined above are addressed in the construction contract, and the risks allocated appropriately.

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