

**Bureau of Labor and Industries**

# **PREVAILING WAGE RATE LAWS**

A Handbook for Public Agencies, Contractors and Subcontractors in Oregon



2008 Edition

**The Wage and Hour Division  
BUREAU OF LABOR AND INDUSTRIES  
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## **To Our Readers**

This book is prepared as a general summary and teaching guide to help public agencies, contractors and subcontractors understand and comply with Oregon's prevailing wage rate law. The information in this book reflects legislative changes through the 2007 legislative session. Appendices include applicable Oregon Revised Statutes and Oregon Administrative Rules, along with sample forms and other useful information.

The information in this book is not intended as legal advice. Oftentimes, applying prevailing wage rate law in specific situations is very complex. Those wishing legal advice should contact an attorney and not rely on this guide.

Those with general questions about the law may call or send a detailed written inquiry to the Bureau of Labor and Industries (BOLI), Prevailing Wage Rate Unit.

The information in this book can be accessed on BOLI's website, at [www.oregon.gov/boli](http://www.oregon.gov/boli).

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## **Oregon's Prevailing Wage Rates**

Oregon passed its prevailing wage rate (PWR) law, often referred to as the “Little Davis-Bacon Act,” in 1959. As the nickname implies, the Act is modeled after the federal “Davis-Bacon” prevailing wage laws. Today, Oregon continues to update and refine its PWR law to reflect changes in the industry and to make it more like its federal counterpart.

Oregon's lawmakers designed PWR law, ORS 279C.800 *et seq.*, to ensure that contractors compete on their ability to perform work competently and efficiently while maintaining community established compensation standards, to encourage the training and education of workers in industry skill standards and to encourage employers to use the funds required by the PWR law for fringe benefits for the actual purchase of such benefits. ORS 279C.805

The Bureau of Labor and Industries (BOLI) is responsible for administering and enforcing the PWR law and for educating contractors, subcontractors and public agencies about its requirements.

This guide focuses on PWR requirements and BOLI enforcement. Underpaid employees as well as contractors, subcontractors, or other interested parties may file complaints with BOLI's Wage and Hour Division, or file a civil suit for damages against a violator of the PWR law.

### **Advisory Committee**

The labor commissioner appoints an advisory committee to assist in the administration of the PWR law. This committee includes an equal number of management and labor members who are involved in building and construction work on public works contracts. The commissioner may also appoint other interested parties. ORS 279C.820

### **PWR Seminars**

BOLI's Prevailing Wage Rate Unit offers free seminars to help contractors, subcontractors and public agencies stay in compliance with prevailing wage rate law. The seminar schedule can be accessed online at [www.oregon.gov/boli/whd/pwr/docs/pwrsched.pdf](http://www.oregon.gov/boli/whd/pwr/docs/pwrsched.pdf).

## **HISTORY OF OREGON'S PREVAILING WAGE RATE LEGISLATION**

- 1959 Oregon enacts a State prevailing wage rate law to cover public works that are not covered by Davis-Bacon regulations. Stated objectives are:
1. To assure quality workmanship on public works;
  2. To discourage exploitation of workers; and
  3. To encourage competition for contracts at the management skills level.
- 1969 Oregon's prevailing wage rate law is amended to include fringe benefits.
- 1977 Oregon's prevailing wage rate law undergoes a major revision, which, among other changes, expands subject workers to include those paid on a salary or per diem basis, and provides debarment for employers who willfully violate the prevailing wage rate statutes.
- 1981 Oregon's prevailing wage rate law is amended to require contracting agencies to notify the Bureau of Labor and Industries (BOLI) of awarded contracts, and to allow the commissioner to seek injunctions against employers without first receiving a wage claim.
- 1983 Oregon's prevailing wage rate law is amended to include a provision that the contracting public agency may be held exclusively liable for unpaid prevailing wages in certain circumstances. In addition, the law now provides that contractors may be debarred for intentional failure to post the prevailing wage rates on the job site.
- 1991 Oregon's prevailing wage rate law is amended to allow the losing bidder to recover at least \$5,000 from the winning bidder if it can be established that the winner has willfully violated any one of several laws, including the prevailing wage rate law.
- 1994 Oregon voters reject Measure 12, which would have repealed Oregon's prevailing wage rate law.
- 1995 Oregon's prevailing wage rate law is substantially amended by the 1995 legislature. The statutes now include a declaration by the Legislative Assembly that the purposes of the prevailing wage rate law are:
- To ensure that contractors compete on the ability to perform work competently and efficiently while maintaining community established compensation standards;
  - To recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards;
  - To encourage training and education of workers to industry skills standards; and
  - To encourage employers to use funds allocated for employee fringe benefits for the actual purchase of those benefits.

Changes to the law include an increase in the threshold for coverage from \$10,000 to \$25,000; a prohibition against dividing public works projects to avoid compliance with the PWR law; and the addition of a prevailing wage fee payable by contractors who contract directly with a public agency. Fees are to be used to pay the costs of:

- State-conducted prevailing wage rate surveys,
- Educational programs, and
- Investigation and enforcement of the prevailing wage rate law.

Other changes to the law include the requirement that contract specifications and contracts for public works include a provision stating the PWR fee shall be paid to BOLI; the addition of an advisory committee to assist in administration of the PWR law; civil penalty authority up to \$5,000 for each violation of the prevailing wage rate law; contractors are no longer required to submit copies of their certified payroll statements to BOLI (however, they are still required to submit these reports to the public agency); and debarment of subcontractors who fail to pay workers when workers' wages are paid by the prime contractor.

1996 BOLI adopts administrative rules that conform state rules to federal Davis-Bacon regulations regarding the "site of work."

1997 Oregon's prevailing wage rate law is amended making public contracting agencies' liability joint and several with any contractor or subcontractor for unpaid prevailing wages when the agency fails to include required prevailing wage rate language in the advertisement for bids, request for bids, contractor specifications, accepted bids, or elsewhere in the contract documents.

Other changes to the law include the amendment to the daily overtime statute to allow employers to adopt work schedules of four ten-hour days on public works projects; liquidated damages may be for an additional amount of wages equal to twice the unpaid overtime wages if contractors have falsified the payroll records; and contractors must adopt a written work schedule on public projects prior to the beginning of work.

The statute (ORS 279C.305) that requires public agencies to prepare and submit a list of their planned public improvement projects to BOLI is amended.

The estimated project cost threshold for least cost comparison requirements when an agency considers using its own employees as workers on a public works is increased from \$50,000 to \$125,000.

ORS 279C.815 (formerly 279.359) is amended to require that BOLI rely on the annual wage survey in determining prevailing wage rates. It allows the commissioner to consider additional information if it appears that the data derived from the wage survey alone is insufficient to establish the prevailing wage rates.

1999 Oregon's PWR law is amended to reapply portions of the PWR law to Oregon University System contracts.

The notice of claim requirement against public works contractors' bond is modified to allow BOLI to include unidentified workers.

School district contracts with community foundations or nonprofit corporations are exempt from prevailing wage rate law requirements under certain and specific conditions; sunsets January 1, 2006.

Prevailing wage rate fees are allowed to be used for education programs on public contracting and purchasing laws in addition to the prevailing wage rate law.

2001 Oregon's prevailing wage rate law is amended to require contractors and subcontractors on public works projects to prepare weekly certified payroll statements and submit them to the public agency monthly, by the fifth business day of the month.

Public contracting agencies are required to include a copy of the contractor's disclosure of first-tier subcontractors with the Notice of Public Works form submitted to BOLI.

ORS 279C.810 is amended by adding an exemption. Public work projects for which no funds of a public agency are directly or indirectly used are exempt from the PWR law. BOLI is required to adopt rules to carry out these provisions. The amendment specifies that "funds of a public agency" does not include funds provided in the form of a government grant to a nonprofit organization, unless the grant is issued for the purpose of construction; and defines "nonprofit organization."

- 2003 Oregon's prevailing wage rate law is amended to exempt Oregon Youth Conservation Corps (OYCC) members.

HB 2341 establishes a Public Contracting Code for public agencies within Oregon. The new Code establishes three separate chapters to modernize and clarify public contracting processes. The first chapter, ORS 279A, establishes an overarching policy for all contracting activities. The second chapter, ORS 279B, covers most types of procurements, except for public improvements, public works and architectural, engineering and related services, which are covered in the third chapter, ORS 279C. The entire prevailing wage rate law is contained within ORS 279C.

- 2005 Oregon's PWR law is substantially amended by the 2005 legislature. Changes to the law include an increase in the PWR threshold for coverage from \$25,000 to \$50,000; contractors must pay the higher of state or federal rates on projects subject to both the state PWR law and the federal Davis-Bacon Act; BOLI must compare state and federal prevailing wage rates, determine which is higher for workers in each trade or occupation in each locality, and make this information available twice each year; and public agencies must include in their project specifications information showing which prevailing rate of wage, either state or federal, is higher.

Other changes to the law include the requirement that all contracts, including subcontracts, must contain a provision that workers shall be paid not less than the specified minimum hourly rate of wage on projects subject to the PWR law; and all contractors and subcontractors working on a public works project must file a \$30,000 "public works bond" with the Construction Contractor's Board. This bond is to be used exclusively for unpaid wages determined due by BOLI. Some exemptions from the requirement are provided for certified disadvantaged, minority, women or emerging small business enterprises. In addition, general contractors must verify that subcontractors have filed a public works bond before permitting a subcontractor to start work on a project.

Project price is now defined to include, but is not limited to, the value of work performed by persons paid by a contractor as part of the project. Project price does not include the value of donated materials or work performed on a project by individuals volunteering to a public agency. "Funds of a public agency" does not include building and development fees waived or paid by the public agency, staff resources used for project oversight or coordination, or staff resources used for the design or inspection of the project.

Finally, contracting agencies and general contractors must withhold 25 percent of amounts earned by contractors if certified payroll reports are not submitted as required.

2006 BOLI adopts administrative rules that conform state rules to federal Davis-Bacon regulations regarding the definition of residential construction projects. To assist in determining a project to be a “residential construction project,” the rule allows the commissioner to consider definitions of “residential construction” that may be in local ordinance or code, or where the prevailing practice of a trade or occupation differs from the definition.

BOLI also adopts administrative rules that allow public agencies to use federal Davis-Bacon wage rates for residential construction projects subject to state law. Public agencies now need to request residential rates from BOLI only when there is no applicable federal rate for a particular classification, and only when the residential construction project is not subject to the federal Davis-Bacon Act.

BOLI adopts administrative rules that allow public agencies to include the applicable prevailing wage rate publication in all specifications by reference only. The reference must include the title and date of the publication or determination, and must include the date of all applicable amendments.

2007 Oregon’s PWR law is substantially amended by the 2007 Legislature. Some of the changes take effect for projects advertised on or after July 1, 2007. These include the following changes.

The definition of “public works” in ORS 279C.800(6)(a) is amended to include in addition to roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest:

- A project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency; or
- A project for construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.

The definition of “funds of a public agency” is amended to exclude, among other things, tax credits or tax abatements, or money from the sale of bonds that are loaned by a state agency to a private entity, unless the money will be used for a public improvement.

If a public works project is of the type described in ORS 279C.800(6)(a)(B) or (C) (a privately owned project with \$750,000 or more of funds of a public agency or in which 25 percent or more of the square footage will be occupied or used by a public agency), the Commissioner of the Bureau of Labor and Industries is required to divide the project if appropriate so that any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency will not be subject to the PWR law. If a project includes parts that are owned by a public agency and parts that are owned by a private entity, the commissioner is required to divide the parts of the project that are not public works from those that are subject to the PWR law if appropriate.

Projects for residential construction that are privately owned and that predominately provide affordable housing are exempted from the PWR law.

BOLI is required to make coverage determinations upon request about whether projects or proposed projects are or would be subject to the PWR law. The requestor or anyone adversely affected or aggrieved by the determination may request a hearing.

Other changes take effect for projects advertised on or after January 1, 2008. These changes include the following.

The applicable prevailing rates of wage for a public works project may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates, and by providing adequate information about how to access the rates.

When a public works project is subject to the Davis-Bacon Act, if the public agency fails to include the state and federal prevailing rates of wage in the specifications for the contract, or fails to include in the specifications information showing which prevailing rate of wage is higher, the public agency will be liable to each affected worker for any unpaid difference between the applicable higher rate of wage and the lower rate of wage. The public agency will also be liable for an additional amount equal to the amount of unpaid wages as liquidated damages.

When a public works project is subject to the Davis-Bacon Act, BOLI must:

- Use the federal definition and interpretation of “site of work;”
- Use the federal guidelines for whether workers transporting materials and supplies to and from the site of the project are due the prevailing rate of wage;
- Apply the federal standard to workers enrolled in skill training programs that are certified by the U.S. Secretary of Transportation under the Federal-Aid Highway Act.

The PWR fee, previously required to be paid by contractors, is now required to be paid by public agencies. The minimum fee is increased to \$250 and the maximum fee is increased to \$7,500. The increased minimum and maximum amounts sunset on January 1, 2011.

BOLI is required to develop and adopt a plan to increase diversity statewide among workers employed on public works projects.

Certified disadvantaged, minority, women or emerging small business enterprises may elect not to file a public works bond with Construction Contractors Board (CCB) for up to four years after certification.

Contractors and subcontractors may elect not to file a public works bond with CCB when working on a public works project for which the total project cost does not exceed \$100,000.

## **Which Projects Are Covered by the PWR Law?**

Public works projects on public land are generally covered by the PWR law if they:

- Cost more than \$50,000;
- Are for construction, reconstruction, major renovation or painting; and
- Directly or indirectly use funds of a public agency.

In addition, public works projects on privately owned land or buildings, often called “public/private projects,” may be covered by the PWR law if they:

- Are for construction, reconstruction, major renovation or painting and will use \$750,000 or more in public funds; or
- Are for construction and a public agency or multiple public agencies will occupy or use 25 percent or more of the square footage of the finished project.

### **Public Works Projects**

The term “public works” includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by a public agency to serve the public interest. ORS 279C.800(6)(a)(A)

The term “public works” also includes:

- Projects for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency; or
- Projects for the construction of a privately owned road, highway building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency. ORS 279C.800(6)(a)(B) and (C)

The PWR law does not regulate the reconstruction or renovation of privately owned property that a public agency leases. However, it does cover new construction on such property. For example, adding square footage to such a property or building outside the footprint of the existing structure is considered to be construction subject to PWR regulation. ORS 279C.800(6)(b); OAR 839-025-0004(20), (23)

### **Covered Activities**

PWR coverage is determined by the type of work performed on the project, not by what a contract is called. For example, if a project includes covered activities, such as rewiring a major portion of a building, and meets the other jurisdictional requirements of the PWR law, the entire project is covered. Any person employed on a public works project whose duties are manual or physical in nature is a worker required to be paid the applicable prevailing wage rate. OAR 839-025-0004(31)

#### **Construction**

Construction includes the initial building of structures and roads. OAR 839-025-0004(5)

**Reconstruction**

Reconstruction includes the restoration of existing buildings and the restoration, rebuilding or resurfacing of existing roads. OAR 839-025-0004(22)

**Major Renovation**

Major renovation includes any remodeling or alteration of existing structures or roads that costs more than \$50,000. OAR 839-025-0004(11)

**Hazardous Materials Spills**

The PWR law covers the clean up of hazardous materials spills if the project includes some construction or reconstruction. The PWR law does not cover projects that only include picking up and hauling away hazardous materials.

**Maintenance Contracts**

General maintenance work, such as sweeping, cleaning, and landscaping, is not covered unless it is done as part of a construction, reconstruction or major renovation project. For example, the PWR law does not apply if maintenance landscaping work such as mowing or pruning is performed on the grounds of an existing building where no other work is being performed. If the same landscaping is part of a major building renovation, however, then it is covered work.

**Demolition**

The PWR law covers demolition work only if it is to prepare for planned construction or renovation. If no construction is planned to replace the demolished property, the demolition is not covered under the law.

**Travel Time**

Employees are not entitled to PWR wages for travel time unless they are traveling between the work site and a dedicated pit, tool yard or another covered site. If employees are otherwise entitled to travel time (traveling from job site to job site during the workday, or because they are required to work more than 30 miles away from their normal work station and are not required to stay overnight, for example), then the employer must pay them an agreed upon rate which is at least minimum wage.

**Excluded Agencies and Workers**

The PWR law does not apply to contracts with certain state agencies, although other wage-related regulations often apply. The PWR exemption applies only if the contract is with the agency itself. For example, while the Oregon State Lottery Commission is exempt, a project is not exempt merely because it is funded with lottery money. Agencies that are not regulated by the PWR law are:

- Oregon State Lottery Commission (ORS 461.120)
- Travel Information Council (ORS 377.836)
- People's Utility Districts (OAR 839-025-0100(1)(b))

People's Utility Districts, while exempt from the PWR law, do have their own, similar laws that apply to their projects.

- Oregon Health Sciences University (ORS 353.130)

Although exempt from ORS Chapter 279, OHSU must ensure that prevailing wages are paid to workers.

### **Excluded Workers**

It is not necessary to pay prevailing wages to inmates of the Oregon Department of Corrections assigned to a work release program when working on covered projects. It is also not necessary to pay prevailing wages to Oregon Youth Conservation Corps members when working on covered projects. OAR 839-025-0100(2)

When a public works project is subject to the federal Davis-Bacon Act, Oregon's prevailing wage rate law does not apply to workers enrolled in skill training programs that are certified by the United States Secretary of Transportation under the Federal-Aid Highway Act (23 U.S.C. 113(c)). ORS 279C.838(5)

### **Only Projects Costing More Than \$50,000 Are Covered**

The PWR law regulates only those projects costing more than \$50,000. This amount is based on the cost of the entire project, not individual contracts. The total project cost includes the value of work performed by every person paid by a contractor or subcontractor for the person's work on the project. The price of a project also includes all materials and supplies, if purchased specifically for the project.

The total project cost does not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay. ORS 279C.810(2)(a); OAR 839-025-0100(1)(a)

The total project cost also excludes the cost of architectural and engineering services, and the value of agency personnel who design, inspect, manage, supervise or otherwise work on the project.

If a project begins with a total project cost under \$50,000, but change orders increase the project cost to more than \$50,000, the entire project will be subject to the PWR law, including all work already performed on the project.

### **Only Projects Paid for with Public Funds Are Covered**

The PWR law does not apply to projects for which no funds of a public agency are directly or indirectly used. ORS 279C.810(2)(b); OAR 839-025-0100(1)(c)

"Directly used" funds of a public agency include:

- Revenue, money or that which can be valued in money collected for or in the custody and control of a public agency; and
- Money loaned by a public agency, including the loan of proceeds from the sale of conduit or pass-through revenue bonds, for the specific purpose of financing a project. OAR 839-025-0004(9)(a)(A)

"Indirectly used" funds of a public agency means the public agency ultimately bears the cost of all or part of the project; such indirectly used funds include:

- Amortizing the cost of construction over the life of a lease and paying these costs with funds of a public agency during the course of the lease;
- The public agency subsidizing the costs of construction that would normally be borne by the contractor;
- Using insurance proceeds that belong to a public agency to pay for construction. OAR 839-025-0004(9)(a)(B)

“Funds of a public agency” does not include:

- Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting;
- Building and development permit fees paid or waived by the public agency;
- Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;
- Staff resources of the public agency used to design or inspect one or more components of a project;
- Tax credits or tax abatements;
- Land that a public agency sells to a private entity at fair market value;
- The difference between the fair market value of land and the value of that land after taking into account any requirements, restrictions or other limitations, exclusive of zoning or land use regulations, the public agency imposes on the development or use of the land;
- The value added to land as a result of a public agency’s site preparation, demolition or remediation, except for the value added in excess of the expenses the public agency incurred in doing such work;
- Money derived from the sale of bonds that are loaned by a state agency to a private entity, unless the money will be used for a public improvement;
- Bonds or loans from the proceeds of bonds issued in accordance with ORS chapter 289 or ORS 441.525, unless the bonds or loans will be used for a public improvement. ORS 279C.810(1)(a); OAR 839-025-0004(9)(b)

## **Retainer Agreements**

Public agencies often enter into retainer agreements, sometimes called “on-call contracts,” that span one or more years for the performance of maintenance and repair activities that may include construction, reconstruction, major renovation, or painting. Frequently these services are to be provided at multiple agency-owned facilities or locations. Even if none of the individual projects covered by the contract exceed the \$50,000 threshold, the contract is subject to the PWR law if the total contract price exceeds the threshold. Whenever a public agency enters into a contract that exceeds \$50,000 and includes a covered activity (i.e., construction, reconstruction, major renovation or painting), the entire contract is subject to the PWR law.

For example, a county may enter into a retainer agreement for highway maintenance wherein the scope of work includes activities such as sealing cracks in the pavement, filling potholes, repairing culverts, fixing fences, repainting traffic lanes, etc., which have been determined to be covered activities as defined in OAR 839-025-0004. If these maintenance duties are contracted out and the contract value is over \$50,000, the contract would be subject to the PWR law. Additionally, any other work done in support of that contract would also be covered.

## **Joint Jurisdiction with Federal Government on Some Projects**

Regardless of whether or not a public works project over \$50,000 is subject to regulation under the Davis-Bacon Act, if a public agency (other than a federal agency) uses federal funds on the project, the project is subject to the state PWR law. This is because once federal funds are in the custody and/or control of a public agency, they become “funds of a public agency” as defined in the PWR law.

On non-residential projects subject to both state and federal prevailing wage laws, contractors must pay the higher of the state or federal prevailing wage rates to workers. ORS 279C.838; OAR 839-025-0035(2)

While most requirements of the state PWR law apply to projects subject to both state and federal prevailing wage laws, there are a few areas in which the federal requirements take precedence. For projects subject to both state and federal laws advertised on or after January 1, 2008, BOLI will follow federal guidelines for the term “site of work” and for when prevailing wages are due to delivery personnel. (See pages 24-25 for more information.)

## **Residential Construction Projects**

BOLI has modeled its definition of “residential construction” after the U.S. Department of Labor’s definition of such projects. Generally, residential construction projects are projects for the construction, reconstruction, major renovation or painting of a single family house or apartment building of no more than four stories in height. The residential project includes all incidental items associated with the project, such as site work, parking areas, utilities, streets and sidewalks. OAR 839-025-0004(24)(a)

Where it is determined that a different definition of “residential construction” has been adopted by local ordinance or code, or the prevailing practice of a particular trade or occupation regarding what is considered “residential construction” differs from the federal definition, the commissioner may consider such information in determining whether a project or part of a project is residential construction. OAR 839-025-0004(24)(b)

### **Residential Rates**

BOLI does not survey residential rates, so residential construction projects subject to Oregon’s PWR law are required to use the federal Davis-Bacon wage rates for residential construction projects. These rates can be found on the U.S. Department of Labor’s website, [www.wdol.gov](http://www.wdol.gov). The federal residential rates apply to residential construction projects subject to Oregon’s PWR law, even if the project is not subject to the federal Davis-Bacon Act. However, if the federal residential rate for a particular trade or classification is ever less than Oregon’s minimum wage rate required by ORS 653.025, no less than Oregon’s minimum wage must be paid to the worker.

In some instances, there are no applicable federal residential Davis-Bacon wage rates for certain trades or classifications. If a wage rate is needed on a residential project subject to both state and federal prevailing wage rate law, a request for a special wage rate determination should be submitted according to the federal requirements in Title 29 CFR, Part 5.5(a)(1)(ii).

If a wage rate is needed on a residential project that is subject only to Oregon’s PWR law, the request for a special wage rate determination must be submitted to BOLI at least 15 days prior to the date the specifications for the project are first advertised. If a public agency fails to request a special wage rate determination as required, the rates in the applicable BOLI rate book will apply to those trades or classifications for which there is no applicable federal residential rate. OAR 839-025-0037

### **Residential Exemption**

If a residential project is predominately for affordable housing and is privately owned, it will not be subject to Oregon’s PWR law. “Affordable housing” means the occupants’ incomes are no greater than 60 percent of the area median income, or no greater than 80 percent if the occupants are owners. “Predominately” for affordable housing means at least 60 percent of the project is designated for affordable housing. Affordable housing can be considered “privately owned” even if it is owned by a public agency, as long as it is leased to a private entity for 50 years or more, or if the affordable housing is owned by a partnership, as long as the public agency is not a majority owner in the partnership. ORS 279C.810(2)(d)

## **Multiple Wage Rate Determinations**

Some public works projects may involve more than a single construction type. For example, one project may consist of the construction of both residential units and commercial space. On such a project, the commissioner may authorize residential wage rates to be paid for work performed in connection with the construction of the residential units, and non-residential prevailing wage rates to be paid for work performed in connection with the construction of the commercial space.

Requests for authorization to use multiple wage determinations on a project must be submitted to BOLI in writing, and must include all relevant details of the project or proposed project.

If the commissioner authorizes multiple wage rate determinations to be used on a project, continued use of the determinations is contingent upon compliance with all of the following:

- The project/contract specifications must clearly delineate the portions of the project subject to each applicable wage rate determination;
- All applicable wage rate determinations must be posted in a conspicuous and accessible location at the site of work, with an explanation of the portions of the project to which each wage rate determination applies;
- The developer or prime contractor must establish adequate controls to ensure that all workers on the project are paid in accordance with the applicable wage rates; and
- Each and every contractor employing workers on the project must prepare, submit and maintain accurate time and payroll records to demonstrate compliance with all wage rate determinations applicable to the project. OAR 839-025-0315

## **Coverage Determination Requests**

When requested to do so by a public agency or other interested party, the commissioner of the Bureau of Labor and Industries will issue a coverage determination about whether a project or proposed project is or would be a public works project. The requests must be submitted to BOLI in writing, must describe all the relevant details of the project or proposed project, and must be accompanied by all documents, records or other information necessary for the commissioner to make the determination. In addition, if the coverage determination request is not submitted by a public agency, the party submitting the request to BOLI must also submit a copy of the request to any public agency associated with the project.

Once BOLI has issued the determination, the requestor or anyone adversely affected by the determination may request reconsideration of the determination or a hearing.

More information about how to submit a coverage determination request, as well as previous coverage determinations issued, can be found on BOLI's website at [www.oregon.gov/boli](http://www.oregon.gov/boli). ORS 279C.815; OAR 839-025-0005

## **How Prevailing Wage Rates are Determined**

### **Annual Surveys**

BOLI uses data collected from an annual survey to set the state prevailing wage rates. The agency sends wage surveys to contractors and subcontractors in all 14 regions of the state to find out what they are paying to different types, or classifications, of workers. If the survey results do not provide enough information to determine the prevailing wage rates, then the agency considers other information, including prevailing wage rates determined by the U.S. Department of Labor. ORS 279C.800 & 815

### **Wage Rates and Work Classifications**

The prevailing practice of an industry determines how work is classified. Wage rates for each classification are listed as a base rate and an hourly fringe rate, and it is the combination of these two amounts that must be paid to the worker. Rates are determined for a number of classifications. It is important to note that it is the work performed by the employee, not the worker's title or qualifications, that determines which classification applies.

### **Rate Books Published Twice Annually**

BOLI publishes the state prevailing wage rates twice a year, and periodically updates them to reflect revisions to labor agreements or other changes. BOLI also publishes a comparison of the state and federal prevailing wage rates twice a year. When the federal government updates its rates, BOLI publishes amendments to reflect those changes. These publications are provided free of charge, and can also be found on BOLI's website at [www.oregon.gov/boli](http://www.oregon.gov/boli).

State law requires public agencies to include the applicable prevailing wage rates in the contract specifications of covered projects, and requires all contractors and subcontractors to post them at all PWR job sites. ORS 279C.830(1); ORS 279C.840(4)

Generally, the applicable prevailing wage rates are those in effect at the time the initial specifications are first advertised for bid solicitations. (See page 17 for more information on applicable rates.) OAR 839-025-0020(4)

### **Addition of Trade Classification to the Rate Book**

The PWR law requires the submission of a written request to add a trade to the prevailing wage rate determinations. Anyone may request the consideration of an additional classification by writing to the PWR Coordinator, Prevailing Wage Rate Unit, Wage and Hour Division, 800 NE Oregon Street #1045, Portland, OR 97232. The request must include the name of the proposed trade, the minimum education required, a description of the skills required and the tools used.

Occasionally the classification process calls for a complete study of the proposed trade. The bureau's PWR coordinator conducts the study and makes recommendations to the commissioner. OAR 839-025-0006

### **Special Wage Determinations**

Sometimes public contracting agencies require the use of a trade not normally included in the wage determinations. If a planned public works project requires a trade that does not have an established classification or rate, the public agency may submit a written request to BOLI for consideration. This request must describe the work to be done and identify the requested trade. If BOLI agrees that a special determination is needed, it works with the agency to conduct a wage survey. The agency conducts the survey and submits the results to the PWR coordinator. This data is used to help the commissioner establish the appropriate classification and rate. OAR 839-025-0007

## How to Determine the Correct Rate of Pay

To determine the correct rate of pay for workers on covered projects, agencies, contractors and subcontractors need to refer to one of the following booklets:

- *Prevailing Wage Rates for Public Works Contracts in Oregon* (state rates only), or
- *Prevailing Wage Rates for Public Works Contracts in Oregon subject to BOTH the State PWR and Federal Davis-Bacon Act* (comparison of the higher of federal and state rates).

Both prevailing wage rate booklets are published twice a year, usually in January and July. Amendments to the state rates are published quarterly, but amendments to the “*Prevailing Wage Rates for Public Works Contracts in Oregon subject to BOTH the State PWR and Federal Davis-Bacon Act*” booklet can be published at any time, depending on if and when the U.S. Department of Labor updates its rates. Both rate booklets and all amendments can be found on BOLI’s website at [www.oregon.gov/boli](http://www.oregon.gov/boli). In addition, the most current Davis-Bacon Act wage rates can be found at [www.wdol.gov](http://www.wdol.gov).

### Projects Subject to State Law Only

To find the correct rate of pay on projects subject to Oregon’s PWR law, use the following steps:

**1. When was the project first advertised for bid?**

Generally, the rates in effect at the time the bid specifications are first advertised are those that apply for the duration of the project.

**2. What type of work is the worker performing?**

Find the definition that most closely matches the actual work being performed by the worker. If you have any questions about work classifications, contact BOLI at the number below.

**3. Where is the work being performed – in which region?**

Find the occupation in the correct region pages associated with the county where the project construction is taking place.

**4. Is there a rate listed next to the classification?**

If so, use it. The rate is made up of an hourly base rate plus an hourly fringe rate. It is the combination of the base rate plus the fringe rate that is due the worker on an hourly basis. (See Appendix A in this book for information on how to calculate allowable hourly credits for employer contributions to benefit plans.)

**5. If the book directs you to “See Appendix,” go to the back of the book and use the rate listed in the Appendix pages.** The rate is made up of an hourly base rate plus an hourly fringe rate. It is the combination of the base rate plus the fringe rate that is due the worker on an hourly basis. This rate may include a group number and/or zone pay. Zone pay is added to the base rate.

**6. Apprentices** must be paid the full fringe rate in those regions where the appendix rate does not apply. However, if the book directs you to “See Appendix,” and the worker is registered in a bona fide apprenticeship program, you may contact BOLI at (971) 673-0839 for the applicable hourly fringe rate. These fringe rates are also posted on BOLI’s website at [www.oregon.gov/boli](http://www.oregon.gov/boli).

**7. If you still need help, CALL BOLI at (971) 673-0839.**

## **Projects Subject to State and Federal Laws**

ORS 279C.838 requires the higher of either the state prevailing wage rates or federal Davis-Bacon rates to be paid to workers on projects in Oregon subject to both the state PWR law and federal Davis-Bacon Act. To find the correct rate of pay on such projects, use the following steps:

**1. When was the project first advertised for bid?**

Under state law, the rates in effect at the time the bid specifications are first advertised are those that apply for the duration of the project. The Davis-Bacon Act uses a different method to set the rates for the project. Check with the project's public agency for any changes to the federal rates that may have occurred after the bid specifications were advertised.

**2. What type of work is the worker performing?**

Find the definition that most closely matches the actual work being performed by the worker. If you have any questions about work classifications, contact BOLI at the number below.

**3. Where is the work being performed – in which county?**

Find the occupation in the correct county pages where the project construction is taking place.

**4. Is there a rate listed next to the classification?**

If so, use it. The rate is made up of an hourly base rate plus an hourly fringe rate. It is the combination of the base rate plus the fringe rate that is due the worker on an hourly basis. (See Appendix A in this book for information on how to calculate allowable hourly credits for employer contributions to benefit plans.)

**5. If the book directs you to “See Appendix-State,” go to the State Appendix in the back of the book and use the rate listed.** It may include a group number and/or zone pay. Zone pay is added to the base rate.

**Apprentices** registered in a bona fide apprenticeship program may be paid less than the full hourly fringe rate in some circumstances. You may contact BOLI at (971) 673-0839 for the applicable hourly fringe rate for apprentices. These fringe rates are also posted on BOLI's website at [www.oregon.gov/boli](http://www.oregon.gov/boli).

**6. If the book directs you to “See Appendix-DB,” go to the Davis-Bacon Appendices in the back of the book and use the rate listed.** It may include a group number and/or zone pay. Zone pay is added to the base rate.

**Apprentices** being paid the federal prevailing wage rate must be paid hourly fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of hourly fringe benefits listed in the Davis-Bacon Appendices.

**7. If the book indicates “SAME,” you can use the rate from either the State Appendix or the Davis-Bacon Appendices.**

**8. If you still need help, CALL BOLI at (971) 673-0839.**

## Public Agency Responsibilities

Public agencies must comply with a host of legal contracting requirements. This guide covers only those requirements related to the PWR law. The Oregon Attorney General's Model Public Contract Rules Manual has information about other statutes, rules and guidelines that apply to public agency contracting.

### Planned Public Improvement Summary

An agency must submit to BOLI a list of public improvements it plans to fund during the coming budget period. The agency must submit the list at least 30 days before it adopts a budget, and should revise the list if its plans change. If an agency plans to use its own personnel and equipment to perform any project estimated to cost more than \$125,000, it must also provide documentation showing that it is less expensive for the agency to use its own resources than it is to contract out the project. Once filed, all documents are public records. Filings should be made with the Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon Street #1045, Portland, Oregon 97232. Forms are available for providing this information (WH-118 and WH-119); they can be found in the back of every PWR rate book and on BOLI's website at [www.oregon.gov/boli](http://www.oregon.gov/boli). ORS 279C.305; OAR 839-025-0008

### Notice of Public Works

Agencies are required to notify BOLI within 30 days of awarding any public works contract subject to PWR law. Agencies must provide BOLI's Notice of Public Works form (WH-81), and include a copy of the disclosure of first-tier subcontractors submitted by the contractor to the public agency pursuant to ORS 279C.370. These must be provided to the Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon Street, #1045, Portland, Oregon 97232.

When a project is a public works project of the type described in ORS 279C.800(6)(a)(B) or (C) (a public/private project), the public agency that provides funds or will occupy or use the project must submit the WH-81 form to BOLI. The form is due at the time the agency commits to provide funds or enters into an agreement to occupy or use the space. ORS 279C.835; OAR 839-025-0013

### Prevailing Wage Fee

On all projects subject to the PWR law, the public agency must pay a fee to BOLI's PWR Unit for every contract awarded to a contractor. The amount of the fee due is one-tenth of one percent (.001) of the contract price; however, there is a minimum fee of \$250 and a maximum fee of \$7,500. The fee is due when the public agency awards the contract. If a public agency awards multiple contracts on a single project, a fee is due for each contract awarded. The public agency must submit a Public Work Contract Fee Information form (WH-39) with payment of the fee. This form can be found in the back of all PWR rate books, and also on BOLI's website at [www.oregon.gov/boli](http://www.oregon.gov/boli). BOLI issues a Certificate of Payment as proof of payment.

The public agency must submit a Fee Adjustment Form (WH-40) to BOLI within 30 days of the final progress payment after completion of the contract when change orders increase or decrease the original contract by \$100,000 or more. If the fee would change by \$100 or more, the public agency must pay any additional fee and submit the adjustment form. If BOLI owes the public agency a refund, the bureau issues it once the adjustment form is processed.

If a contract does not have a "hard" bid amount, the public agency should base the initial fee on the guaranteed maximum. Once the project is complete, the public agency may file an adjustment form that reflects the actual cost of the project. If there is no guaranteed maximum amount, the agency must make a good faith estimate of the contract price and calculate the fee based on this estimated amount. ORS

279C.825; OAR 839-025-0200 *et. seq.*

When a project is a public works project of the type described in ORS 279C.800(6)(a)(B) or (C) (a public/private project), the public agency that provides funds or will occupy or use the project must pay a PWR fee to the PWR Unit. The amount of the fee will be based on the total project amount. If the total project amount is not known, the public agency must base the fee on the guaranteed maximum amount of the project or must make a good faith estimate of the contract price. If multiple agencies commit funds or will occupy or use the space, if not otherwise previously agreed upon by the agencies, the fee will be pro-rated proportionately based on the amount of funds provided or the space occupied or used by each agency. OAR 839-025-0230

### **Contracts and Contract Specifications Require Specific Provisions**

Public contracting agencies must include certain items in the contract specifications and in the contracts for projects subject to the PWR law.

*Contract specifications must include:*

- A provision stating the applicable prevailing wage rates, including any applicable amendments. Generally, the applicable prevailing wage rates are those in effect at the time the initial specifications are first advertised for bid solicitations, although different provisions apply to Construction Manager/General Contractor (CM/GC) contracts. (See page 18 for this information.) If the project is subject to both the state PWR law and the Davis-Bacon Act, the higher of the state and federal rates must be included, along with any applicable amendments. A statement incorporating the appropriate rates by reference will satisfy this requirement, but the reference must be specific as to the title and date of the publication that applies, and the date(s) of all amendments that apply. ORS 279C.830(1); OAR 839-025-0020(4) and (5)
- A provision that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project. ORS 279C.830(3)

*Contracts must include:*

- A provision that if the contractor fails to pay for labor and services, the agency can pay for them and withhold these amounts from payments to the contractor. ORS 279C.515; OAR 839-025-0020(2)(a)
- A provision that the contractor must pay daily, weekly, weekend and holiday overtime as required. ORS 279C.540; OAR 839-025-0020(2)(b)
- A provision that the employer must give written notice to the workers of the number of hours per day and days per week they may be required to work. OAR 839-025-0020(2)(c)
- A provision that the contractor must make prompt payment for all medical services for which the contractor has agreed to pay, and for all amounts for which the contractor collects or deducts from the worker's wages. ORS 279C.530; OAR 839-025-0020(2)(d)
- A provision that workers must be paid not less than the applicable state or federal prevailing wage rate, whichever is higher. ORS 279C.830(1)(c); OAR 839-025-0020(3)
- A provision that requires the contractor to have a public works bond filed with the Construction Contractors Board before starting work on the project. ORS 279C.830(3)(a)
- A provision that requires the contractor to include in every subcontract a provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the project. ORS 279C.830(3)(b)

Contracting agencies are jointly and severally liable for any unpaid prevailing wages unless they have included a statement in the contract documents, such as the contract, specifications or the advertisement

for bid, that all workers must be paid the applicable prevailing wage rate. ORS 279C.855(3); OAR 839-025-0080(4)

If a public works project is subject to the Davis-Bacon Act but the public agency fails to include the state and federal prevailing rates of wage in the specifications, or fails to include in the specifications information showing which prevailing rate of wage is higher, and the workers on the project are paid the lower rather than the higher prevailing wage rate, the public agency is liable to the workers for the difference between the lower and the higher rate, plus an equal amount as liquidated damages, for every hour worked. ORS 279C.855(4); OAR 839-025-0080(6)

### **Use of a Construction Manager/General Contractor (CM/GC) by a Public Agency**

When a public agency uses a CM/GC on a public works project, the CM/GC will generally perform various pre-construction tasks such as design phase development, constructability reviews and cost estimating. A guaranteed maximum price for completion of the construction-type work is typically established by amendment of the initial contract after the pre-construction tasks are complete. The CM/GC then typically acts as the General Contractor and begins the subcontracting process. Use of a CM/GC to manage public works projects for a public agency does not relieve the agency or the CM/GC of their responsibilities under the prevailing wage rate regulations.

The rates in effect at the time the CM/GC contract becomes a public works contract are the applicable rates to be used for the duration of the project. The CM/GC contract becomes a public works contract either when the contract first constitutes a binding and enforceable obligation on the part of the CM/GC to perform or arrange for the performance of construction, reconstruction, major renovation or painting, or when the CM/GC contract enters the construction phase, whichever occurs first.

For example, the CM/GC will have a binding and enforceable obligation to perform or arrange for the performance of construction after the public agency and CM/GC commit to the guaranteed maximum price. The CM/GC contract enters the “construction phase” when the agency first authorizes the performance of early construction-type work directly related to the public works project. OAR 839-025-0020(6)

### **Ensuring a Payment Bond is Filed When Required**

The public agency should verify that the contractor files a payment bond or posts another security, when required pursuant to ORS 279C.380 and 279C.400. If the agency fails to do so, it is jointly liable with the contractor for any unpaid prevailing wages. The agency may pay any claims for unpaid labor and deduct the amount of the claims from the amount it pays the contractor. ORS 279C.625

### **Withholding Retainage**

In addition to any other retainage obligated by the Public Contracting Code, the PWR law requires public agencies to withhold 25 percent of any amount earned by the prime contractor if the prime contractor does not turn in its certified payroll reports each month. Once the certified payroll reports have been submitted, the public agency must pay the 25 percent withheld within 14 days. ORS 279C.845(7); OAR 839-025-0010(5)

### **BOLI Prohibits Dividing Projects to Avoid PWR**

Contracting agencies may not divide a project to avoid compliance with the PWR law. ORS 279C.827; OAR 839-025-0310

BOLI treats separate contracts for the same project as a single project for PWR purposes and may issue an order compelling the violating agency to treat the contracts as a single project.

The bureau looks at a number of factors to decide if separate contracts actually constitute a single project, such as:

- The physical separation of project structures;
- Whether a single public works project includes several types of improvements or structures;
- The anticipated outcome of the particular improvements or structures the agency plans to fund;
- Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;
- Whether the work on the project is performed in one time period or in several phases as components of a larger entity;
- Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;
- The manner in which the public agency and the contractors administer and implement the project;
- Other relevant matters as may arise in any particular case.

If a public works project is of the type described in ORS 279C.800(6)(a)(B) or (C) (i.e., a public/private project), the Commissioner of the Bureau of Labor and Industries may divide the project if appropriate, considering the above factors, so that the parts of the project that do not include public funds or that will not be occupied or used by the public agency will not be subject to the PWR law.

Additionally, if a project includes parts that are publicly owned and parts that are privately owned, the commissioner may divide the project if appropriate, considering the above factors, so that the parts of the project that are privately owned are not subject to the PWR law. Interested parties must submit a coverage determination request to BOLI for assistance with such a division of a project. ORS 279C.827; OAR 839-025-0310; ORS 279C.815

## **A Checklist for Public Agencies**

### **Required:**

- Submit the Planned Public Improvement Summary (WH-118) to BOLI prior to each budget period.
- Include the prevailing wage rates, public works bond requirement and other required language in the contract and the contract specifications.
- Submit the PWR fee and Public Works Fee Information form (WH-39) to BOLI for every public works contract awarded.
- Submit the Notice of Public Works form (WH-81) and copy of the disclosure of first-tier subcontractors to BOLI within 30 days of awarding the contract.
- Verify that the agency has not contracted with any of the contractors on BOLI's current *List of Contractors Ineligible to Receive Public Works Contracts*. This list of debarred contractors is on BOLI's website at [www.oregon.gov/boli](http://www.oregon.gov/boli).
- Require that the contractor has a payment bond or has obtained a cashier's check or certified check, unless exempt.
- Withhold 25 percent of any amount earned by the prime contractor if the prime contractor fails to submit its certified payroll reports as required.

### **Suggested:**

- Verify that the project manager has knowledge of construction and worker classifications.

- ❑ Verify that subcontractors know that the job is a prevailing wage rate job.
- ❑ Verify that none of the subcontractors working on the project are on BOLI's current *List of Contractors Ineligible to Receive Public Works Contracts*.
- ❑ Confirm that the correct prevailing wage rates and the details of any benefit plans are conspicuously posted on the project site.
- ❑ Verify that all contractors and subcontractors are using the correct work classifications.
- ❑ Confirm that all contractors and subcontractors are filing complete and accurate certified payrolls, and are paying employees the correct prevailing wage rate.

## **Contractor Responsibilities**

### **Filing a Public Works Bond with Construction Contractors Board**

Contractors and subcontractors must file a \$30,000 public works bond with the Construction Contractors Board (CCB) before beginning work on a public works project. The public works bond must provide that the contractor or subcontractor will pay claims ordered by the bureau to workers on public works projects. Unlike other required payment and performance bonds, the public works bond remains in effect continuously and covers all public works projects worked on during the duration of the bond. ORS 279C.836(1)

Before allowing a subcontractor to start work on a public works project, the contractor must ensure the subcontractor has filed a public works bond with the CCB. This information can be found on CCB's website at [www.oregon.gov/ccb](http://www.oregon.gov/ccb) (under the Contractor License Search section). ORS 279C.836(2)

Any person that is required to pay prevailing wages on a public project must file a public works bond with the CCB. This is the case even if the employer does not have a CCB license. For example, non-construction companies such as temporary employment agencies are not required to have a CCB license, but if they employ workers on a public works project, they will have to pay those workers the appropriate prevailing wage rate and will therefore be required to file a public works bond with the CCB. ORS 279C.836(4)

An exemption from this requirement is allowed for certified disadvantaged, minority, women or emerging small business enterprises, for the first four years of certification. Such an enterprise must provide the CCB with written notification of its certification, and must complete the CCB's exemption form. In addition, the business enterprise must notify the public agency and the prime contractor that a public works bond has not been filed by the business enterprise. ORS 279C.836(7)

Contractors and subcontractors working on a public works project with a total project cost of \$100,000 or less may elect not to file a public works bond with CCB. This \$100,000 threshold amount is for the total project cost, not for an individual contract amount. For example, if a subcontractor has an \$8,000 contract on a project with a total cost of \$120,000, the subcontractor must file a public works bond with CCB before beginning work on this project. ORS 279C.836(8)

In some cases of emergency, if declared in accordance with rules adopted under ORS 279A.065, the requirement for filing a public works bond with CCB may be excused. ORS 279C.836(9)

Public works bond forms can be found on BOLI's website at [www.oregon.gov/boli](http://www.oregon.gov/boli). Other forms, such as non-construction company forms and exemption forms, can be found on CCB's website at [www.oregon.gov/ccb](http://www.oregon.gov/ccb).

### **Required Contract Language**

*Every* contract and subcontract must contain a provision that states the workers will be paid not less than the applicable prevailing wage rate for the type of work being performed. ORS 279C.830(1)(c); OAR 839-025-0020(3)

## **Payment of Prevailing Wages**

Contractors and subcontractors must pay workers on public works projects no less than the applicable prevailing rate of wage for the type of work they perform. ORS 279C.840; OAR 839-025-0035(1)

A “worker” is defined as a person whose duties are manual or physical in nature, including those workers who use tools or who are performing the work of a trade, as distinguished from a person whose duties are mental, professional or managerial. OAR 839-025-0004(31)

Except for Construction Manager/General Contractor (CM/GC) contracts, the rates in effect at the time the initial specifications are first advertised for bid solicitations are the rates that apply for the duration of that project. OAR 839-025-0020(4)(a) (See Section (6) of this rule for CM/GC related information.)

When a public works project is subject to both the state and federal prevailing wage rate laws, contractors and subcontractors must pay the higher of either the state or federal prevailing wage rates for the type of work being performed. ORS 279C.838; OAR 839-025-0035(2)

Contractors and subcontractors are in compliance with prevailing wage rate (PWR) requirements if the amounts paid to the employee in wages and in qualified fringe benefits meet or exceed the total of the base and fringe benefits rates published in the rate book. For example, if the base rate is \$20 per hour and the fringe rate is \$4 per hour, and the employee works eight hours a day, Monday through Friday, the employee is entitled to \$960 [(\$20/hour x 40 hours) + (\$4/hour x 40 hours)].

The employer can satisfy this obligation by paying \$960 in wages to the employee, or \$600 in wages to the employee and \$360 to a fringe program, or \$700 in wages and \$260 in fringe benefits – or any other similar combination of wages and fringe benefits.

### **Overtime Requirements**

Generally, on projects subject to the PWR law, overtime is due on a daily basis, after eight hours per day, Monday through Friday. This is the case even if the employee has not worked 40 hours in the workweek.

If an employee works an established schedule of four ten-hour days on a PWR covered project, overtime may not be due until after ten hours per day. To have an established “four-ten” schedule, the four days of work must be consecutive and must fall within Monday and Friday; therefore an employee could work a four-ten schedule of either Monday through Thursday or Tuesday through Friday. ORS 279C.540; OAR 839-025-0050

If an established four-ten schedule is not followed because of weather, scheduling, or for any other reason, overtime will be owed for all hours worked over eight per day that week. An employer may change an established work schedule, but only if the change is intended to be permanent and is not designed to evade the PWR overtime requirements. OAR 839-025-0034

Regardless of the work schedule an employer establishes on a PWR covered project, workers must be paid overtime for all hours worked on Saturdays, Sundays, six legal holidays (New Year’s Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day), and for hours worked over 40 in a week. If one of the legal holidays falls on a Saturday or Sunday, the preceding Friday or following Monday becomes the recognized holiday and all hours worked on that day on a PWR covered project must be paid at an overtime rate. ORS 279C.540; OAR 839-025-0050

The overtime rate is 1.5 times the hourly base rate, plus the hourly fringe rate. Although the fringe rate does not have to be paid at time and one half, it must be paid for all hours worked, including overtime

hours. Overtime should be paid using the following equation:

$$(hourly\ base\ rate \times 1.5) + hourly\ fringe\ rate$$

If hourly zone pay is due, that amount is added to the base rate, and the following equation should be used:

$$((hourly\ base\ rate + hourly\ zone\ pay) \times 1.5) + hourly\ fringe\ rate$$

If an employee earns more than one base rate of pay for the day/week, then the daily/weekly overtime owed, in addition to the regular straight time wages, is based on a *weighted average* of the hourly base rates earned. OAR 839-025-0050(2)(b)

Examples of how to calculate overtime are in OAR 839-025-0050(2)(c). Examples of weighted average overtime calculations are in Appendix C of this handbook.

If a collective bargaining agreement applies and has different overtime provisions, the provisions in the bargaining agreement will govern. ORS 279C.540(4)

For all contracts with Oregon University System, the overtime provisions of ORS 279C.540 do not apply. Overtime on such projects is due only after 40 hours in the workweek. ORS 351.086

### **Employees with Multiple Classifications**

Employees who perform more than one classification of work must be paid the applicable prevailing wage rate for the time spent working in each classification. It is the employer's responsibility to track separately the hours spent by each employee doing each job classification, and to report them separately on the certified payroll. If this is not done, the employee should be paid for all hours worked at the highest rate the employee earned that week.

### **Work Schedules**

Contractors and subcontractors must give workers the regular work schedule (days of the week and number of hours per day) in writing, before beginning work on the project. Contractors and subcontractors may provide the schedule at the time of hire, prior to starting work on the contract, or by posting the schedule at the work site, along with the prevailing wage rate information and any fringe benefit information. If an employer fails to give written notice of the worker's schedule, the work schedule will be presumed to be a five-day schedule. The schedule may only be changed if the change is intended to be permanent and is not designed to evade the PWR overtime requirements. ORS 279C.540(2); OAR 839-025-0034

### **Apprentices and Trainees**

Workers may be paid the applicable apprentice or trainee rate only if BOLI's Apprenticeship and Training Division or the federal Bureau of Apprenticeship and Training has registered them as apprentices or trainees. OAR 839-025-0035(9) and (10); OAR 839-025-0060; OAR 839-025-0065

Contractors and subcontractors must comply with the ratio of journey workers to apprentices specified in the apprenticeship standards. Contractors and subcontractors who do not comply with these ratios must pay all apprentices the full prevailing wage rate.

In trades where apprentices customarily receive only a portion of the hourly fringe benefit amount, registered apprentices may be paid the base rate pursuant to their apprenticeship agreement and the fringe benefit rate according to the prevailing practice in the region in which they are performing work. Otherwise, apprentices must be paid the full fringe benefit portion of the prevailing wage rate. OAR 839-025-0040(2)

### **Owners, Managers, and Supervisors**

The requirement to pay the applicable prevailing rate of wage may apply to owners, managers and supervisors. If owners, managers or supervisors perform manual labor on a public works project for more than 20 percent of their workweek, they must be paid the applicable prevailing rate of wage for the type of work performed during those hours, and those hours must be reported on the certified payroll. On the other hand, if owners, managers or supervisors spend 20 percent or less of their workweek performing manual labor on a public works project, they do not need to be paid prevailing wages, nor do their hours need to be reported on the certified payroll. OAR 839-025-0035(3) and (4)

For example, if a supervisor works 42 hours one week, and during that week spends a total of nine hours, which equals 21.4 percent of 40 hours, throughout the week performing manual labor on a public works project (or on several public works projects), the supervisor would need to be paid the appropriate prevailing wage rate for those nine hours of work.

The PWR law does not apply to “owner-operators” of trucks. Drivers who own and operate their own trucks, and who are independent contractors, do not need to be paid prevailing wages for the time spent driving their own trucks. Operators of other equipment or motor vehicles are not exempt.

### **Site of Work**

Contractors and subcontractors must pay prevailing wages for work done at the site of work. The site of work is the physical place where the construction called for in the project contract will remain after the work is complete.

For purposes of Oregon’s PWR law, site of work also includes pits, batch plants, tool-yards and similar locations that are within a reasonable distance of the structure. Any such locations established after the project was first advertised for bid are considered “dedicated” and are part of the site of work. Even if the pit, batch plant or tool-yard was opened before the first advertisement, it is part of the site of work if it is dedicated or nearly so to the PWR project. Work performed on a dedicated site must be paid at the appropriate prevailing wage rate, as does the drive time between the dedicated site and the project site. OAR 839-025-0004(25); OAR 839-025-0035(5), (6), and (7)

On public works projects that are subject to the Davis-Bacon Act, pits, batch plants, tool-yards and other locations will only be considered “dedicated” to the project if they are adjacent or virtually adjacent to the project site. ORS 279C.838(2)

### **Truck Drivers**

Truck drivers, parts runners and other delivery personnel working for contractors and subcontractors are generally not due the prevailing rate of wage for delivery to and from the site of work. However, if driving takes place on the site of work, or if these workers are engaged in performing other manual work at the work site, the applicable prevailing wage rate must be paid to the workers for time spent on site. For enforcement purposes, truck drivers performing delivery for a construction contractor or subcontractor must be paid prevailing wages if they perform 15 minutes or more of driving or other work at the work site. OAR 839-025-0004(30); OAR 839-025-0035(7)

Truck drivers performing delivery for a commercial supplier are not generally due prevailing wages for incidental work performed on the project site. These workers are due prevailing wages only if they spend more than 20 percent of their time during a workweek engaged in work on the project site. OAR 839-025-0035(6)

A commercial supplier who enters into a construction contract on a PWR project is a construction contractor for purposes of the law and must comply with the law as it applies to construction contractors.

On public works projects that are subject to the Davis-Bacon Act, delivery personnel are not due prevailing wages unless they spend more than an incidental amount of time engaged in work on the project site. For enforcement purposes, an incidental amount of time is generally considered to be more than 20 percent of the workweek. ORS 279C.838(3)

The PWR law does not apply to “owner-operators” of trucks. Drivers who own and operate their own trucks and who are independent contractors do not need to be paid prevailing wages for the time spent driving their own trucks. Operators of other equipment or motor vehicles are not exempt.

### **Fringe Benefits**

Employers may claim credit for “bona fide” fringe benefits they provide to their employees. The employer’s contribution must be made for the benefit of the employee, must not be required by law, and must be made on a regular basis (at least quarterly). Plans that provide for delayed vesting or have eligibility requirements are “bona fide” if they meet the other requirements. Safety training, drug testing, state industry council contributions, trade promotion funds, equipment costs, travel pay, per diem payments and workers’ compensation insurance do not qualify as fringe benefits. ORS 279C.800(1); OAR 839-025-0004(8)

### **Examples of Bona Fide Fringe Benefits**

- Health and welfare plans
- Vacation plans
- Pension plans, in some cases
- Apprenticeship training

See Appendix A for more information on fringe benefits and their required qualifications, and for instructions on how to calculate the amount that may be credited for payments into fringe benefit programs.

When reporting fringe benefit credits on certified payroll reports, these must be listed separately for each employee, by plan name, showing the hourly credit taken for each plan.

## **Required Postings**

### **Prevailing Wage Rates**

Each and every contractor and subcontractor must post the applicable prevailing wage rates and fringe benefit plan information in a conspicuous place at the work site so workers have ready access to the information. ORS 279C.840(4); OAR 839-025-0033(1)

### **Details of Fringe Benefit Programs**

Contractors and subcontractors must post the details of all fringe benefit plans or programs if any contributions are made to a third party for fringe benefits. The posting should include a description of the plan, information about how to file a claim and where to obtain more information. ORS 279C.840(5); OAR 839-025-0033(2)

### **Work Schedule**

Contractors and subcontractors must give workers the regular work schedule (days of the week and number of hours per day) in writing, before beginning work on the project. Contractors and subcontractors may provide the schedule at the time of hire, prior to starting work on the contract, or by posting the schedule at the work site, along with the prevailing wage rate information and any fringe

benefit information. If an employer fails to give written notice of the worker's schedule, the work schedule will be presumed to be a five-day schedule. The schedule may only be changed if the change is intended to be permanent and is not designed to evade the PWR overtime requirements. ORS 279C.540(2); OAR 839-025-0034

## **Certified Payroll**

### **Filing Requirements**

Every contractor and subcontractor on a covered project must file certified payroll records with the public agency. Contractors and subcontractors must complete a certified payroll statement for each week a worker is employed on a public work. These certified payroll statements must be submitted once a month, by the fifth business day of the following month, to the public agency. ORS 279C.845; OAR 839-025-0010

### **Certified Payroll Form**

To help contractors and subcontractors satisfy the filing requirement, form WH-38 is included in each PWR rate book, and it can also be found on BOLI's website at [www.oregon.gov/boli](http://www.oregon.gov/boli). BOLI does not require contractors and subcontractors to use this form, but they must supply all information the form requests (unless otherwise noted), and this information must be certified. Contractors and subcontractors using their own forms or reports can comply with the certification requirement by attaching and completing a copy of the certified statement from the WH-38 form to their filing.

For each worker, contractors and subcontractors must submit name and address, work classification, the number of hours worked each day, the pay rate, gross amount paid, deductions and net amount paid, and the amount contributed to any party, plan or program for fringe benefits and the type of benefit provided. If fringe benefits are provided to workers as wages, this should be shown as well. If owners, managers or supervisors have earned prevailing wages during the week, they must also appear on the certified payroll report, showing all the same information as that required for other workers, although deductions and net amount paid may not apply to owners.

To meet filing requirements, the employer must sign the certified statement to confirm that the information is true and complete. Unsigned reports do not satisfy the filing requirement. Submitting false or incomplete information may be the basis for civil penalties or debarment.

### **Multiple Work Classifications**

If an employee works in more than one classification, the contractor or subcontractor must carefully track how much time is spent doing each type of work. Contractors and subcontractors must pay employees the applicable prevailing rate for the hours they spend in each work classification. If the contractor's records do not clearly show the time spent in each classification, the contractor must pay the worker at the highest classification rate for all hours worked.

### **Withholding Retainage**

The PWR law requires prime contractors to withhold 25 percent of any amount earned by a first-tier subcontractor if the subcontractor does not turn in its certified payroll reports each month. Once the certified payroll reports have been submitted, the prime contractor must pay the 25 percent withheld within 14 days. ORS 279C.845(8); OAR 839-025-0010(6)

## **Other Contractor Responsibilities**

### **Required Records**

All contractors and subcontractors who work on public works projects must maintain records showing that the appropriate prevailing rate of wage and overtime rate has been paid to all workers. These records must be maintained for a minimum of three years from the completion of work on public works project. OAR 839-025-0025

Examples of records that must be maintained include:

- Certified payroll reports
- Name and address of each employee
- Work classifications of each employee
- The rates of wages and fringe benefits paid to each employee
- Daily and weekly hours worked by each employee
- Total daily and weekly compensation paid to each employee
- All withholdings and deductions taken from each employee's pay
- Any and all payroll records pertaining to the employees working on the public works project
- All apprenticeship and training agreements

### **Annual Survey Requirements**

Every year, the Oregon Employment Department, under the direction of BOLI, conducts a comprehensive geographical wage survey on Oregon's non-residential construction industry. Completion of the annual survey is mandatory, and all survey responses are kept confidential. Although residential construction hours are not included in the data, residential contractors must respond to the survey each year.

BOLI uses the data from the annual survey to set the state prevailing wage rates. This is why it is important for *every* contractor and subcontractor to complete and return the survey. The information requested is essential, and failure to respond to the survey as required may result in the assessment of civil penalties against a non-responding contractor. ORS 279C.815

## **A Checklist for Contractors and Subcontractors**

- Respond promptly and accurately to communications from BOLI.
- File a public works bond with CCB before starting work on a public works project.
- Before allowing a subcontractor to work on a PWR project, ensure the subcontractor has filed a public works bond with CCB.
- Verify that any subcontractor contracted with is not on BOLI's current *List of Contractors Ineligible to Receive Public Works Contracts*. This list of debarred contractors is on BOLI's website at [www.oregon.gov/boli](http://www.oregon.gov/boli).
- Include in every contract and subcontract a provision that the workers will be paid not less than the applicable prevailing wage rate for the type of work being performed.
- Ensure that all subcontractors and employees know that they are working on a prevailing wage rate job.
- Ensure that supervisors and foremen know how to properly classify workers.
- Keep accurate daily records. Show the amount of time each worker spends in each classification of work.

- ❑ Review employee time cards often to ensure times and duties are reported accurately. Have employees sign in and out for the day and for lunch.
- ❑ File accurate and complete certified payrolls with the public agency.
- ❑ Notify employees of their work schedules, in writing and prior to beginning work.
- ❑ Post the prevailing wage rates in a conspicuous place on the project site.
- ❑ Post the details of any benefit plans in a conspicuous place on the project site.
- ❑ Keep all required records for at least three years.
- ❑ Return wage surveys promptly and with accurate information.

**Additional Items for Prime Contractors:**

- ❑ Withhold 25 percent of amounts earned by a first-tier subcontractor if the subcontractor does not turn in its certified payroll reports as required.
- ❑ Review the certified payroll and oversee the job site to confirm that subcontractors are properly classifying and paying their workers.
- ❑ Post any required payment bond.

## **Prevailing Wage Rate Law Enforcement**

BOLI's enforcement goal is compliance. The bureau has a variety of enforcement tools that range from education and training to civil penalties, debarment and other sanctions. BOLI uses the appropriate sanction to fit the violation. For example, if a contractor, subcontractor or agency accidentally violates PWR law, BOLI considers the violating party's willingness to cooperate and correct the problem when it determines an enforcement action. In such cases, BOLI may direct the agency, contractor or subcontractor to attend a training course on PWR law, and ask for a commitment of future compliance. For willful or repeated violations of the law, it is more likely that BOLI will impose civil penalties or debar a violating contractor from working on public works projects for three years. ORS 279C.860 and 279C.865; OAR 839-025-0085 and 839-025-0520

### **Agency Liability**

A public agency must give adequate notice to the contractor that PWR law applies to the project. Failure to treat the project as subject to PWR law may make the agency liable for unpaid wages, civil penalties or orders to ensure compliance with the law.

### **Unpaid Prevailing Wages**

The public agency is jointly liable for any unpaid prevailing wages unless the contract documents contain a statement requiring the contractor and all subcontractors to comply with ORS 279C.840. If the contractor had notice that the project is covered by PWR law, the public agency's liability is joint and several with any contractor or subcontractor that had notice of the requirement to comply with ORS 279C.840, for any unpaid prevailing wages. ORS 279C.855(3); OAR 839-025-0080(4)

If a public works project is subject to the Davis-Bacon Act but the public agency fails to include the state and federal prevailing rates of wage in the specifications, or fails to include in the specifications information showing which prevailing rate of wage is higher, and the workers on the project are paid the lower rather than the higher prevailing wage rate, the public agency is liable to the workers for the difference between the lower and the higher rate, plus an equal amount as liquidated damages, for every hour worked. ORS 279C.855(4); OAR 839-025-0080(6)

If a contract requires a payment bond or other security and the agency fails to obtain it, the agency and the officers authorizing the contract are jointly liable with the contractor for any unpaid prevailing wages. ORS 279C.625; ORS 279C.380; ORS 279C.400

### **Civil Penalties for Public Agencies**

BOLI may impose civil penalties of up to \$5,000 per violation. ORS 279C.865; OAR 839-025-0500 *et seq.*

Violations include:

- Failing to include or reference the applicable prevailing wage rates in the contract specifications.
- Failing to include in the contract specifications a provision that the contractor and every subcontractor must file a public works bond with the CCB before starting work on the project.
- Awarding a contract to a debarred contractor.
- Failing to include in the contract a provision that workers shall be paid prevailing wages.
- Failing to include in the contract a provision requiring the contractor to file a public works bond with the CCB before starting work on the project.

- Failing to include in the contract a provision requiring the contractor to include in every subcontract a provision requiring the contractor to file a public works bond with the CCB before starting work on the project.
- Failing to pay a PWR fee to BOLI.
- Failing to notify BOLI when a contract is awarded.
- Failing to include a copy of the disclosure of first-tier subcontractors with the Notice of Award.
- Failing to retain 25 percent of the amount the contractor earned when the contractor fails to submit certified payroll reports as required.
- Dividing a project to avoid paying the PWR.
- Circumventing PWR laws in any way.

### **Compelling Compliance**

BOLI may issue an order compelling an agency to comply with the PWR law. ORS 279C.827(1)(b)

### **Contractor Liability**

If a contractor or subcontractor does not fulfill obligations under the PWR law, there are a number of possible consequences.

#### **Unpaid Prevailing Wages**

Any contractor or subcontractor failing to pay prevailing wages as required is liable for the amount of underpayment. ORS 279C.855(1); OAR 839-025-0080(1)

#### **Liquidated Damages**

Contractors and subcontractors may also be liable for liquidated damages equal to the amount of unpaid wages. For example, if a contractor or subcontractor underpaid an employee by \$1,500, the contractor, subcontractor or surety thereof is responsible for the unpaid wages plus an equal amount in liquidated damages for a total of \$3,000. The liquidated damages are twice the amount of unpaid overtime wages if payroll records have been falsified. ORS 279C.855(1), ORS 279C.540(9), OAR 839-025-0080(2) and (3)

#### **Prime Contractor Liability for the Violations of a Subcontractor**

If a subcontractor fails to pay prevailing wages, any employee may file a claim against the prime contractor's bond. The prime contractor may be responsible for any underpayment of the subcontractor's employees. ORS 279C.855(2)

#### **Civil Penalties**

BOLI may impose civil penalties against contractors and subcontractors for any violation of the prevailing wage statutes or administrative rules, even if there was no underpayment of wages. Such violations include failing to respond to a wage survey, failing to file a public works bond with the CCB, failing to post required information at the job site or failing to file certified payroll reports. BOLI may impose penalties up to \$5,000 per violation. If violations are ongoing, each day counts as a separate violation. ORS 279C.865; OAR 839-025-0500 *et seq.*

BOLI considers many factors when imposing civil penalties, including:

- Previous or repeated violations.
- The severity of the violations.
- Whether the contractor or subcontractor knew, or should have known, about the violations.

- How difficult it would have been for the contractor or subcontractor to comply.
- The contractor's/subcontractor's response to the violations.

It is important for contractors and subcontractors to cooperate with investigations and correct any violations as quickly as possible to reduce any civil penalties that the bureau may impose.

### **Warning Letters**

BOLI may send warning letters to contractors and subcontractors who have violated the PWR law. BOLI imposes significantly higher penalties against contractors and subcontractors who commit violations after receiving a warning letter, up to and including assessing maximum civil penalties and debarment.

### **Debarment**

For willfully violating the PWR law, BOLI may debar a contractor or subcontractor from receiving public contracts (except for federal contracts) in Oregon for up to three years. The bureau may also personally debar the officers of a debarred corporation. BOLI may debar a subcontractor, even if the violation was not willful, if the subcontractor did not pay prevailing wages to workers and the prime contractor had to pay them. BOLI maintains a list of debarred contractors, referred to as the "List of Ineligibles." This list is included in each published rate book and is available on the BOLI website at [www.oregon.gov/boli](http://www.oregon.gov/boli). ORS 279C.860; OAR 839-025-0085 *et seq.*

### **Prohibited Practices**

PWR law prohibits anyone from trying to circumvent the law. Such activity includes hiring contractors or subcontractors who are on the ineligible list or falsifying certified payroll records. ORS 279C.840(7); OAR 839-025-0300; OAR 839-025-0340

### **Dividing Projects**

Public contracting agencies must not divide a public works project into more than one project for the purpose of avoiding compliance with the PWR law. ORS 279C.827; OAR 839-025-0310

BOLI considers the following factors when deciding if separate contracts actually constitute a single project:

- The physical separation of project structures;
- Whether a single public works project includes several types of improvements or structures;
- The anticipated outcome of the particular improvements or structures the agency plans to fund;
- Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;
- Whether the work on the project is performed in one time period or in several phases as components of a larger entity;
- Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;
- The manner in which the public agency and the contractors administer and implement the project;
- Other relevant matters as may arise in any particular case.

### **Payment of Prevailing Wage by Persons Other than Contractors or Subcontractors**

The law forbids any third party to pay any portion of the prevailing wages owed. This most often occurs in "market targeting" plans. **Exception:** Government agencies may pay a portion of the prevailing wages pursuant to a bona fide worker training or retraining program. ORS 279C.840(6); OAR 839-025-0320

**Wage Averaging**

The PWR law also bans wage averaging. Wage averaging is lowering workers' wages on non-PWR jobs to compensate for higher rates contractors or subcontractors pay on covered jobs. ORS 279C.840(7); OAR 839-025-0330

## **Appendix A – Computing the Allowable Hourly Credit for Fringe Benefit Contributions**

Oregon’s PWR law and the federal Davis-Bacon Act are similar regarding fringe benefits. To qualify for any credit, the fringe benefit plan must meet all of the following requirements:

- Contributions must be made regularly, and at least on a quarterly basis.
- Contributions made for prevailing wage work may not be used to fund the plan or program for periods of non-prevailing wage rate work.
- Contributions must not be required by law (such as taxes, workers’ compensation, etc.)
- Contributions must be irrevocable and for the employee’s benefit.

### **Hourly Contributions**

If a contractor or subcontractor makes contributions on a per hour basis for all hours worked, including both PWR and non-PWR hours, credit may be taken for the amount contributed to the plan each hour for each employee. For example, a contractor paying \$2.78 per employee hour into a qualifying health plan may credit \$2.78 per hour towards the hourly fringe benefit requirements.

### **Weekly, Monthly or Quarterly Contributions**

If a contractor or subcontractor makes a flat weekly, monthly or quarterly contribution to a qualifying plan for an employee, the allowable hourly credit is calculated by dividing the contribution amount by the total number of hours, both PWR and non-PWR hours, the employee worked during the contribution period. For example, if the employer contribution one month was \$250, and if the employee worked 170 hours that month, the credit would be \$1.47 per hour (\$250 per month / 170 hours worked = \$1.47 per hour credit).

The general formula to use is as follows:

$$\begin{aligned} & \text{Amount of contribution paid on behalf of the employee} \\ \div & \text{ All hours worked by the employee during the contribution time period (including non-PWR} \\ & \text{hours)} \\ = & \text{ Allowable hourly equivalent fringe benefit credit.} \end{aligned}$$

### **Calculate Credits Separately for Each Employee**

The allowable hourly credit must be determined and tracked separately for each employee because the credit is based on figures that will vary from person to person, depending on the benefit contribution amount for each particular employee and the number of hours that the employee worked during the contribution period.

### **Employer’s Contribution**

Only the employer’s contribution toward a benefit plan may be used to calculate the allowable hourly credit. If an employee contributes toward a benefit plan, the amount of the employee’s contribution may not be used in calculating the credit.

### **Eligibility Requirements**

Eligibility requirements for a plan, such as a waiting period, are permissible. However, during the period in which an employee is ineligible to participate in the plan, no credit may be taken against the hourly fringe benefit amount due that employee. Pension plans with vesting provisions are eligible if they meet the requirements of the ERISA. (See Appendix B for contact information about ERISA.)

## **Pension Plans**

In addition to the general contribution requirements listed previously, contributions to a pension plan *must* be made to a trustee or to a third person. The “third person” must not be affiliated with the contractor or subcontractor, and the trust or fund must be set up in such a way that in no event will the contractor or subcontractor be able to recapture any of the contributions paid into the plan, or in any way divert the funds to his or her own use or benefit.

## **Unequal Contributions**

If a defined contribution pension plan provides for a higher hourly rate of contribution on PWR-covered work than for non-covered work, the higher rate paid for PWR work may be fully credited only if the plan provides for immediate participation by employees and 100 percent vesting after an employee works no more than 500 hours.

For example, if an employer contributes \$1.00 per hour to a pension plan for each PWR hour worked, and contributes \$.25 per hour for each non-PWR hour worked, the employer may only take the full credit of \$1.00 per hour if the pension plan allows for immediate participation and vesting as outlined above.

If unequal contributions are made to a defined contribution pension plan, and the plan does not provide for immediate participation and vesting as outlined above, the allowable credit is based on the average contribution the employer made over the previous fiscal year. The total pension benefit contributions made during this twelve-month period should be divided by the total number of hours worked (including non-PWR hours) during that period. The result is an average hourly contribution the employer may claim.

As an example, an employer contributes \$1.00 per hour to a pension plan for each PWR hour worked, and contributes \$.25 per hour for each non-PWR hour worked. During the previous year, the employee worked 1,500 PWR hours and 500 non-PWR hours. The total contribution for this year would be \$1,625 ((1,500 PWR hours x \$1.00 per hour) + (500 non-PWR hours x \$.25 per hour) = \$1,625). The total yearly contribution of \$1,625 would then be divided by 2,000 hours, which is the total number of hours worked during the year. The resulting credit would be \$.81 per hour ( $\$1,625 / 2,000 \text{ hours} = \$.81$ ).

## **Unfunded Plans**

Employers may offer benefits to employees such as vacation, sick and holiday pay. Because employers do not generally put money aside for these benefits, they are referred to as “unfunded” plans. Employers may take a credit for such benefits, but the plan must meet several requirements:

- The plan must actually provide a benefit to the employees.
- The benefit must represent a commitment that can be legally enforced.
- The benefit must be carried out under a financially responsible plan or program.
- The plan or program providing the benefit must be communicated in writing to the employees.

Unless all of these conditions are met, the employer may not take a credit for an unfunded plan.

Calculating the allowable hourly credit for unfunded plans is similar to other credit computations: The total benefit amount for a contribution period is divided by the total hours worked during the contribution period. As an example, an employee may earn 40 hours of vacation per year. If the employee’s regular rate of pay is \$10 per hour, the total yearly benefit amount is \$400 (40 hours x \$10 per hour = \$400). If the employee worked 2000 hours during the year, the allowable hourly credit for vacation benefits would be \$.20 per hour ( $\$400 / 2000 \text{ hours} = \$.20$ ).

The employer must carefully track the amount of unfunded benefits an employee earns and uses. If an employee quits or is terminated and has a “balance” of earned vacation, sick or holiday pay that has not

been used, this “balance” must be paid to the employee with the final paycheck.

**Qualified Apprenticeship Programs**

If a contractor or subcontractor employs workers who are registered in a bona fide apprenticeship or training program with BOLI’s Apprenticeship and Training Division, the costs incurred by the contractor or subcontractor in that program may be taken as a credit. Only the actual costs incurred for the training program, such as instruction, books, tools and materials, may be credited. However, time or costs involved in administering the program may not be included in the actual costs of the training program.

Each trade or classification must be treated separately, and the cost incurred for apprenticeship training for one classification may not be used to offset costs required to be incurred for another classification. For example, a contractor may not claim credit for apprenticeship training costs that were actually incurred for electricians and apply that credit toward meeting the prevailing wage obligation for carpenters.

Rather than contribute to an apprenticeship training fund on an hourly basis, some employers contribute a lump sum in advance for the annual cost of the program. If the employer does not make contributions on an hourly basis, the hourly credit should be calculated as follows:

Total contributions to a qualified apprenticeship or training program for a certain classification over a time period

÷            The total number of hours worked by all employees in that classification

=            Hourly credit allowed.

**Reporting Hourly Fringe Benefits**

Each fringe benefit contribution must be listed *as an hourly rate* on certified payroll reports, and the hourly rate must be reported individually for each worker.

For example, if an employer pays \$250 one month for a bona fide benefit for an employee, and that translates into a credit of \$1.47 per hour, the employer must report \$1.47 per hour credit on the certified payroll report rather than the monthly payment of \$250.

If an employer does not offer any bona fide fringe benefits to an employee, the entire PWR hourly fringe rate must be paid to the worker as wages on regular payroll dates. All hourly fringe benefits that are paid as wages to an employee must be reported separately from the hourly base wages on certified payroll reports.

**Posting Details of the Plans on the Project Site**

Every contractor and subcontractor must post the details of all fringe benefit plans or programs if any contributions are made to a third party for fringe benefits. The posting should include a description of the plan, information about how to file a claim and where to obtain more information.

## **Appendix B – Contacts**

### **Oregon Bureau of Labor and Industries**

800 N.E. Oregon Street, #1045

Portland, Oregon 97232

[www.oregon.gov/boli](http://www.oregon.gov/boli)

#### **Apprenticeship and Training Division**

(971) 673-0760

#### **Civil Rights Division**

(971) 673-0761

#### **PWR Technical Assistance for Employers**

(971) 673-0838

#### **Technical Assistance for Employers (non-PWR)**

(971) 673-0824

#### **Wage and Hour Division**

(971) 673-0761

### **Construction Contractors Board**

P.O. Box 14140

700 Summer St NE, Suite 300

Salem, Oregon 97309-5052

(503) 378-4621 Ext. 4900

[www.oregon.gov/ccb](http://www.oregon.gov/ccb)

### **United States Department of Labor**

Wage and Hour Division

1515 SW Fifth, Suite 1040

Portland, Oregon 97201

(503) 326-3057 Ext. 5

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## Appendix C – Calculating Weighted Average Overtime

In all of these examples, overtime is being computed as though there is a five-day work schedule. Daily overtime is computed for hours worked after eight in a day.

If a contractor or subcontractor adopts a work schedule of four consecutive days, rather than five (Monday through Thursday, or Tuesday through Friday), daily overtime would be computed for hours worked after ten in a day, rather than eight. The following examples work for any situation:

### EXAMPLE 1:

John Doe worked on a public works contract during the period July 15 to July 31. Doe’s base rate of pay as determined by BOLI was \$12.50 per hour. His fringe benefits amount to \$3.50 for a total of \$16.00 per hour. The contractor pays the fringe benefits to a trustee pursuant to a bona fide plan.

WEEK #1							Total
S	M	T	W	T	F	S	
			15	16	17	18	
			8	7	10		25

Doe worked 10 hours on Friday, July 17 (two overtime hours). He did not work on Saturday or over 40 hours during the week. There were no holidays worked. The \$3.50 per hour fringe benefit is not included with the hourly rate for overtime computation purposes. Doe’s earnings in Week #1 are therefore:

$$\begin{aligned}
 \$12.50/\text{hr} \times 25 \text{ hrs} &= \$312.50 \\
 \$6.25/\text{hr} \times 2 \text{ hrs} &= \underline{\$12.50} \\
 \text{Gross Wages Earned} &= \underline{\underline{\$325.00}}
 \end{aligned}$$

WEEK #2							Total
S	M	T	W	T	F	S	
19	20	21	22	23	24	25	
	6	4	10	13	2	5	40

Doe worked 40 hours during the week, seven of which were hours worked over eight in one day (July 22 and July 23) and five of which were worked on Saturday, July 25 (total of 12 overtime hours). As in Week #1, fringe benefits are excluded from the overtime computation. Doe’s earnings in Week #2 are therefore:

$$\begin{aligned}
 \$12.50/\text{hr} \times 40 \text{ hrs} &= \$500.00 \\
 \$6.25/\text{hr} \times 12 \text{ hrs} &= \underline{\$75.00} \\
 \text{Gross Wages Earned} &= \underline{\underline{\$575.00}}
 \end{aligned}$$

WEEK #3							Total
S	M	T	W	T	F	S	
26	27	28	29	30	31		
6	10	10	10	10	4		50

Doe worked 50 hours during the week, eight of which were hours worked over eight per day and six of which were hours worked on Sunday, July 26, which is a holiday as defined in ORS 279C.540 (total of 14 overtime hours). As in Week #1, fringe benefits are excluded from the overtime computations. Doe's earnings in Week #3 are therefore:

$$\begin{array}{rcl}
 \$12.50/\text{hr} \times 50 \text{ hrs} & = & \$625.00 \\
 \$6.25/\text{hr} \times 14 \text{ hrs} & = & \$87.50 \\
 \text{Gross Wages Earned} & = & \underline{\$712.50}
 \end{array}$$

**EXAMPLE 2:**

Assume John Doe's hours worked and fringe benefits paid were the same as in Example 1 above. Assume, however, that Doe's hourly base rates varied because he was employed in more than one classification, as follows:

**WEEK #1**

S	M	T	W	T	F	S	Total
			15	16	17	18	
			8	7	10		25

Doe worked all of Wednesday and Thursday (July 15-16) at \$12.50 per hour. On Friday, July 17, he worked seven hours at \$12.50 per hour and three hours at \$13.10 per hour. As required by OAR 839-025-0050(2)(b), because Doe worked two hours overtime on Friday and worked that day at two different rates, the weighted average of his base rates of pay must be calculated in order to compute his overtime rate for that day. Doe's weekly earnings would be as follows:

Straight time:

$$\begin{array}{rcl}
 \$12.50/\text{hr} \times 22 \text{ hrs} & = & \$275.00 \\
 \$13.10/\text{hr} \times 3 \text{ hrs} & = & \underline{\$39.30} \\
 & & \$314.30 \quad \mathbf{\$314.30}
 \end{array}$$

+

Overtime:

$$\begin{array}{rcl}
 *\$6.34/\text{hr} \times 2 \text{ hrs} & = & \$12.68 \quad \underline{\mathbf{\$12.68}}
 \end{array}$$

**Gross wages earned = \$326.98**

\*To calculate 1/2 the weighted average:

$$\begin{array}{rcl}
 (\$12.50/\text{hr} \times 7 \text{ hrs}) + (\$13.10/\text{hr} \times 3 \text{ hrs}) & = & \$126.80 \\
 \$126.80 \div 10 \text{ hrs} & = & \$12.68 \\
 \$12.68 \times .5 & = & \$6.34
 \end{array}$$

**WEEK #2**

S	M	T	W	T	F	S	Total
19	20	21	22	23	24	25	
	6	4	10	13	2	5	40

Doe worked at \$12.50 per hour, except four hours on Wednesday, July 22, where he worked at \$11.75 per hours, and five hours on Saturday, July 25, at \$12.10 per hour. Doe's weekly earnings are as follows:

Straight time:	
\$12.50/hr x 31 hrs	= \$387.50
\$11.75/hr x 4 hrs	= \$47.00
\$12.10/hr x 5 hrs	= <u>60.50</u>
	\$495.00 <b>\$495.00</b>
	+
Overtime:	
\$6.25/hr x 5 hrs	= \$31.25 (July 23)
*\$6.10/hr x 2 hrs	= \$12.20 (July 22)
**\$6.05/hr x 5 hrs	= <u>\$30.25</u> (July 25)
	\$73.70 <b>\$73.70</b>
<b>Gross wages earned</b>	<b>= \$568.70</b>

\*To calculate 1/2 the weighted average on July 22:

(\$12.50/hr x 6 hrs) + (\$11.75/hr x 4 hrs)	=	\$122.00
\$122.00 ÷ 10 hrs	=	\$12.20
\$12.20 x .5	=	\$6.10

\*\*All work performed on Saturday, July 25, is overtime, as defined in ORS 279C.540. Therefore, Doe is paid overtime pay for the entire five hours that he worked.

**WEEK #3**

S	M	T	W	T	F	S	Total
26	27	28	29	30	31		
6	10	10	10	10	4		50

On Sunday, July 26, Doe worked six hours at \$10.50 per hour. Since Sunday is a holiday as defined in ORS 279C.540, he is paid overtime for the entire day. Doe worked at \$12.50 per hour July 27-30. On each of those days he worked two hours overtime, totaling eight hours of overtime pay. On July 31 he worked four hours at \$11.00 per hour. Doe's weekly earnings are as follows:

Straight time:	
\$12.50/hr x 40 hrs	= \$500.00
\$10.50/hr x 6 hrs	= \$63.00
\$11.00/hr x 4 hrs	= <u>44.00</u>
	\$607.00 <b>\$607.00</b>
	+
Overtime:	
\$6.25/hr x 8 hrs	= \$50.00
\$5.25/hr x 6 hrs	= <u>\$31.50</u> (July 26)
	\$81.50 <b>\$81.50</b>
<b>Gross wages earned</b>	<b>= \$688.50</b>

**EXAMPLE 3:**

For the example week ending June 3, John Doe worked a total of 61.5 hours. Thirty of the hours in the example week were non-PWR, worked at the rate of \$9.50 per hour; 31.5 hours were PWR, earned at the base rate of \$16.99 and fringe rate of \$5.97 per hour. OAR 839-025-0050(2)(b) requires that when an employee works at multiple rates of pay and earns overtime, the overtime rate must be calculated using a weighted-average method based on all rates earned, as shown in this example.

	S	M	T	W	T	F	S	Total	>40
	28	29	30	31	1	2	3		
PWR		12	10	9.5	10	10	10	31.5	14
Non-PWR								30	

There were 7.5 hours of daily PWR overtime earned from June 29-31. The 7.5 hours were subtracted from the 61.5 hours worked, leaving 54 hours that week. Of these 54 hours, 14 were overtime hours over 40 in the workweek.

Straight time:

$$\begin{aligned}
 \$9.50/\text{hr} \times 30 \text{ hrs} &= \$285.00 && \text{non-PWR} \\
 \$16.99/\text{hr} \times 31.5 \text{ hrs} &= \underline{+\$535.19} && + \text{PWR} \\
 &&& \mathbf{\$820.19}
 \end{aligned}$$

Overtime:

$$\begin{aligned}
 *\$820.19 \div 61.5 &= \$13.34 \\
 **\$13.34 \times .5 &= \$6.67 \\
 ***\$6.67 \times 14 &= \mathbf{\$93.38}
 \end{aligned}$$

- \* Divide the total straight-time wages earned by the total number of hours worked;
- \*\* Multiply \* rate by .5; and
- \*\*\* Multiply \*\* rate by the number of hours over 40 = **weighted average portion of overtime still owed.**

$$\begin{aligned}
 \text{Total Wages Earned} &= \mathbf{\$820.19} \\
 \text{Weighted Ave. OT} &= \mathbf{\$93.38} \\
 \text{PWR Daily OT} &= \mathbf{\$63.75} \quad \dagger \text{ (see below)} \\
 \text{PWR Fringe Benefits} &= \underline{\mathbf{\$188.06}} \quad \ddagger \text{ (see below)}
 \end{aligned}$$

$$\mathbf{\text{Gross wages earned} \quad \$1,165.38}$$

† ((\\$16.99/hr x .5) x 7.5 hours daily PWR OT  
 ‡ (\\$5.97/hr x 31.5 PWR hours)

## Appendix D – Oregon Revised Statutes, 2007 Edition

### Definitions for Public Contracting Code

279A.010 Definitions for Public Contracting Code

#### Penalties

279A.990 Penalties

#### Hours of Labor

279C.540 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules

279C.545 Time limitation on claim for overtime; posting of circular by contractor

#### Action on Payment Bonds and Public Works Bonds

279C.600 Right of action on payment bond or public works bond of contractor or subcontractor; notice of claim

279C.605 Notice of claim

279C.610 Action on contractor's public works bond or payment bond; time limitation

279C.615 Preference for labor and material liens

279C.620 Rights of person providing medical care to employees of contractor

279C.625 Joint liability when payment bond not executed

#### Prevailing Wage Rate

279C.800 Definitions for ORS 279C.800 to 279C.870

279C.805 Policy

279C.807 Workforce diversity for public works projects

279C.808 Rules

279C.810 Exemptions; rules

279C.815 Determination of prevailing wage; sources of information; comparison of state and federal prevailing wage; other powers of commissioner

279C.817 Determination of applicability of prevailing wage rate; time limitation; hearing; rules

279C.820 Advisory committee to assist commissioner

279C.825 Fees; rules

279C.827 Division of public works project; applicability of prevailing wage rate to divided projects

279C.830 Provisions concerning prevailing rate of wage in specifications, contracts and subcontracts; applicability of prevailing wage; fee; bond

279C.835 Notifying commissioner of public works contract

279C.836 Public works bond; rules

279C.838 Applicability of state and federal rates of wage; determination of site of project; determination of applicability of wage to transportation workers; waiver

279C.840 Payment of prevailing rate of wage; posting of rates and fringe benefit plan provisions

279C.845 Certified statements regarding payment of prevailing rates of wage; retainage

279C.850 Inspection to determine whether prevailing rate of wage being paid; civil action for failure to pay prevailing rate of wage or overtime

279C.855 Liability for violations

279C.860 Ineligibility for public works contracts for failure to pay or post notice of prevailing rates of wage; certified payroll reports to commissioner

279C.865 Civil penalties

279C.870 Civil action to enforce payment of prevailing rates of wage

**279A.010 Definitions for Public Contracting Code.** (1) As used in the Public Contracting Code, unless the context or a specifically applicable definition requires otherwise:

(a) "Bidder" means a person that submits a bid in response to an invitation to bid.

(b) "Contracting agency" means a public body authorized by law to conduct a procurement. "Contracting agency" includes, but is not limited to, the Director of the Oregon Department of Administrative Services and

- any person authorized by a contracting agency to conduct a procurement on the contracting agency's behalf. "Contracting agency" does not include the judicial department or the legislative department.
- (c) "Days" means calendar days.
- (d) "Department" means the Oregon Department of Administrative Services.
- (e) "Director" means the Director of the Oregon Department of Administrative Services or a person designated by the director to carry out the authority of the director under the Public Contracting Code.
- (f) "Emergency" means circumstances that:
- (A) Could not have been reasonably foreseen;
- (B) Create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and
- (C) Require prompt execution of a contract to remedy the condition.
- (g) "Energy savings performance contract" means a public contract between a contracting agency and a qualified energy service company for the identification, evaluation, recommendation, design and construction of energy conservation measures, including a design-build contract, that guarantee energy savings or performance.
- (h) "Executive department" has the meaning given that term in ORS 174.112.
- (i) "Goods" includes supplies, equipment, materials, personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, and combinations of any of the items identified in this paragraph.
- (j) "Goods and services" or "goods or services" includes combinations of any of the items identified in the definitions of "goods" and "services."
- (k)(A) "Grant" means:
- (i) An agreement under which a contracting agency receives moneys, property or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, from a grantor for the purpose of supporting or stimulating a program or activity of the contracting agency and in which no substantial involvement by the grantor is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions; or
- (ii) An agreement under which a contracting agency provides moneys, property or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, to a recipient for the purpose of supporting or stimulating a program or activity of the recipient and in which no substantial involvement by the contracting agency is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions.
- (B) "Grant" does not include a public contract for a public improvement, for public works, as defined in ORS 279C.800, or for emergency work, minor alterations or ordinary repair or maintenance necessary to preserve a public improvement, when under the public contract a contracting agency pays, in consideration for contract performance intended to realize or to support the realization of the purposes for which grant funds were provided to the contracting agency, moneys that the contracting agency has received under a grant.
- (L) "Industrial oil" means any compressor, turbine or bearing oil, hydraulic oil, metal-working oil or refrigeration oil.
- (m) "Judicial department" has the meaning given that term in ORS 174.113.
- (n) "Legislative department" has the meaning given that term in ORS 174.114.
- (o) "Local contract review board" means a local contract review board described in ORS 279A.060.
- (p) "Local contracting agency" means a local government or special government body authorized by law to conduct a procurement. "Local contracting agency" includes any person authorized by a local contracting agency to conduct a procurement on behalf of the local contracting agency.
- (q) "Local government" has the meaning given that term in ORS 174.116.
- (r) "Lowest responsible bidder" means the lowest bidder who:
- (A) Has substantially complied with all prescribed public contracting procedures and requirements;
- (B) Has met the standards of responsibility set forth in ORS 279B.110 or 279C.375;
- (C) Has not been debarred or disqualified by the contracting agency under ORS 279B.130 or 279C.440; and
- (D) If the advertised contract is a public improvement contract, is not on the list created by the Construction Contractors Board under ORS 701.227.
- (s) "Lubricating oil" means any oil intended for use in an internal combustion crankcase, transmission, gearbox or differential or an automobile, bus, truck, vessel, plane, train, heavy equipment or machinery powered by an internal combustion engine.

(t) “Person” means a natural person capable of being legally bound, a sole proprietorship, a corporation, a partnership, a limited liability company or partnership, a limited partnership, a for-profit or nonprofit unincorporated association, a business trust, two or more persons having a joint or common economic interest, any other person with legal capacity to contract or a public body.

(u) “Post-consumer waste” means a finished material that would normally be disposed of as solid waste, having completed its life cycle as a consumer item. “Post-consumer waste” does not include manufacturing waste.

(v) “Price agreement” means a public contract for the procurement of goods or services at a set price with:

(A) No guarantee of a minimum or maximum purchase; or

(B) An initial order or minimum purchase combined with a continuing contractor obligation to provide goods or services in which the contracting agency does not guarantee a minimum or maximum additional purchase.

(w) “Procurement” means the act of purchasing, leasing, renting or otherwise acquiring goods or services. “Procurement” includes each function and procedure undertaken or required to be undertaken by a contracting agency to enter into a public contract, administer a public contract and obtain the performance of a public contract under the Public Contracting Code.

(x) “Proposer” means a person that submits a proposal in response to a request for proposals.

(y) “Public body” has the meaning given that term in ORS 174.109.

(z) “Public contract” means a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. “Public contract” does not include grants.

(aa) “Public contracting” means procurement activities described in the Public Contracting Code relating to obtaining, modifying or administering public contracts or price agreements.

(bb) “Public Contracting Code” or “code” means ORS chapters 279A, 279B and 279C.

(cc) “Public improvement” means a project for construction, reconstruction or major renovation on real property by or for a contracting agency. “Public improvement” does not include:

(A) Projects for which no funds of a contracting agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or

(B) Emergency work, minor alteration, ordinary repair or maintenance necessary to preserve a public improvement.

(dd) “Public improvement contract” means a public contract for a public improvement. “Public improvement contract” does not include a public contract for emergency work, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement.

(ee) “Recycled material” means any material that would otherwise be a useless, unwanted or discarded material except for the fact that the material still has useful physical or chemical properties after serving a specific purpose and can, therefore, be reused or recycled.

(ff) “Recycled oil” means used oil that has been prepared for reuse as a petroleum product by refining, rerefining, reclaiming, reprocessing or other means, provided that the preparation or use is operationally safe, environmentally sound and complies with all laws and regulations.

(gg) “Recycled paper” means a paper product with not less than:

(A) Fifty percent of its fiber weight consisting of secondary waste materials; or

(B) Twenty-five percent of its fiber weight consisting of post-consumer waste.

(hh) “Recycled PETE” means post-consumer polyethylene terephthalate material.

(ii) “Recycled product” means all materials, goods and supplies, not less than 50 percent of the total weight of which consists of secondary and post-consumer waste with not less than 10 percent of its total weight consisting of post-consumer waste. “Recycled product” includes any product that could have been disposed of as solid waste, having completed its life cycle as a consumer item, but otherwise is refurbished for reuse without substantial alteration of the product’s form.

(jj) “Secondary waste materials” means fragments of products or finished products of a manufacturing process that has converted a virgin resource into a commodity of real economic value. “Secondary waste materials” includes post-consumer waste. “Secondary waste materials” does not include excess virgin resources of the manufacturing process. For paper, “secondary waste materials” does not include fibrous waste generated during the manufacturing process such as fibers recovered from waste water or trimmings of paper machine rolls, mill broke, wood slabs, chips, sawdust or other wood residue from a manufacturing process.

(kk) “Services” mean services other than personal services designated under ORS 279A.055, except that, for state contracting agencies with procurement authority under ORS 279A.050 or 279A.140, “services” includes personal services as designated by the state contracting agencies.

- (LL) "Special government body" has the meaning given that term in ORS 174.117.
- (mm) "State agency" means the executive department, except the Secretary of State and the State Treasurer in the performance of the duties of their constitutional offices.
- (nn) "State contracting agency" means an executive department entity authorized by law to conduct a procurement.
- (oo) "State government" has the meaning given that term in ORS 174.111.
- (pp) "Used oil" has the meaning given that term in ORS 459A.555.
- (qq) "Virgin oil" means oil that has been refined from crude oil and that has not been used or contaminated with impurities.

(2) Other definitions appearing in the Public Contracting Code and the sections in which they appear are:

- (a) "Adequate" ..... ORS 279C.305
- (b) "Administering contracting agency" ..... ORS 279A.200
- (c) "Affirmative action" ..... ORS 279A.100
- (d) "Architect" ..... ORS 279C.100
- (e) "Architectural, engineering and land surveying services" ..... ORS 279C.100
- (f) "Bid documents" ..... ORS 279C.400
- (g) "Bidder" ..... ORS 279B.415
- (h) "Bids" ..... ORS 279C.400
- (i) "Brand name" ..... ORS 279B.405
- (j) "Brand name or equal specification" ..... ORS 279B.200
- (k) "Brand name specification" ..... ORS 279B.200
- (L) "Class special procurement" ..... ORS 279B.085
- (m) "Consultant" ..... ORS 279C.115
- (n) "Contract-specific special procurement" ..... ORS 279B.085
- (o) "Cooperative procurement" ..... ORS 279A.200
- (p) "Cooperative procurement group" ..... ORS 279A.200
- (q) "Donee" ..... ORS 279A.250
- (r) "Engineer" ..... ORS 279C.100
- (s) "Findings" ..... ORS 279C.330
- (t) "Fire protection equipment" ..... ORS 279A.190
- (u) "Fringe benefits" ..... ORS 279C.800
- (v) "Funds of a public agency" ..... ORS 279C.810
- (w) "Good cause" ..... ORS 279C.585
- (x) "Good faith dispute" ..... ORS 279C.580
- (y) "Goods" ..... ORS 279B.115
- (z) "Housing" ..... ORS 279C.800
- (aa) "Interstate cooperative procurement" ..... ORS 279A.200
- (bb) "Invitation to bid" ..... ORS 279B.005  
..... and 279C.400
- (cc) "Joint cooperative procurement" ..... ORS 279A.200
- (dd) "Labor dispute" ..... ORS 279C.650
- (ee) "Land surveyor" ..... ORS 279C.100
- (ff) "Legally flawed" ..... ORS 279B.405
- (gg) "Locality" ..... ORS 279C.800
- (hh) "Nonprofit organization" ..... ORS 279C.810
- (ii) "Nonresident bidder" ..... ORS 279A.120
- (jj) "Not-for-profit organization" ..... ORS 279A.250
- (kk) "Original contract" ..... ORS 279A.200
- (LL) "Permissive cooperative

	procurement” .....	ORS 279A.200
(mm)	“Person” .....	ORS 279C.500
	.....and 279C.815	
(nn)	“Personal services” .....	ORS 279C.100
(oo)	“Prevailing rate of wage” .....	ORS 279C.800
(pp)	“Procurement description” .....	ORS 279B.005
(qq)	“Property” .....	ORS 279A.250
(rr)	“Public agency” .....	ORS 279C.800
(ss)	“Public contract” .....	ORS 279A.190
(tt)	“Public works” .....	ORS 279C.800
(uu)	“Purchasing contracting agency” .....	ORS 279A.200
(vv)	“Regularly organized fire department” .....	ORS 279A.190
(ww)	“Related services” .....	ORS 279C.100
(xx)	“Request for proposals” .....	ORS 279B.005
(yy)	“Resident bidder” .....	ORS 279A.120
(zz)	“Responsible bidder” .....	ORS 279A.105
	.....and 279B.005	
(aaa)	“Responsible proposer” .....	ORS 279B.005
(bbb)	“Responsive bid” .....	ORS 279B.005
(ccc)	“Responsive proposal” .....	ORS 279B.005
(ddd)	“Retainage” .....	ORS 279C.550
(eee)	“Special procurement” .....	ORS 279B.085
(fff)	“Specification” .....	ORS 279B.200
(ggg)	“State agency” .....	ORS 279A.250
(hhh)	“Substantial completion” .....	ORS 279C.465
(iii)	“Surplus property” .....	ORS 279A.250
(jjj)	“Unnecessarily restrictive” .....	ORS 279B.405

## Penalties

**279A.990 Penalties.** (1) The provisions of ORS 291.990 apply to ORS 279A.140, 279A.280 and 279B.270. Any violation of ORS 279A.140, 279A.280 or 279B.270 shall be punished as described in ORS 291.990.

(2) Any contractor, subcontractor, agent or person in authority or in charge who violates any provision of ORS 279C.520 or 279C.540 as to hours of labor shall be fined not less than \$50 nor more than \$1,000 or imprisoned in the county jail for not less than five days nor more than one year, or both.

(3) Any contractor or subcontractor subject to ORS 279C.840 who fails to pay the prevailing rate of wage as required by ORS 279C.840 shall be punished by a fine of not more than \$1,000 or by imprisonment in the county jail for not more than six months, or both. [2003 c.794 §46]

## Hours of Labor

**279C.540 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules.**

(1) When labor is employed by the state or a county, school district, municipality, municipal corporation or subdivision thereof through a contractor, a person may not be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it, in which event, the person so employed for excessive hours shall receive at least time and a half pay:

(a)(A) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

(B) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

(b) For all work performed on Saturday and on the following legal holidays:

(A) Each Sunday.

- (B) New Year's Day on January 1.
- (C) Memorial Day on the last Monday in May.
- (D) Independence Day on July 4.
- (E) Labor Day on the first Monday in September.
- (F) Thanksgiving Day on the fourth Thursday in November.
- (G) Christmas Day on December 25.

(2) An employer shall give notice in writing to employees who perform work under subsection (1) of this section, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that employees may be required to work.

(3) For the purpose of this section, each time a legal holiday, other than Sunday, listed in subsection (1) of this section falls on Sunday, the succeeding Monday shall be recognized as a legal holiday. Each time a legal holiday listed in subsection (1) of this section falls on Saturday, the preceding Friday shall be recognized as a legal holiday.

(4) Subsections (1) to (3) of this section do not apply to a public improvement contract or a contract for services if the contractor is a party to a collective bargaining agreement in effect with any labor organization.

(5) When specifically agreed to under a written labor-management negotiated labor agreement, an employee may be paid at least time and a half pay for work performed on any legal holiday specified in ORS 187.010 and 187.020 that is not listed in subsection (1) of this section.

(6) This section does not apply to contracts for personal services as defined in ORS 279C.100, provided that persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in subsection (1)(b)(B) to (G) of this section and for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(7) Subsections (1) and (2) of this section do not apply to contracts for services at a county fair or for other events authorized by a county fair board if persons employed under the contract receive at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week.

(8)(a) Subsections (1) and (2) of this section do not apply to contracts for services. However, persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in subsection (1)(b)(B) to (G) of this section and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) An employer shall give notice in writing to employees who work on a contract for services, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(9) Any contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of this section is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to the unpaid overtime wages as liquidated damages. If the violation results from willful falsification of payroll records, the contractor or subcontractor or contractor's or subcontractor's surety is liable to the affected employees in the amount of their unpaid overtime wages and an additional amount equal to twice the unpaid overtime wages as liquidated damages.

(10) An action to enforce liability to employees under subsection (9) of this section may be brought as an action on the contractor's payment bond as provided for in ORS 279C.610.

(11) In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries may adopt rules to carry out the provisions of this section. [2003 c.794 §144; 2005 c.103 §31]

**279C.545 Time limitation on claim for overtime; posting of circular by contractor.** When labor is employed by the state or a county, school district, municipality, municipal corporation or subdivision thereof through another as a contractor, any worker employed by the contractor shall be foreclosed from the right to collect for any overtime provided in ORS 279C.540 unless a claim for payment is filed with the contractor within 90 days from the completion of the contract, providing the contractor has:

(1) Caused a circular clearly printed in boldfaced 12-point type and containing a copy of this section to be posted in a prominent place alongside the door of the timekeeper's office or in a similar place that is readily available and freely visible to workers employed on the work.

(2) Maintained the circular continuously posted from the inception to the completion of the contract on which workers are or have been employed. [2003 c.794 §145]

## **Action on Payment Bonds and Public Works Bonds**

### **279C.600 Right of action on payment bond or public works bond of contractor or subcontractor; notice of claim.**

(1) A person claiming to have supplied labor or materials for the performance of the work provided for in a public contract, including any person having a direct contractual relationship with the contractor furnishing the payment bond or a direct contractual relationship with any subcontractor, or an assignee of such person, or a person claiming moneys due the State Accident Insurance Fund Corporation, the Unemployment Compensation Trust Fund or the Department of Revenue in connection with the performance of the contract, has a right of action on the contractor's payment bond as provided for in ORS 279C.380 and 279C.400 only if:

- (a) The person or the assignee of the person has not been paid in full; and
- (b) The person gives written notice of claim, as prescribed in ORS 279C.605, to the contractor and the contracting agency.

(2) When, upon investigation, the Commissioner of the Bureau of Labor and Industries has received information indicating that one or more workers providing labor on a public works have not been paid in full at the prevailing rate of wage or overtime wages, the commissioner has a right of action first on the contractor's public works bond required under ORS 279C.836 and then, for any amount of a claim not satisfied by the public works bond, on the contractor's payment bond, as provided in ORS 279C.380 and 279C.400. When an investigation indicates that a subcontractor's workers have not been paid in full at the prevailing rate of wage or overtime wages, the commissioner has a right of action first on the subcontractor's public works bond and then, for any amount of a claim not satisfied by the subcontractor's public works bond, on the contractor's payment bond. The commissioner's right of action exists without necessity of an assignment and extends to workers on the project who are not identified when the written notice of claim is given, but for whom the commissioner has received information indicating that the workers have provided labor on the public works and have not been paid in full. The commissioner shall give written notice of the claim, as prescribed in ORS 279C.605, to the contracting agency, the Construction Contractors Board, the contractor and, if applicable, the subcontractor. The commissioner may not make a claim for the same unpaid wages against more than one bond under this section. [2003 c.794 §154; 2005 c.360 §3]

**279C.605 Notice of claim.** (1) The notice of claim required by ORS 279C.600 must be sent by registered or certified mail or hand delivered no later than 120 days after the day the person last provided labor or furnished materials or 120 days after the worker listed in the notice of claim by the Commissioner of the Bureau of Labor and Industries last provided labor. The notice may be sent or delivered to the contractor or subcontractor at any place the contractor or subcontractor maintains an office or conducts business or at the residence of the contractor or subcontractor.

(2) Notwithstanding subsection (1) of this section, if the claim is for a required contribution to a fund of any employee benefit plan, the notice required by ORS 279C.600 must be sent or delivered within 150 days after the employee last provided labor or materials.

(3) The notice must be in writing substantially as follows:

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To (here insert the name of the contractor or subcontractor and the name of the public body):

Notice hereby is given that the undersigned (here insert the name of the claimant) has a claim for (here insert a brief description of the labor or materials performed or furnished and the person by whom performed or furnished; if the claim is for other than labor or materials, insert a brief description of the claim) in the sum of (here insert the amount) dollars against the (here insert public works bond or payment bond, as applicable) taken from (here insert the name of the principal and, if known, the surety or sureties upon the public works bond or payment bond) for the work of (here insert a brief description of the work concerning which the public works bond or payment bond was taken). Such material or labor was supplied to (here insert the name of the contractor or subcontractor).

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(here to be signed)

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(4) When notice of claim is given by the commissioner and if the claim includes a worker who is then unidentified, the commissioner shall include in the notice a statement that the claim includes an unidentified

worker for whom the commissioner has received information indicating that the worker has not been paid in full at the prevailing rate of wage required by ORS 279C.840 or overtime wages required by ORS 279C.540.  
(5) The person making the claim or giving the notice shall sign the notice. [2003 c.794 §155; 2005 c.360 §4]

**279C.610 Action on contractor's public works bond or payment bond; time limitation.** (1) The Commissioner of the Bureau of Labor and Industries or a person who has a right of action on the public works bond or the payment bond under ORS 279C.600 and, where required, who has filed and served the notice or notices of claim, as required under ORS 279C.600 and 279C.605, or that person's assignee, may institute an action on the contractor's public works bond or payment bond in a circuit court of this state or the federal district court of the district.

(2) The action shall be on the relation of the commissioner, the claimant, or that person's assignee, as the case may be, and shall be in the name of the contracting agency that let the contract or, when applicable, the public agency or agencies for whose benefit the contract was let. It may be prosecuted to final judgment and execution for the use and benefit of the commissioner or the claimant, or that person's assignee, as the fact may appear.

(3) The action shall be instituted no later than two years after the person last provided labor or materials or two years after the worker listed in the commissioner's notice of claim last provided labor. [2003 c.794 §156; 2005 c.360 §5]

**279C.615 Preference for labor and material liens.** All labor and material liens have preference and are superior to all other liens and claims of any kind or nature created by ORS 279C.500 to 279C.530 and 279C.600 to 279C.625. [2003 c.794 §157]

**279C.620 Rights of person providing medical care to employees of contractor.** A person providing medical, surgical or hospital care services or other needed care and attention, incident to sickness or injury, to the employees of a contractor or subcontractor on a public contract is deemed to have performed labor on the public contract for the purposes of ORS 279C.600 to 279C.625. [2003 c.794 §158]

**279C.625 Joint liability when payment bond not executed.** If the public improvement contract is one for which a payment bond as provided for in ORS 279C.380 and 279C.400 is required and the contractor fails to pay for labor or materials or to pay claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund or the Department of Revenue and the officers of the public body that authorized the contract fail or neglect to require the person entering into the contract to execute the payment bond:

(1) The State of Oregon and the officers authorizing the contract shall be jointly liable for the labor and materials used in the performance of any work under the contract, and for claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund and the Department of Revenue, if the contract was entered into with the State of Oregon.

(2) The public body and the officers authorizing the contract shall be jointly liable for the labor and materials used in the performance of any work under the contract and for claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund and the Department of Revenue, if the contract was entered into on behalf of a public body other than the state. [2003 c.794 §159; 2005 c.103 §35]

## **Prevailing Wage Rate**

**279C.800 Definitions for ORS 279C.800 to 279C.870.** As used in ORS 279C.800 to 279C.870, unless the context requires otherwise:

(1) "Fringe benefits" means the amount of:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person under a plan, fund or program; and

(b) The rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program that is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only when the contractor or subcontractor is not required by other federal, state or local law to provide any of these benefits.

- (2) "Housing" has the meaning given that term in ORS 456.055.
- (3) "Locality" means the following district in which the public works, or the major portion thereof, is to be performed:
- (a) District 1, composed of Clatsop, Columbia and Tillamook Counties;
  - (b) District 2, composed of Clackamas, Multnomah and Washington Counties;
  - (c) District 3, composed of Marion, Polk and Yamhill Counties;
  - (d) District 4, composed of Benton, Lincoln and Linn Counties;
  - (e) District 5, composed of Lane County;
  - (f) District 6, composed of Douglas County;
  - (g) District 7, composed of Coos and Curry Counties;
  - (h) District 8, composed of Jackson and Josephine Counties;
  - (i) District 9, composed of Hood River, Sherman and Wasco Counties;
  - (j) District 10, composed of Crook, Deschutes and Jefferson Counties;
  - (k) District 11, composed of Klamath and Lake Counties;
  - (L) District 12, composed of Gilliam, Grant, Morrow, Umatilla and Wheeler Counties;
  - (m) District 13, composed of Baker, Union and Wallowa Counties; and
  - (n) District 14, composed of Harney and Malheur Counties.
- (4) "Prevailing rate of wage" means the rate of hourly wage, including all fringe benefits, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries.
- (5) "Public agency" means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any instrumentality thereof organized and existing under law or charter.
- (6)(a) "Public works" includes, but is not limited to:
- (A) Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;
  - (B) A project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency; or
  - (C) A project for the construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.
- (b) "Public works" does not include:
- (A) The reconstruction or renovation of privately owned property that is leased by a public agency; or
  - (B) The renovation of publicly owned real property that is more than 75 years old by a private nonprofit entity if:
    - (i) The real property is leased to the private nonprofit entity for more than 25 years;
    - (ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and
    - (iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007. [2003 c.794 §165; 2007 c.764 §34]

**279C.805 Policy.** The Legislative Assembly declares that the purposes of the prevailing rate of wage law are:

- (1) To ensure that contractors compete on the ability to perform work competently and efficiently while maintaining community-established compensation standards.
- (2) To recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards.
- (3) To encourage training and education of workers to industry skills standards.
- (4) To encourage employers to use funds allocated for employee fringe benefits for the actual purchase of those benefits. [2003 c.794 §166]

**279C.807 Workforce diversity for public works projects.** (1) The Bureau of Labor and Industries shall develop and adopt a plan to increase diversity statewide among workers employed on projects subject to ORS 279C.800 to 279C.870. The bureau shall develop the plan after conducting a statewide public process to solicit proposals to increase diversity and shall adopt the plan after considering proposals submitted to the bureau.

(2) The bureau shall report each year to the Legislative Assembly or to the appropriate legislative interim committee concerning progress that results from the plan adopted under this section and may submit recommendations for legislation or other measures that will improve diversity among workers employed on projects subject to ORS 279C.800 to 279C.870. The bureau shall submit the first report no later than January 1, 2009. [2007 c.844 §9]

**Note:** 279C.807 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 279C or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

**279C.808 Rules.** In accordance with applicable provisions of ORS chapter 183, the Commissioner of the Bureau of Labor and Industries shall adopt rules necessary to administer ORS 279C.800 to 279C.870. [2007 c.764 §45]

**279C.810 Exemptions; rules.** (1) As used in this section:

(a) "Funds of a public agency" does not include:

(A) Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting;

(B) Building and development permit fees paid or waived by the public agency;

(C) Tax credits or tax abatements;

(D) Land that a public agency sells to a private entity at fair market value;

(E) The difference between:

(i) The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of zoning or land use regulations, that the public agency imposes on the development or use of the land; and

(ii) The fair market value of the land if the land is not subject to the limitations described in subparagraph (i) of this paragraph;

(F) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;

(G) Staff resources of the public agency used to design or inspect one or more components of a project;

(H) Moneys derived from the sale of bonds that are loaned by a state agency to a private entity, unless the moneys will be used for a public improvement;

(I) Value added to land as a consequence of a public agency's site preparation, demolition of real property or remediation or removal of environmental contamination, except for value added in excess of the expenses the public agency incurred in the site preparation, demolition or remediation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to 279C.870; or

(J) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS chapter 289 or ORS 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.

(b) "Nonprofit organization" means an organization or group of organizations described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.

(2) ORS 279C.800 to 279C.870 do not apply to:

(a) Projects for which the contract price does not exceed \$50,000. In determining the price of a project, a public agency:

(A) May not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay; and

(B) Shall include the value of work performed by every person paid by a contractor or subcontractor in any manner for the person's work on the project.

(b) Projects for which no funds of a public agency are directly or indirectly used. In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries shall adopt rules to carry out the provisions of this paragraph.

(c) Projects:

(A) That are privately owned;

(B) That use funds of a private entity;

(C) In which less than 25 percent of the square footage of a completed project will be occupied or used by a public agency; and

(D) For which less than \$750,000 of funds of a public agency are used.

(d) Projects for residential construction that are privately owned and that predominantly provide affordable housing. As used in this paragraph:

(A) "Affordable housing" means housing that serves occupants whose incomes are no greater than 60 percent of the area median income or, if the occupants are owners, whose incomes are no greater than 80 percent of the area median income.

(B) "Predominantly" means 60 percent or more.

(C) "Privately owned" includes:

(i) Affordable housing provided on real property owned by a public agency if the real property and related structures are leased to a private entity for 50 or more years; and

(ii) Affordable housing owned by a partnership, nonprofit corporation or limited liability company in which a housing authority, as defined in ORS 456.005, is a general partner, director or managing member and the housing authority is not a majority owner in the partnership, nonprofit corporation or limited liability company.

(D) "Residential construction" includes the construction, reconstruction, major renovation or painting of single-family houses or apartment buildings not more than four stories in height and all incidental items, such as site work, parking areas, utilities, streets and sidewalks, pursuant to the United States Department of Labor's "All Agency Memorandum No. 130: Application of the Standard of Comparison "Projects of a Character Similar" Under Davis-Bacon and Related Acts," dated March 17, 1978. However, the commissioner may consider different definitions of residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

(i) Exist in local ordinances or codes; or

(ii) Differ, in the prevailing practice of a particular trade or occupation, from the United States Department of Labor's description of residential construction. [2003 c.794 §172; 2005 c.153 §1; 2005 c.360 §8; 2007 c.764 §35]

**279C.815 Determination of prevailing wage; sources of information; comparison of state and federal prevailing wage; other powers of commissioner.** (1) As used in this section, "person" includes any employer, labor organization or any official representative of an employee or employer association.

(2)(a) The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality described in ORS 279C.800 at least once each year by means of an independent wage survey and make this information available at least twice each year. The commissioner may amend the rate at any time.

(b) If it appears to the commissioner that the data derived only from the survey described in paragraph (a) of this subsection are insufficient to determine the prevailing rate of wage, the commissioner also shall consider additional information such as collective bargaining agreements, other independent wage surveys and the prevailing rates of wage determined by appropriate federal agencies or agencies of adjoining states. If there is not a majority in the same trade or occupation paid at the same rate, the average rate of hourly wage, including all fringe benefits, paid in the locality to workers in the same trade or occupation shall be the prevailing rate. If the wage paid by any contractor or subcontractor to workers on any public works is based on some period of time other than an hour, the hourly wage shall be mathematically determined by the number of hours worked in that period of time.

(c) The commissioner shall compare the prevailing rate of wage determined under paragraph (a) of this subsection with the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) and determine which rate is higher for workers in each trade or occupation in each locality. The commissioner shall make this information, showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, available at the same time as the commissioner makes information available under paragraph (a) of this subsection.

(3) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

(4) Notwithstanding ORS 192.410 to 192.505, all reports and returns or other information provided to the commissioner under this section are confidential and not available for inspection by the public.

(5) In order to assist the commissioner in making determinations of the prevailing rates of wage, the commissioner may enter into contracts with public or private parties to obtain relevant data and information. Any such contract may include provisions for the manner and extent of the market review of affected trades and occupations and such other requirements regarding timelines of reports, accuracy of data and information and

supervision and review as the commissioner may prescribe. [2003 c.794 §173; 2005 c.360 §9; 2007 c.764 §36; 2007 c.844 §3]

**279C.817 Determination of applicability of prevailing wage rate; time limitation; hearing; rules.** (1) The Commissioner of the Bureau of Labor and Industries shall, upon the request of a public agency or other interested person, make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840. (2) The requester shall provide the commissioner with information necessary to enable the commissioner to make the determination. (3) The commissioner shall make the determination within 60 days after receiving the request or 60 days after the requester has provided the commissioner with the information necessary to enable the commissioner to make the determination, whichever is later. The commissioner may take additional time to make the determination if the commissioner and the requester mutually agree that the commissioner may do so. (4) The commissioner shall afford the requester or a person adversely affected or aggrieved by the commissioner's determination a hearing in accordance with ORS 183.413 to 183.470. An order the commissioner issues under ORS 183.413 to 183.470 is subject to judicial review as provided in ORS 183.482. (5) The commissioner shall adopt rules establishing the process for requesting and making the determinations described in this section. [2007 c.764 §43]

**279C.820 Advisory committee to assist commissioner.** (1) The Commissioner of the Bureau of Labor and Industries shall appoint an advisory committee to assist the commissioner in the administration of ORS 279C.800 to 279C.870.

(2) The advisory committee must include equal representation of members from management and labor in the building and construction industry who perform work on public works contracts and such other interested parties as the commissioner shall appoint. [2003 c.794 §179]

**279C.825 Fees; rules.** (1)(a) The Commissioner of the Bureau of Labor and Industries, by rule, shall establish a fee to be paid by the public agency that awards a public works contract subject to ORS 279C.800 to 279C.870. The fee shall be used to pay the costs of:

(A) Surveys to determine the prevailing rates of wage;

(B) Administering and providing investigations under and enforcement of ORS 279C.800 to 279C.870; and

(C) Providing educational programs on public contracting law under the Public Contracting Code.

(b) The fee shall be 0.1 percent of the contract price. However, in no event may a fee be charged and collected that is more than \$5,000 or less than \$100.

(2) The commissioner shall pay moneys received under this section into the State Treasury. The moneys shall be credited to the Prevailing Wage Education and Enforcement Account created by ORS 651.185.

(3) The public agency shall pay the fee at the time the public agency enters into the public works contract. [2003 c.794 §178; 2007 c.844 §7]

**Note:** Section 8, chapter 844, Oregon Laws 2007, provides:

**Sec. 8.** Notwithstanding the maximum and minimum fee amounts set forth in ORS 279C.825 (1)(b), for public works contracts entered into on or after the effective date of this 2007 Act [January 1, 2008] and before January 1, 2011, the fee charged and collected may not be more than \$7,500 or less than \$250. [2007 c.844 §8]

**279C.827 Division of public works project; applicability of prevailing wage rate to divided projects.** (1)(a) A public agency may not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

(b) When the Commissioner of the Bureau of Labor and Industries determines that a public agency has divided a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner shall issue an order compelling compliance.

(c) In making determinations under this subsection, the commissioner shall consider:

(A) The physical separation of the project structures;

(B) The timing of the work on project phases or structures;

(C) The continuity of project contractors and subcontractors working on project parts or phases;

(D) The manner in which the public agency and the contractors administer and implement the project;

(E) Whether a single public works project includes several types of improvements or structures; and

(F) Whether the combined improvements or structures have an overall purpose or function.

(2) If a project is a public works of the type described in ORS 279C.800 (6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsection (1)(c) of this section to separate the parts of the project that include funds of a public agency or that will be occupied or used by a public agency from the parts of the project that do not include funds of a public agency and that will not be occupied or used by a public agency. If the commissioner divides the project, any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency is not subject to ORS 279C.800 to 279C.870.

(3) If a project includes parts that are owned by a public agency and parts that are owned by a private entity, the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsections (1)(c) and (2) of this section to separate the parts of the project that are public works from the parts of the project that are not public works. If the commissioner divides the project, parts of the project that are not public works are not subject to ORS 279C.800 to 279C.870. [2007 c.764 §44]

**279C.830 Provisions concerning prevailing rate of wage in specifications, contracts and subcontracts; applicability of prevailing wage; fee; bond.**

(1)(a) Except as provided in paragraph (d) of this subsection, the specifications for every contract for public works shall contain a provision stating the existing state prevailing rate of wage and, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) that may be paid to workers in each trade or occupation required for the public works employed in the performance of the contract either by the contractor or subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract. When the prevailing rates of wage are available electronically or are accessible on the Internet, the rates may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates.

(b) If a public agency is required under paragraph (a) of this subsection to include the state and federal prevailing rates of wage in the specifications, the public agency also shall include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, as determined by the Commissioner of the Bureau of Labor and Industries under ORS 279C.815 (2)(c).

(c) Every contract and subcontract shall contain a provision that the workers shall be paid not less than the specified minimum hourly rate of wage in accordance with ORS 279C.838 and 279C.840.

(d) A public works project described in ORS 279C.800 (6)(a)(B) or (C) is subject to the existing state prevailing rate of wage or, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act that is in effect at the time a public agency enters into an agreement with a private entity for the project. After that time, the specifications for any contract for the public works shall include the applicable prevailing rate of wage.

(2) The specifications for every contract for public works between a public agency and a contractor shall contain a provision stating that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279C.825 (1). The contract shall contain a provision that the fee shall be paid to the commissioner under the administrative rule of the commissioner.

(3) The specifications for every contract for public works shall contain a provision stating that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9). Every contract awarded by a contracting agency shall contain a provision requiring the contractor:

(a) To have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9).

(b) To include in every subcontract a provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9). [2003 c.794 §168; 2005 c.360 §10; 2007 c.415 §2; 2007 c.764 §37; 2007 c.844 §4]

**279C.835 Notifying commissioner of public works contract.** Public agencies shall notify the Commissioner of the Bureau of Labor and Industries in writing, on a form prescribed by the commissioner, whenever a contract subject to the provisions of ORS 279C.800 to 279C.870 has been awarded. The notification shall be made within 30 days of the date that the contract is awarded. The notification shall include a copy of the disclosure of first-tier subcontractors that was submitted under ORS 279C.370. [2003 c.794 §175]

**279C.836 Public works bond; rules.** (1) Except as provided in subsection (4), (7), (8) or (9) of this section, before starting work on a contract or subcontract for a public works project, a contractor or subcontractor shall

file with the Construction Contractors Board a public works bond with a corporate surety authorized to do business in this state in the amount of \$30,000. The bond must provide that the contractor or subcontractor will pay claims ordered by the Bureau of Labor and Industries to workers performing labor upon public works projects. The bond must be a continuing obligation, and the surety's liability for the aggregate of claims that may be payable from the bond may not exceed the penal sum of the bond. The bond must remain in effect continuously until depleted by claims paid under this section, unless the surety sooner cancels the bond. The surety may cancel the bond by giving 30 days' written notice to the contractor or subcontractor, to the board and to the Bureau of Labor and Industries. When the bond is canceled, the surety is relieved of further liability for work performed on contracts entered into after the cancellation. The cancellation does not limit the surety's liability for work performed on contracts entered into before the cancellation.

(2) Before permitting a subcontractor to start work on a public works project, the contractor shall verify that the subcontractor has filed a public works bond as required under this section, has elected not to file a public works bond under subsection (7) or (8) of this section or is exempt under subsection (4) or (9) of this section.

(3) A contractor or subcontractor is not required under this section to file a separate public works bond for each public works project for which the contractor or subcontractor has a contract.

(4) A person that is not required under ORS 279C.800 to 279C.870 to pay prevailing rates of wage on a public works project is not required to file a public works bond under this section.

(5) A public works bond required by this section is in addition to any other bond the contractor or subcontractor is required to obtain.

(6) The board may, by rule, require a contractor or subcontractor to obtain a new public works bond if a surety pays a claim out of an existing public works bond. The new bond must be in the amount of \$30,000. The board may allow a contractor or subcontractor to obtain, instead of a new bond, a certification that the surety remains liable for the full penal sum of the existing bond, notwithstanding payment by the surety on the claim.

(7)(a) A disadvantaged, minority, women or emerging small business enterprise certified under ORS 200.055 may, for up to four years after certification, elect not to file a public works bond as required under subsection (1) this section. If a business enterprise elects not to file a public works bond, the business enterprise shall give the board written verification of the certification and written notice that the business enterprise elects not to file the bond.

(b) A business enterprise that elects not to file a public works bond under this subsection shall notify the public agency for whose benefit the contract was awarded or, if the business enterprise is a subcontractor, the contractor of the election before starting work on a public works project. When a business enterprise elects not to file a public works bond under this subsection, a claim for unpaid wages may be made against the payment bond of the business enterprise or, if the business enterprise is a subcontractor, the payment bond of the contractor.

(c) An election not to file a public works bond expires four years after the date the business enterprise is certified. After an election has expired and before starting or continuing work on a contract or subcontract for a public works project, the business enterprise shall file a public works bond with the board as required under subsection (1) of this section.

(8) A contractor or subcontractor may elect not to file a public works bond as required under subsection (1) of this section for any public works project for which the contract price does not exceed \$100,000.

(9) In cases of emergency, or when the interest or property of the public agency for whose benefit the contract was awarded probably would suffer material injury by delay or other cause, the requirement for filing a public works bond may be excused, if a declaration of the emergency is made in accordance with rules adopted under ORS 279A.065.

(10) The board shall make available on a searchable public website information concerning public works bonds filed with the board, claims made on those bonds, elections made by certified business enterprises not to file those bonds and the expiration date of each election. The board may adopt rules necessary to perform the duties required of the board by this section.

(11) The Commissioner of the Bureau of Labor and Industries, with approval of the board, shall adopt rules that establish language for public works bonds. [2005 c.360 §2; 2007 c.415 §1; 2007 c.764 §38]

**279C.838 Applicability of state and federal rates of wage; determination of site of project; determination of applicability of wage to transportation workers; waiver.** When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.):

(1) If the state prevailing rate of wage is higher than the federal prevailing rate of wage, the contractor and every subcontractor on the project shall pay at least the state prevailing rate of wage as determined under ORS 279C.815;

(2) The Commissioner of the Bureau of Labor and Industries shall determine the site of the project in a manner consistent with the term “site of the work” as that term is used in federal law and in regulations adopted or guidelines issued in accordance with the Davis-Bacon Act;

(3) The commissioner shall determine in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act whether workers transporting materials and supplies to and from the site of the project are subject to the Davis-Bacon Act and are entitled to be paid the prevailing rate of wage;

(4) Except as provided in subsection (1) of this section, the commissioner, in consultation with the advisory committee appointed under ORS 279C.820, may administer and enforce ORS 279C.800 to 279C.870 in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act. The commissioner may provide a waiver from a requirement set forth in ORS 279C.800 to 279C.870 if necessary to achieve consistency with the Davis-Bacon Act and to further the purposes of ORS 279C.805; and

(5) ORS 279C.800 to 279C.870 do not apply to workers enrolled in skill training programs that are certified by the United States Secretary of Transportation under the Federal-Aid Highway Act (23 U.S.C. 113(c)). [2005 c.360 §7; 2007 c.844 §5]

**279C.840 Payment of prevailing rate of wage; posting of rates and fringe benefit plan provisions.** (1) The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour’s work in the same trade or occupation in the locality where the labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash, by the making of contributions of a type referred to in ORS 279C.800 (1)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279C.800 (1)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs is not less than the prevailing rate of wage.

(2) After a contract for public works is executed with any contractor or work is commenced upon any public works, the amount of the prevailing rate of wage is not subject to attack in any legal proceeding by any contractor or subcontractor in connection with that contract.

(3) It is not a defense in any legal proceeding that the prevailing rate of wage is less than the amount required to be in the specifications of a contract for public works, or that there was an agreement between the employee and the employer to work at less than the wage rates required to be paid under this section.

(4) Every contractor or subcontractor engaged on a project for which there is a contract for a public works shall keep the prevailing rates of wage for that project posted in a conspicuous and accessible place in or about the project. The Commissioner of the Bureau of Labor and Industries shall furnish without charge copies of the prevailing rates of wage to contractors and subcontractors.

(5) Every contractor or subcontractor engaged on a project for which there is a contract for a public works to which the prevailing wage requirements apply that also provides or contributes to a health and welfare plan or a pension plan, or both, for the contractor or subcontractor’s employees on the project shall post a notice describing the plan in a conspicuous and accessible place in or about the project. The notice preferably shall be posted in the same place as the notice required under subsection (4) of this section. In addition to the description of the plan, the notice shall contain information on how and where to make claims and where to obtain further information.

(6)(a) Except as provided in paragraph (c) of this subsection, no person other than the contractor or subcontractor may pay or contribute any portion of the prevailing rate of wage paid by the contractor or subcontractor to workers employed in the performance of a public works contract.

(b) For the purpose of this subsection, the prevailing rate of wage is the prevailing rate of wage specified in the contract.

(c) This subsection is not intended to prohibit payments to a worker who is enrolled in any government-subsidized training or retraining program.

(7) A person may not take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee’s regular rate of pay on any project not subject to ORS 279C.800 to 279C.870 in a manner that has the effect of offsetting the prevailing rate of wage on a public works project. [2003 c.794 §167]

**279C.845 Certified statements regarding payment of prevailing rates of wage; retainage.** (1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:

(a) The hourly rate of wage paid each worker whom the contractor or the subcontractor has employed upon the public works; and

(b) That no worker employed upon the public works has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract.

(2) The certified statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read the certified statement and knows the contents thereof and that the same is true to the contractor or subcontractor's knowledge.

(3) The certified statements shall set out accurately and completely the payroll records for the prior week, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.

(4) The contractor or subcontractor shall deliver or mail each certified statement required by subsection (1) of this section to the public agency. Certified statements for each week during which the contractor or subcontractor employs a worker upon the public works shall be submitted once a month, by the fifth business day of the following month. Information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 to 279C.870.

(5) Each contractor or subcontractor shall preserve the certified statements for a period of three years from the date of completion of the contract.

(6) Certified statements received by a public agency are public records subject to the provisions of ORS 192.410 to 192.505.

(7) Notwithstanding ORS 279C.555 or 279C.570 (7), if a contractor is required to file certified statements under this section, the public agency shall retain 25 percent of any amount earned by the contractor on the public works until the contractor has filed with the public agency certified statements as required by this section. The public agency shall pay the contractor the amount retained under this subsection within 14 days after the contractor files the certified statements as required by this section, regardless of whether a subcontractor has failed to file certified statements as required by this section. The public agency is not required to verify the truth of the contents of certified statements filed by the contractor under this section.

(8) Notwithstanding ORS 279C.555, the contractor shall retain 25 percent of any amount earned by a first-tier subcontractor on a public works until the subcontractor has filed with the public agency certified statements as required by this section. The contractor shall verify that the first-tier subcontractor has filed the certified statements before the contractor may pay the subcontractor any amount retained under this subsection. The contractor shall pay the first-tier subcontractor the amount retained under this subsection within 14 days after the subcontractor files the certified statements as required by this section. Neither the public agency nor the contractor is required to verify the truth of the contents of certified statements filed by a first-tier subcontractor under this section. [2003 c.794 §169; 2005 c.360 §11]

**279C.850 Inspection to determine whether prevailing rate of wage being paid; civil action for failure to pay prevailing rate of wage or overtime.** (1) At any reasonable time the Commissioner of the Bureau of Labor and Industries may enter the office or business establishment of any contractor or subcontractor performing public works and gather facts and information necessary to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works.

(2) Upon request by the commissioner, every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection during normal business hours any payroll or other records in the possession or under the control of the contractor or subcontractor that are deemed necessary by the commissioner to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works. The commissioner's request must be made a reasonable time in advance of the inspection.

(3) Notwithstanding ORS 192.410 to 192.505, any record obtained or made by the commissioner under this section is not open to inspection by the public.

(4) The commissioner may, without necessity of an assignment, initiate legal proceedings against employers to enjoin future failures to pay required prevailing rates of wage or overtime pay and to require the payment of prevailing rates of wage or overtime pay due employees. The commissioner is entitled to recover, in addition to

other costs, such sum as the court or judge may determine reasonable as attorney fees. If the commissioner does not prevail in the action, the commissioner shall pay all costs and disbursements from the Bureau of Labor and Industries Account. [2003 c.794 §170]

**279C.855 Liability for violations.** (1) Any contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of ORS 279C.840 is liable to the workers affected in the amount of their unpaid minimum wages, including all fringe benefits, and in an additional amount equal to the unpaid wages as liquidated damages.

(2) Actions to enforce liability to workers under subsection (1) of this section may be brought as actions on contractors' bonds as provided for in ORS 279C.610.

(3) If a public agency fails to include a provision that the contractor and any subcontractor shall comply with ORS 279C.840 in the advertisement for bids, the request for bids, the contract specifications, the accepted bid or elsewhere in the contract documents, the liability of the public agency for unpaid minimum wages, as described in subsection (1) of this section, is joint and several with any contractor or subcontractor that had notice of the requirement to comply with ORS 279C.840.

(4) When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.) and a public agency fails to include the state and federal prevailing rates of wage in the specifications for the contract for public works as required under ORS 279C.830 (1)(a), or fails to include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality as required under ORS 279C.830 (1)(b), the public agency is liable to each affected worker for:

(a) The worker's unpaid minimum wages, including fringe benefits, in an amount that equals, for each hour worked, the difference between the applicable higher rate of wage and the lower rate of wage; and

(b) An additional amount, equal to the amount of unpaid minimum wages due under paragraph (a) of this subsection, as liquidated damages.

(5) The Commissioner of the Bureau of Labor and Industries may enforce the provisions of subsections (3) and (4) of this section by a civil action under ORS 279C.850 (4), by a civil action on an assigned wage claim under ORS 652.330, or by an administrative proceeding on an assigned wage claim under ORS 652.332. [2003 c.794 §171; 2007 c.844 §6]

**279C.860 Ineligibility for public works contracts for failure to pay or post notice of prevailing rates of wage; certified payroll reports to commissioner.** (1) When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS chapter 183, determines that a contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works, a subcontractor has failed to pay to its employees amounts required by ORS 279C.840 and the contractor has paid those amounts on the subcontractor's behalf, or a contractor or subcontractor has intentionally failed or refused to post the prevailing rates of wage as required by ORS 279C.840 (4), the contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible, for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list as provided in this section, to receive any contract or subcontract for public works. The commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies.

(2) When the contractor or subcontractor is a corporation, the provisions of subsection (1) of this section apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing rate of wage or the failure to pay to a subcontractor's employees amounts required by ORS 279C.840 that are paid by the contractor on the subcontractor's behalf.

(3) For good cause shown, the commissioner may direct the removal of the name of a contractor or subcontractor from the ineligible list.

(4) To assist the commissioner in determining whether the contractor or subcontractor is paying the prevailing rate of wage, when a prevailing rate of wage claim is filed, or evidence indicating a violation has occurred, a contractor or subcontractor required to pay the prevailing rate of wage to workers employed upon public works under ORS 279C.800 to 279C.870 shall send a certified copy of the payroll for those workers when the commissioner requests the certified copy. [2003 c.794 §174]

**279C.865 Civil penalties.** (1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$5,000 for each violation of any provision of ORS 279C.800 to 279C.870 or any rule of the commissioner adopted thereunder.

(2) Civil penalties under this section shall be imposed as provided in ORS 183.745.

(3) All moneys collected as penalties under this section shall be first applied toward reimbursement of costs incurred in determining violations, conducting hearings and assessing and collecting the penalties. The remainder, if any, of moneys collected as penalties under this section shall be paid into the State Treasury and credited to the General Fund and are available for general governmental expenses. [2003 c.794 §177]

**279C.870 Civil action to enforce payment of prevailing rates of wage.** (1) The Commissioner of the Bureau of Labor and Industries or any other person may bring a civil action in any court of competent jurisdiction to require a public agency under a public contract with a contractor to withhold twice the wages in dispute if it is shown that the contractor or subcontractor on the contract has intentionally failed or refused to pay the prevailing rate of wage to workers employed on that contract and to require the contractor to pay the prevailing rate of wage and any deficiencies that can be shown to exist because of improper wage payments already made. In addition to other relief, the court may also enjoin the contractor or subcontractor from committing future violations. The contractor or subcontractor involved shall be named as a party in all civil actions brought under this section. In addition to other costs, the court may award the prevailing party reasonable attorney fees at the trial and on appeal. However, attorney fees may not be awarded against the commissioner under this section.

(2) The court shall require any party, other than the commissioner, that brings a civil action under this section to post a bond sufficient to cover the estimated attorney fees and costs to the public agency and to the contractor or subcontractor of any temporary restraining order, preliminary injunction or permanent injunction awarded in the action, in the event that the party bringing the action does not ultimately prevail.

(3) In addition to any other relief, the court in a civil action brought under this section may enjoin the public agency from contracting with the contractor or subcontractor if the court finds that the commissioner would be entitled to place the contractor or subcontractor on the ineligible list established under ORS 279C.860 (1). If the court issues such an injunction, the commissioner shall place the contractor or subcontractor on the list for a period of three years, subject to the provision of ORS 279C.860 (2). [2003 c.794 §176; 2007 c.764 §39]

## **Appendix E – Oregon Administrative Rules, Chapter 839, Division 25**

### **Procedural Rules**

- 839-025-0000 Notice of Proposed Rule
- 839-025-0003 Forms
- 839-025-0004 Definitions
- 839-025-0005 Determination Requests
- 839-025-0006 Purpose and Procedure for Addition of Trade
- 839-025-0007 Purpose and Procedure for Special Wage Determination
- 839-025-0008 List of Planned Public Improvements

### **Forms Prescribed by the Labor Commissioner**

- 839-025-0010 Payroll and Certified Statement
- 839-025-0013 Notice of Award Form
- 839-025-0015 Public Works Bonds

### **Contract Requirements**

- 839-025-0020 Public Works Contracts and Contract Specifications; Required Conditions

### **Records**

- 839-025-0025 Required Records
- 839-025-0030 Records Availability

### **Posting**

- 839-025-0033 Posting Requirements
- 839-025-0034 Establishing a Work Schedule

### **Prevailing Rate of Wage**

- 839-025-0035 Payment of Prevailing Rate of Wage
- 839-025-0037 Residential Construction Projects

### **Fringe Benefits**

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### **Overtime Wages**

- 839-025-0050 Overtime Wages Computations
- 839-025-0054 Exemption from Overtime Pay Requirements on Public Improvement Projects

### **Apprentices and Trainees**

- 839-025-0060 Apprentices
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### **Enforcement**

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- 839-025-0085 Contract Ineligibility
- 839-025-0090 List of Ineligibles
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### **Exemptions**

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### **Installation of Art on Public Works Projects and the Payment of the Prevailing Rate of Wage**

- 839-025-0150 Definitions
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**Fees on Public Works Contracts**

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- 839-025-0210 Adjustment of Fees
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- 839-025-0230 Special Circumstances/No General Contractors

**Actions that Circumvent Payment of Prevailing Wages Prohibited**

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- 839-025-0310 Dividing Projects Prohibited
- 839-025-0315 Use of Multiple Wage Rate Determinations on Projects
- 839-025-0320 Payment of Prevailing Wage by Persons Other than Contractors or Subcontractors Prohibited
- 839-025-0330 Wage Averaging Prohibited
- 839-025-0340 Circumventions of the Prevailing Wage Rate Law

**Civil Penalties for Violation of Prevailing Wage Rates on Public Works Matters**

- 839-025-0500 Definitions
- 839-025-0510 Violations Separate and Distinct
- 839-025-0520 Criteria to Determine Civil Penalty
- 839-025-0530 Violations for Which a Civil Penalty May Be Assessed
- 839-025-0540 Schedule of Civil Penalties

**Procedural Rules**

**839-025-0000**

**Notice of Proposed Rules**

(1) Prior to the permanent adoption, amendment, or repeal of any rule relating to Prevailing Wage Rates on Public Works, the Bureau of Labor and Industries must give notice of intended action as required in OAR 839-002-0002.

(2) The notice provisions in OAR 839-002-0002 do not apply to the determination of prevailing wage rates pursuant to ORS 279C.815(2) or to the adoption of such rates as rule amendments to OAR 839-025-0700 and 839-025-0750.

Stat. Auth.: ORS 279 & 651.060(4)

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BLI 26-2000(Temp), f. 12-19-00, cert. ef. 12-20-00 thru 6-18-01; BLI 15-2001, f. & cert. ef. 11-14-01; BLI 9-2004, f. 7-26-04, cert. ef. 7-27-04; Renumbered from 839-016-0000, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

**839-025-0003**

**Forms**

(1) All forms referenced in these rules may be obtained on the bureau's website, [www.oregon.gov/boli](http://www.oregon.gov/boli) or at the address listed below.

(2) Completed forms, requests and fees referenced in these rules may be filed with the Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon St. #1045, Portland, OR 97232.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0003, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06

**839-025-0004**

**Definitions**

As used in OAR chapter 839, division 025, unless the context requires otherwise:

(1) "Apprentice" means:

- (a) A person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Bureau of Apprenticeship and Training (BAT) or with any state apprenticeship agency recognized by BAT; or
- (b) A person in probationary employment as an apprentice in such an apprenticeship program, but who is not individually registered in the program, but who has been certified by the BAT or a state apprenticeship agency to be eligible for probationary employment as an apprentice.
- (2) "The Basic Hourly Rate of Pay" or "Hourly Rate" means the rate of hourly wage, excluding fringe benefits, paid to the worker.
- (3) "Bureau" means the Bureau of Labor and Industries.
- (4) "Commissioner" means the Commissioner of the Bureau of Labor and Industries, or designee.
- (5) "Construction" means the initial construction of buildings and other structures, or additions thereto, and of highways and roads. "Construction" does not include the transportation of material or supplies to or from the public works project by employees of a construction contractor or construction subcontractor.
- (6) "Division" means the Wage and Hour Division of the Bureau of Labor and Industries.
- (7) "Employ" includes to suffer or permit to work.
- (8) "Fringe benefits" means the amount of:
- (a) The rate of contribution irrevocably made on a regular basis and not less often than quarterly by a contractor or subcontractor to a trustee or to a third person pursuant to a plan, fund or program; and
- (b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state or local law to provide any of such benefits. Other bona fide fringe benefits do not include reimbursement to workers for meals, lodging or other travel expenses, nor contributions to industry advancement funds (CIAF for example).
- (9)(a) "Funds of a public agency" includes any funds of a public agency that are directly or indirectly used, as described below.
- (A) "Directly used funds of a public agency" means revenue, money, or that which can be valued in money collected for a public agency or derived from a public agency's immediate custody and control, and, except as provided in ORS 279C.810(1)(a)(H) and (J) and subsection (b) of this section, includes but is not limited to any money loaned by a public agency, including the loan of proceeds from the sale of conduit or pass-through revenue bonds for the specific purpose of financing a project, and public property or other assets used as payment for all or part of a project.
- (B) "Indirectly used funds of a public agency" means, except as provided in subsection (b) of this section, that a public agency ultimately bears the cost of all or part of the project, even if a public agency is not paying for the project directly or completing payment at the time it occurs or shortly thereafter. A public agency does not indirectly use funds of a public agency when it elects not to collect land rent that is due. Examples of when an agency "ultimately bears the cost" of all or part of a project include but are not limited to:
- (i) Amortizing the costs of construction over the life of a lease and paying these costs with funds of a public agency during the course of the lease;
- (ii) A public agency subsidizing the costs of construction that would normally be borne by the contractor;
- (iii) Using insurance proceeds that belong to a public agency to pay for construction. Insurance proceeds represent "money collected for the custody and control of a public agency" and therefore are funds of a public agency, whether the contractor obtains payment directly from the insurance company or the public agency; or
- (iv) Using or creating a private entity as a conduit for funding a project when the private entity is in fact an alter ego of the public agency.
- (b) "Funds of a public agency" does not include:
- (A) Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting;
- (B) Building and development permit fees paid or waived by the public agency;
- (C) Tax credits or tax abatements;
- (D) Land that a public agency sells to a private entity at fair market value;
- (E) The difference between:

- (i) The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of zoning or land use regulations, that the public agency imposes on the development or use of the land; and
- (ii) The fair market value of the land if the land is not subject to the limitations described in subparagraph (i) of this paragraph;
- (F) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;
- (G) Staff resources of the public agency used to design or inspect one or more components of a project;
- (H) Moneys derived from the sale of bonds that are loaned by a state agency to a private entity, unless the moneys will be used for a public improvement;
- (I) Value added to land as a consequence of a public agency's site preparation, demolition of real property or remediation or removal of environmental contamination, except for value added in excess of the expenses the public agency incurred in the site preparation, demolition or remediation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to 279C.870; or
- (J) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS chapter 289 or ORS 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.
- (10) "Housing" has the meaning given that term in ORS 456.055.
- (11) "Major renovation" means the remodeling or alteration of buildings and other structures within the framework of an existing building or structure and the alteration of existing highways and roads, the contract price of which exceeds \$50,000.
- (12) "Nonprofit organization," as used in section (9)(b)(A) of this rule, means an organization or group of organizations described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.
- (13) "Normal business hours" means the hours during which the office of the contractor or subcontractor is normally open for business. In the absence of evidence to the contrary, the Division will consider the hours between 8:00 a.m. and 5:00 p.m., excluding the hours between 12:00 noon and 1:00 p.m., on weekdays as normal business hours.
- (14) "Overtime" means all hours worked:
  - (a) On Saturdays;
  - (b) On the following legal holidays:
    - (A) Each Sunday;
    - (B) New Year's Day on January 1;
    - (C) Memorial Day on the last Monday in May;
    - (D) Independence Day on July 4;
    - (E) Labor Day on the first Monday in September;
    - (F) Thanksgiving Day on the fourth Thursday in November;
    - (G) Christmas Day on December 25.
  - (c) Over 40 hours in a week; and either
  - (d) Over eight (8) hours in a day; or
  - (e) Over 10 hours in a day provided:
    - (A) The employer has established a work schedule of four consecutive days (Monday through Thursday or Tuesday through Friday) pursuant to OAR 839-025-0034; and
    - (B) The employer operates in accordance with this established work schedule.
- (15) "Overtime rate" means the basic hourly rate of pay multiplied by one and one-half.
- (16) "Overtime wages" means the overtime hours worked multiplied by the overtime rate.
- (17) "Person" includes a public or private corporation, a partnership, a sole proprietorship, a limited liability company, a government or governmental instrumentality.
- (18) "Prevailing wage rate claim" means a claim for wages filed by a worker with the Division.
- (19) "Public agency" means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any instrumentality thereof organized and existing under law or charter.
- (20)(a) "Public work," "public works" or "public works project" includes but is not limited to:
  - (A) Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;

(B) A project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency; or

(C) A project for the construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.

(b) "Public works" does not include:

(A) The reconstruction or renovation of privately owned property that is leased by a public agency; or

(B) The renovation of publicly owned real property that is more than 75 years old by a private nonprofit entity if:

(i) The real property is leased to the private nonprofit entity for more than 25 years;

(ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and

(iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 1, 2007.

(21) "Public works contract" or "contract" means any contract, agreement or understanding, written or oral, into which a public agency enters for any public work.

(22) "Reconstruction" means highway and road resurfacing and rebuilding, the restoration of existing highways and roads, and the restoration of buildings and other structures.

(23) "Reconstruction or renovation of privately owned property which is leased by a public agency" includes improvements of all types within the framework or footprint of an existing building or structure.

(24)(a) "Residential construction project" means a public work project for the construction, reconstruction, major renovation or painting of a single family house or apartment building of not more than four (4) stories in height and all incidental items such as site work, parking areas, utilities, streets and sidewalks pursuant to the U.S. Department of Labor's "All Agency Memorandum No. 130" -- "Application Of The Standard of Comparison 'Projects Of a Character Similar' Under the Davis-Bacon and Related Acts" dated March 17, 1978. (See Appendix 6.)

(b) Notwithstanding the provisions of subsection (a) of this section, where it is determined that a different definition of "residential construction" has been adopted by local ordinance or code, or that the prevailing practice of a particular trade or occupation regarding what is considered "residential construction" differs from the U.S. Department of Labor definition of residential construction, the commissioner may consider such information in determining a project to be a "residential construction project."

(25) "Site of work" is defined as follows:

(a) The site of work is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed, and other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site.

(b) Except as provided in subsection (c) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards and similar facilities, are part of the site of work provided they are dedicated exclusively, or nearly so, to the performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them. Such facilities which are established by a supplier of materials for the project after the opening of bids are deemed to be dedicated exclusively to the performance of the contract or project.

(c) Not included in the site of work are permanent home offices, branch plant establishments, fabrication plants, and tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, and similar facilities of a commercial supplier or materialman which are established by a supplier of materials for the project before opening of bids and not on the project site, are not included in the site of work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract or project.

(26) "Special wage determination" means a wage determination made at the request of a public agency and which is applicable only to specific job classes. A special wage determination is issued in those cases where there is no current wage determination applicable to specific job classes and the use of such job classes is contemplated on a public works project.

(27) "Trade" or "occupation" is defined in accordance with the prevailing practices of the construction industry in Oregon.

(28) "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Bureau of Apprenticeship and Training as meeting its standards for on-the-job training programs and which has been so certified by that bureau.

(29) "Wage determination" includes the original decision and any subsequent amendments made by the commissioner in accordance with ORS 279C.815.

(30) "Wages" or "Prevailing Wages" means the basic hourly rate of pay and fringe benefits as defined in sections (2) and (8) of this rule.

(31) "Worker" means a person employed on a public works project and whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental, professional or managerial. The term "worker" includes apprentices, trainees and any person employed or working on a public works project in a trade or occupation for which the commissioner has determined a prevailing rate of wage. (See OAR 839-025-0035.)

[ED. NOTE: Attachment referenced are available from the agency.]

Stat. Auth.: ORS 279C & 651.060

Stats. Implemented: ORS 279C.800, 279C.870

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 7-1989(Temp), f. 10-2-89, cert. ef. 10-3-89; BL 5-1990, f. 3-30-90, cert. ef. 4-1-90; BL 3-1996, f. & cert. ef. 1-26-96; BL 8-1996, f. 8-26-96, cert. ef. 9-1-96; BL 3-1997(Temp), f. 7-31-97, cert. ef. 8-1-97; BL 1-1998, f. & cert. ef. 1-5-98; BLI 15-2001, f. & cert. ef. 11-14-01; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0004, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 19-2006(Temp), f. 5-12-06, cert. ef. 5-15-06 thru 11-10-06; BLI 39-2006, f. 11-8-06, cert. ef. 11-10-06; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0005**

#### **Determination Requests**

(1) A request for a determination as to whether a project or proposed project is a public works under Or Laws 2007, ch. 764, sec. 43, must meet the following requirements before it will be considered by the commissioner:

(a) The request must be in writing, describe all relevant details of the project or proposed project, and be submitted to: Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon St., #1045, Portland, OR, 97232.

(b) A copy of the request must be sent to any public agency known to be associated with the project at the time it is submitted to the Prevailing Wage Rate Unit. The request must identify the public agencies receiving a copy of the request.

(c) In addition to the written request, the requester must provide all documents, records, and other information necessary to enable the commissioner to make the determination. This information includes, but is not limited to, copies of advertisements, project plans and specifications, development and disposition agreements, contracts, project financing information, loan agreements, and any other relevant information related to the project or proposed project. When the requester is not a public agency and information necessary for a determination is in the custody or control of a public agency, it is the requester's responsibility to obtain the information from the public agency and provide it with the request.

(2) The requester has a continuing duty to provide the Prevailing Wage Rate Unit with all relevant documents, records and other information until a determination is made. If any information submitted in connection with a request is modified or superseded in any material respect after the request is made, the requester must promptly submit the updated information to the Prevailing Wage Rate Unit.

(3) The commissioner will inform the requester if additional documents, records, or other information is necessary to enable the commissioner to make the determination.

(4) If the commissioner informs a requester that the Prevailing Wage Rate Unit has not received all the documents, records, or other information necessary to make a determination, the request will remain pending for 90 calendar days. If the Prevailing Wage Rate Unit does not receive the information the commissioner deems necessary to make a determination while the request is pending, the requester may be required to submit a new request in order to obtain a determination.

(5) If a requester fails or refuses to provide documents, records, or other information necessary to enable the commissioner to make the determination and the commissioner has reasonable grounds to believe such documents, records, or other information exist, the commissioner may inform the requester that the commissioner is unable to issue a determination.

(6) The commissioner's determination will be issued to the requester, with copies mailed to any public agencies identified on the request.

(7) The determination will include notice of the right of the requester and any person adversely affected or aggrieved by the determination to a hearing, pursuant to ORS 183.415, OAR 137-003-0001, the supplemental provisions for hearing requests in OAR Ch. 839, div. 50. and Or Laws 2007, ch. 764, sec. 43.

(8)(a) After the commissioner issues a determination, the requester or any public agency served with a copy of the determination may request that the commissioner reconsider the determination.

(b) A request for reconsideration must be received within 15 calendar days of the date the determination was mailed. Requests must be submitted to the Prevailing Wage Rate Unit. A request for reconsideration does not toll the time period for requesting a contested case hearing on the determination.

(c) The reconsideration request must be in writing and include the reason or reasons for the request and any documents in support of the request.

(d) The commissioner will accept or reject the request within 15 business days of receipt of the request by the Prevailing Wage Rate Unit. If the commissioner does not accept the request within 15 business days, it is deemed denied.

Stat. Auth.: ORS 279C & 651.060, Other Auth. HB 2140, Sec. 45, 2007

Stats. Implemented: ORS 279C.800, 279C.870

Hist.: BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0006**

#### **Purpose and Procedure for Addition of Trade**

(1) As a result of technological advancements and/or policy changes, new trades periodically emerge in the construction industry. When this happens, it may be appropriate for the commissioner to add such trades into the prevailing wage rate determinations. The following procedure is designed to insure that new trades are included in prevailing wage rate determinations when appropriate.

(2) Any person may request the addition of a trade by submitting a written request to the Prevailing Wage Rate Unit. This request must, at a minimum, specify:

- (a) Name of proposed trade;
- (b) Minimum education required; and
- (c) Description of minimum skills required and tools used.

(3) The PWR Coordinator will recommend to the commissioner whether or not to conduct a complete study of the proposed trade. The requesting party will be notified in writing by the PWR Coordinator of the commissioner's decision.

(4) If the PWR Coordinator conducts the requested study, the following areas, at a minimum, will be included in the review:

- (a) Relevant practices of the U.S. Department of Labor under the Davis-Bacon Act;
- (b) Whether the proposed trade is substantially different from trades included in the current wage determination;
- (c) The relevant prevailing practices in the State of Oregon.

(5) The PWR Coordinator will submit a report and a recommendation to the commissioner.

(6) The commissioner will decide whether or not to include the proposed trade. The requesting party will be notified in writing of the commissioner's decision.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96;

BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0006, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

### **839-025-0007**

#### **Purpose and Procedure for Special Wage Determination**

(1) In planning a public works project, public agencies periodically require the use of a trade not normally included in wage determinations. Special wage determinations allow the commissioner to recognize a trade and establish a rate for it. This procedure also allows the commissioner to respond in a timely fashion to the needs of the public agency. Special wage determinations are not available when the wage determination is applicable.

(2) Any public agency may submit a written request for a special wage determination to the Prevailing Wage Rate Unit. The request must contain:

- (a) A written description of the work to be performed; and

- (b) An identification of the requested trade(s).
  - (3) Within two weeks the PWR Coordinator will recommend to the commissioner whether or not a special wage determination should be established.
  - (4) If a special wage determination is to be allowed, the PWR Coordinator will provide the requesting agency with the instruments, procedures, and minimum requirements for conducting a wage survey. The requesting agency will conduct the wage survey in accordance with bureau procedures and submit the results to the PWR Coordinator.
  - (5) The PWR Coordinator will review the data for methodological compliance and accuracy and submit it to the commissioner with a recommendation.
  - (6) The commissioner will approve or disapprove the special wage determination request after considering the PWR Coordinator's recommendation. The public agency will be notified, in writing, of the commissioner's final decision.
  - (7) If the special wage determination is approved, it is valid only for the locality specified in the special wage determination and only until the first day of July following the date of approval unless amended prior to that date.
  - (8) A copy of the approved special wage determination will be kept on file by the PWR Coordinator and the Wage and Hour Division.
- Stat. Auth.: ORS 279 & 651  
 Stats. Implemented: ORS 279.348 - 279.380  
 Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0007, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

**839-025-0008**

**List of Planned Public Improvements**

- (1) As used in this rule the term "Public improvement" has the same meaning as it does in ORS 279A.010(aa).
- (2) Each public agency must prepare and file with the commissioner a list of every public improvement known to the agency that the agency plans to fund during the subsequent budget period. The list must be submitted to the Prevailing Wage Rate Unit not less than 30 days prior to the adoption of the agency's budget. If the agency revises its list after the adoption of its budget, the agency must file the revised list with the commissioner at that time.
- (3) Copies of the lists of planned public improvements filed with the commissioner by public agencies as required by ORS 279C.305(2) are available to the public upon written request to the Prevailing Wage Rate Unit. The request must contain the following information:
  - (a) The name of the public agency;
  - (b) The name of any division, section or department of the public agency, if applicable; and
  - (c) The approximate date of the budget period for which the list was filed.
- (4) The cost of supplying copies requested in section (3) of this rule will be calculated in accordance with OAR 839-030-0010, which sets forth the fees to be charged by the bureau when responding to requests for copies of public records.
- (5) To assist public contracting agencies in complying with the provisions of ORS 279C.305 and these rules, the commissioner has prepared two forms, WH-118 and WH-119. The use of these forms by the public contracting agency is optional. However, the statutory requirements of ORS 279C.305(2) are satisfied when these forms are completed and mailed to the Prevailing Wage Rate Unit. The forms should be completed as follows:
  - (a) The Planned Public Improvement Summary form, WH-118, should be used to summarize all planned projects in the subsequent budget period, noting the project information requested on the form;
  - (b) ORS 279C.305 requires public contracting agencies to show that they are conforming to state policy when they plan to use their own personnel and equipment on projects estimated to exceed \$125,000. The Capital Improvement Project Cost Comparison Estimate form, WH-119, should be completed for the purpose of complying with this provision. In developing cost comparisons, unit costs which can be substantiated by the agency's cost accounting system should be used. Contractor unit prices that reflect bidding data should also be used.

[ED. NOTE: Forms referenced are available from the agency.]

Stat. Auth.: ORS 279 & 651  
 Stats. Implemented: ORS 279.348 - 279.380  
 Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef.

2-15-02; Renumbered from 839-016-0008, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08; BLI 5-2008, f. & cert. ef. 3-10-08

## **Forms Prescribed by the Labor Commissioner**

### **839-025-0010**

#### **Payroll and Certified Statement**

(1) The form required by ORS 279C.845 is the Payroll and Certified Statement form, **WH-38**. This form must accurately and completely set out the contractor's or subcontractor's payroll for each week during which the contractor or subcontractor employs a worker upon a public works project.

(2) The contractor or subcontractor may submit the weekly payroll on the **WH-38** form or may use a similar form providing such form contains all the elements of the **WH-38** form. When submitting the weekly payroll on a form other than **WH-38**, the contractor or subcontractor must attach the certified statement contained on the **WH-38** form to the payroll forms submitted.

(3) Each Payroll and Certified Statement form must be submitted by the contractor or subcontractor to the public agency by the fifth business day of each month following a month in which workers were employed upon a public works project.

(4) The Payroll and Certified Statement forms received by the public agency are public records subject to the provisions of ORS 192.410 to 192.505. As such, they must be made available upon request. Pursuant to ORS 279C.845(2), information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 through 279C.870.

(5) If the contractor fails to submit its payroll and certified statement forms to the public agency as required by subsection (3) of this rule, the public agency must retain 25 percent of any amount earned by the contractor until the contractor has submitted the required payroll and certified statements to the public agency.

(a) The amount to be retained shall be calculated at 25 percent of the unpaid amount earned by the contractor at the time each payroll and certified statement are due. For example, if the contractor fails to submit its payroll and certified statement by the fifth of the month and the contractor earned \$100,000 in the period since its last payroll and certified statement were submitted to the public agency, the public agency must retain 25 percent of \$100,000 (\$25,000), until such time as the required payroll and certified statement are submitted.

(b) When calculating the amount to be retained, amounts previously retained shall not be included as amounts earned by the contractor.

(c) Once the required payroll and certified statement have been submitted to the public agency, the public agency must pay the amount retained to the contractor within 14 days.

(6) If a first-tier subcontractor fails to submit a payroll and certified statement form to the public agency as required by subsection (3) of this rule, the contractor must retain 25 percent of any amount earned by the first-tier subcontractor until the first-tier subcontractor has submitted the required payroll and certified statements to the public agency.

(a) The amount to be retained shall be calculated at 25 percent of the unpaid amount earned by the first-tier subcontractor at the time each payroll and certified statement are due. For example, if the first-tier subcontractor fails to submit the payroll and certified statement by the fifth of the month and the first-tier subcontractor earned \$100,000 in the period since the last payroll and certified statement were submitted to the public agency, the contractor must retain 25 percent of \$100,000 (\$25,000), until such time as the required payroll and certified statement are submitted.

(b) When calculating the amount to be retained, amounts previously retained shall not be included as amounts earned by the first-tier subcontractor.

(c) The contractor must verify that the first-tier subcontractor has filed the required payroll and certified statement(s) with the public agency before the contractor may pay the first-tier subcontractor any amount retained under this section.

(d) Once the first-tier subcontractor has filed the required payroll and certified statement with the public agency, the contractor must pay the amount retained to the first-tier subcontractor within 14 days.

(7) Notwithstanding ORS 279C.555 or 279C.570(7), amounts retained pursuant to the provisions of this rule shall be in addition to any other amounts retained.

(8)(a) If a project is a public works of the type described in ORS 279C.800(6)(a)(B), and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public agency or agencies providing funds for the project.

(b) When more than one public agency provides funds for a project, the public agencies may designate one agency to receive the contractor's and any subcontractors' payrolls.

(9)(a) If a project is a public works of the type described in ORS 279C.800(6)(a)(C), and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public agency or agencies that will occupy or use the completed project.

(b) When more than one public agency will occupy or use the completed project, the public agencies may designate one agency to receive the contractor's and any subcontractors' payrolls.

[ED. NOTE: Forms and Publications referenced are available from the agency.]

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 13-1992, f. & cert. ef. 12-14-9; BL 3-1996, f. & cert. ef. -1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0010, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0013**

#### **Notice of Public Works Form**

(1) The notification form required by ORS 279C.835 is the Notice of Public Works form, **WH-81**.

(2) Except as provided in sections (4) and (5) of this rule, the public agency must file the Notice of Public Works form, **WH-81**, with the Prevailing Wage Rate Unit within 30 days after the date a public works contract is awarded.

(3) Pursuant to ORS 279C.835, the Notice of Public Works form, **WH-81**, must include a copy of the disclosure of first-tier subcontractors submitted to the public agency by the contractor if a public agency awards a contract to a contractor for a public works project.

(4) When a project is a public works project pursuant to ORS 279C.800(6)(a)(B) and no public agency awards a contract to a contractor for the project, the Notice of Public Works form shall be filed by the public agency providing public funds for the project at the time the public agency commits to the provision of funds for the project.

(5) When a project is a public works project pursuant to ORS 279C.800(6)(a)(C) and no public agency awards a contract to a contractor for the project, the Notice of Public Works form shall be filed by the public agency when the agency enters into an agreement to occupy or use the completed project.

(6) Public agencies are not required to file a Notice of Public Works form when the contract awarded is not regulated under the provisions of ORS 279C.800 to 279C.870.

[ED. NOTE: Forms and Publications referenced are available from the agency.]

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0013, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

## **Contract Requirements**

### **839-025-0015**

#### **Public Works Bonds**

(1) Pursuant to ORS 279C.836, except as provided, before starting work on a contract or subcontract for a public works project of \$100,000 or more, a contractor or subcontractor must file with the Construction Contractors Board a public works bond with a corporate surety authorized to do business in this state in the amount of \$30,000.

(2) The Commissioner of the Bureau of Labor and Industries adopts the language in the Statutory Public Works Bond set forth in **Appendix 5**.

(3) The name of the entity as it appears on the public works bond must be the same as the entity name filed at the Oregon Corporation Division (if applicable).

(a) If the entity is a sole proprietorship, the bond must include the name of the sole proprietor;

(b) If the entity is a partnership, or joint venture, the bond must include the names of all partners or venturers (except limited partners);

- (c) If the entity is a limited liability partnership, the bond must be issued in the name of all partners and in the name of the limited liability partnership;
  - (d) If the entity is a limited partnership, the bond must be issued in the name of all general partners and in the name of the limited partnership and any other business name(s) used. Limited partners do not need to be listed on the bond;
  - (e) If the entity is a corporation or trust, the bond must be issued showing the corporate or trust name; or
  - (f) If the entity is a limited liability company, the bond must be issued in the name of the limited liability company.
- (4) If at any time an entity changes or amends its entity name, the Construction Contractors Board must be notified within 30 days of the date of the change.
  - (5) If an entity is a sole proprietorship, partnership, limited liability partnership, limited partnership, joint venture, corporation, limited liability company, business trust or any other entity, and changes the entity to one of the other entity types, the new entity must supply a new bond.
  - (6) Riders to existing bonds changing the type of entity bonded will be construed as a cancellation of the bond and will not be otherwise accepted.
  - (7) The inclusion or exclusion of business name(s) on a bond shall not limit the liability of an entity. Claims against a bonded entity will be processed regardless of business names used by such entity.

[ED. NOTE: Appendix referenced are available from the agency.]

Stat. Auth.: ORS 279C & 651.060

Stats. Implemented: ORS 279C.800 - 279C.870

Hist.: BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 5-2008, f. & cert. ef. 3-10-08

### **839-025-0020**

#### **Public Works Contracts and Contract Specifications; Required Conditions**

(1) For purposes of this rule:

- (a) "Construction Manager/General Contractor contract" (or "CM/GC contract") means a contract that typically results in a general contractor/construction manager initially undertaking various pre-construction tasks that may include, but are not limited to: design phase development, constructability reviews, value engineering, scheduling, and cost estimating, and in which a guaranteed maximum price for completion of construction-type work is typically established by amendment of the initial contract, after the pre-construction tasks are complete or substantially complete. "CM/GC" refers to the general contractor/construction manager under this form of contract. Following the design phase, the CM/GC may then act as a General Contractor and begin the subcontracting process. The CM/GC typically coordinates and manages the construction process, provides contractor expertise, and acts as a member of the project team.
- (b) "Construction specifications" include the detailed description of physical characteristics of the improvement, design details, technical descriptions of the method and manner of doing the work, quantities or qualities of any materials required to be furnished, descriptions of dimensions, required units of measurement, composition or manufacturer, and descriptions of any quality, performance, or acceptance requirements.

(2) Every public works contract must contain the following:

- (a) A condition or clause that, if the contractor fails, neglects, or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person, or the assignee of the person, in connection with the public works contract as such claim becomes due, the proper officer or officers of the public agency may pay such claim and charge the amount of the payment against funds due or to become due the contractor by reason of the contract (Reference: ORS 279C.515);
- (b) A condition that no person will be employed for more than 10 hours in any one day, or 40 hours in any one week except in cases of necessity, emergency, or where the public policy absolutely requires it, and in such cases the person so employed must be paid at least time and one-half the regular rate of pay for all time worked:
  - (A) For all overtime in excess of eight hours a day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or
  - (B) For all overtime in excess of 10 hours a day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and
  - (C) For all work performed on Saturday and on any legal holiday specified in ORS 279C.540;
- (c) A condition that an employer must give notice to employees who work on a public works contract in writing, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work (Reference: ORS 279C.520); and

(d) A condition that the contractor must promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention, incident to sickness or injury, to employees of such contractor, of all sums which the contractor agrees to pay for such services and all moneys and sums which the contractor collected or deducted from the wages of the contractor's employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service (Reference: ORS 279C.530).

(3) Every public works contract and subcontract must contain a provision that each worker in each trade or occupation employed in the performance of the contract either by the contractor, subcontractor or other person doing or contracting to do or contracting for the whole or any part of the work on the contract, must be paid not less than the applicable state prevailing rate of wage, or the applicable federal prevailing rate of wage, whichever is higher.

(4)(a) Except as provided in sections (6) and (7) of this rule, the existing rate of wage is the rate in effect at the time the initial specifications were first advertised for bid solicitations.

(b) If a public agency is required under subsection (a) of this section or section (6) of this rule to include the state and federal prevailing rates of wage in the specifications for a contract for public works, the public agency also shall include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, as determined by the Commissioner of the Bureau of Labor and Industries under ORS 279C.815(2)(b).

(5)(a) The provisions described in sections (3) and (4), and sections (6) and (7) if applicable, must be included in all specifications for each contract awarded on the project, regardless of the price of any individual contract, so long as the combined price of all contracts awarded on the project is \$50,000 or more (Reference: ORS 279C.830).

(b) A statement incorporating the applicable prevailing wage rate publication and any amendments thereto or Davis-Bacon wage rate determination into the specifications by reference will satisfy these requirements. Such reference must include the title of the applicable wage rates publication or determination and the date of the publication or determination as well as the date of any applicable amendments.

(c) When the prevailing wage rates are available electronically or are accessible on the Internet, the rates may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates. Such reference must include the title of the applicable wage rates publication or determination and the date of the publication or determination as well as the date of any applicable amendments.

(6) When a public agency is a party to a CM/GC contract, the CM/GC contract becomes a public works contract either when the contract first constitutes a binding and enforceable obligation on the part of the CM/GC to perform or arrange for the performance of construction, reconstruction, major renovation or painting of an improvement that is a public works or when the CM/GC contract enters the construction phase, whichever occurs first. The prevailing wage rate in effect at that time shall apply and must be included with the construction specifications for the CM/GC contract. For example, the CM/GC will have a binding and enforceable obligation to perform or arrange for the performance of construction, reconstruction, major renovation or painting of an improvement after the public agency and CM/GC commit to the guaranteed maximum price. For purposes of this rule, the CM/GC contract enters the construction phase when the agency first authorizes the performance of early construction, reconstruction, major renovation or painting work directly related to the improvement project.

(7) A public works project described in ORS 279C.800(6)(a)(B) or (C) that is not a CM/GC contract subject to section (6) of this rule is subject to the existing state prevailing rate of wage or, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act that is in effect at the time a public agency enters into an agreement with a private entity for the project. After that time, the specifications for any contract for the public works shall include the applicable prevailing rate of wage.

(8) If a project is a public works of the type described in ORS 279C.800(6)(a)(B) or (C), a public agency will be deemed to have complied with the provisions of ORS 279C.830 if the public agency requires compliance with the provisions of section (5) of this rule in any agreement entered into by the public agency committing to provide funds for the project or to occupy or use the completed project.

(9) Public agencies may obtain, without cost, a copy of the existing prevailing rate of wages for use in preparing the contract specifications by contacting the Prevailing Wage Rate Unit or any office of the bureau.

Stat. Auth.: ORS 279C & 651.060

Stats. Implemented: ORS 279C.800-279C.870

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 7-1989(Temp), f. 10-2-89, cert. ef. 10-3-89; BL 5-1990, f. 3-

30-90, cert. ef. 4-1-90; BL 3-1996, f. & cert. ef. 1-26-96; BL 3-1997(Temp), f. 7-31-97, cert. ef. 8-1-97; BL 1-1998, f. & cert. ef. 1-5-98; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0020, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 19-2006(Temp), f. 5-12-06, cert. ef. 5-15-06 thru 11-10-06; BLI 39-2006, f. 11-8-06, cert. ef. 11-10-06; BLI 2-2007, f. & cert. ef. 1-23-07; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

## **Records**

### **839-025-0025**

#### **Required Records**

(1) All contractors and subcontractors performing work on public works contracts subject to ORS 279C.800 to 279C.870 shall make and maintain for a period of three (3) years from the completion of work upon such public works records necessary to determine whether the prevailing rate of wage and overtime has been or is being paid to workers upon public works.

(2) In addition to the Payroll and Certified Statement, Form WH-38, records necessary to determine whether the prevailing wage rate and overtime wages have been or are being paid include but are not limited to records of:

- (a) The name and address of each employee;
- (b) The work classification or classifications of each employee;
- (c) The rate or rates of monetary wages and fringe benefits paid to each employee;
- (d) The rate or rates of fringe benefit payments made in lieu of those required to be provided to each employee;
- (e) Total daily and weekly compensation paid to each employee;
- (f) The daily and weekly hours worked by each employee;
- (g) Apprenticeship and Training Agreements;
- (h) Any deductions, rebates or refunds taken from each employee's total compensation and actual wages paid;
- (i) Any payroll and other such records pertaining to the employment of employees upon a public work.

(3) When apprentices and/or trainees are employed on a public works project, the records must clearly distinguish them from other employees.

(4) When a contractor or subcontractor employs a worker on public works projects and non public works projects during the same work week and the worker is paid a rate of pay which is less than the prevailing wage rate when working on a non public works project, the contractor or subcontractor must separately record the hours worked on the public works projects and those hours worked elsewhere.

(5) For all public works contracts subject to ORS 279C.800 to 279C.870 first advertised or solicited on or before January 1, 2008, contractors shall maintain records documenting that the appropriate fee was paid. Such records shall be maintained for a period of two years and shall include but are not limited to:

- (a) Contract documents showing the contract price;
- (b) Change orders or other adjustments to the final contract price;
- (c) Receipts showing amounts paid.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0025, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0030**

#### **Records Availability**

(1) Every contractor and subcontractor performing work on a public works contract shall make available to representatives of the Wage and Hour Division records necessary to determine if the prevailing wage rate has been or is being paid to workers upon such public work and records showing contract prices and sums paid as fees to the bureau. Such records shall be made available to representatives of the Wage and Hour Division for inspection and transcription during normal business hours.

(2) The contractor or subcontractor shall make the records referred to in section (1) of this rule available within 24 hours of a request from a representative of the Wage and Hour Division or at such later date as may be specified by the division.

(3) When a prevailing wage rate claim or complaint has been filed with the Wage and Hour Division or when the division has otherwise received evidence indicating that a violation has occurred and upon a written request by a representative of the Division a public works contractor or subcontractor shall send a certified copy of such contractor's or subcontractor's payroll records to the Division within ten days of receiving such request. The

Division's written request for such certified copies will indicate that a prevailing wage rate claim has been filed or that the division has received evidence indicating that a violation has occurred.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0030, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

## **Posting**

### **839-025-0033**

#### **Posting Requirements**

(1) Every contractor or subcontractor must post the prevailing wage rates applicable to the project in a conspicuous place at the site of work. The posting must be easily accessible to employees working on the project. Contractors may obtain a copy of the applicable wage rates by contacting the Prevailing Wage Rate Unit or any office of the bureau.

(2) When a contractor or subcontractor provides for or contributes to a health and welfare plan or pension plan for employees who are working on a public works project, the contractor or subcontractor must post a notice containing the following information:

- (a) A description of the plan or plans;
- (b) Information on how and where claims can be made; and
- (c) Where to obtain more information.

(3) The notice required to be posted in section (2) of this rule must be posted in a conspicuous place at the site of work and be easily accessible to employees working on the project. The notice must be posted in the same location as the prevailing wage rate pursuant to section (1) of this rule.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0033, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

### **839-025-0034**

#### **Establishing a Work Schedule**

(1) Employers must give written notice to employees who work on a public contract of the days per week and number of hours per day they may be required to work.

(2) The notice required by section (1) of this rule may be given:

- (a) At the time the employee is hired;
- (b) Prior to commencing work on the contract; or
- (c) By posting a notice at a place frequented by and accessible to employees.

(3) If an employer fails to give the notice required by section (1) of this rule, the work schedule will be presumed to be a five-day work schedule.

(4) The work schedule may be changed by the employer if the change is intended to be permanent and is not designed to evade the overtime requirements of ORS 279C.540 and OAR 839-025-0050. Notice of any work schedule changes intended to be made by an employer must be provided in writing to affected employees in advance of the change.

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.334

Hist.: BL 3-1997(Temp), f. 7-31-97, cert. ef. 8-1-97; BL 1-1998, f. & cert. ef. 1-5-98; Renumbered from 839-016-0034, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

## **Prevailing Rate of Wage**

### **839-025-0035**

#### **Payment of Prevailing Rate of Wage**

(1) Every contractor or subcontractor employing workers on a public works project must pay to such workers no less than the applicable prevailing rate of wage for each trade or occupation, as determined by the commissioner, in which the workers are employed.

(2) When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.), if the state prevailing rate of wage is higher than the federal prevailing rate of wage, the contractor and every subcontractor on the project shall pay no less than the state prevailing rate of wage as determined under ORS 279C.815.

(3) Every person paid by a contractor or subcontractor in any manner for the person's labor in the construction, reconstruction, major renovation or painting of a public work is employed and must receive no less than the applicable prevailing rate of wage, regardless of any contractual relationship alleged to exist. Thus, for example, if partners are themselves performing the duties of a worker, the partners must receive no less than the prevailing rate of wage for the hours they are so engaged.

(4) Persons employed on a public works project and who are spending more than 20% of their time during any workweek in performing duties which are manual or physical in nature as opposed to mental or managerial in nature are workers and must be paid the applicable prevailing rate of wage. Mental or managerial duties include, but are not limited to, administrative, executive, professional, supervisory or clerical duties.

(5) Persons employed on a public works project for the manufacture or furnishing of materials, articles, supplies or equipment (whether or not a public agency acquires title to such materials, articles, supplies or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) are not workers required to be paid the applicable prevailing rate of wage unless the employment of such persons is performed in connection with and at the site of the public works project.

(6) Except as provided in ORS 279C.838, persons employed on a public works project who are employed by a commercial supplier of goods or materials must be paid no less than the applicable prevailing rate of wage when the work is performed at the "site of work" as that term is defined in OAR 839-025-0004(25) or when the work is performed in fabrication plants, batch plants, borrow pits, job headquarters, tool yards or other such places that are dedicated exclusively or nearly so to the public works project.

(7) Except as provided in ORS 279C.838, persons employed on a public works project by the construction contractor or construction subcontractor to transport materials or supplies to or from the public works project are required to be paid the applicable prevailing wage rate for work performed in connection with the transportation of materials or supplies at the "site of work" as that term is defined in OAR 839-025-0004(25).

(8) Persons employed on a public works project for service work as opposed to construction work are not workers required to be paid the prevailing rate of wage.

(9) Every apprentice, as defined in these rules, must be paid not less than the appropriate percentage of the applicable journeyman's wage rate and fringe benefits as determined pursuant to ORS 279C.800 to 279C.870. Any worker listed on a payroll at an apprentice wage rate, who is not an apprentice as defined in these rules, must be paid not less than the applicable prevailing rate of wage for the classification of work actually performed. In addition, if the total number of apprentices employed exceeds the ratio permitted in the applicable standards, all apprentices so employed must be paid not less than the applicable journeyman's prevailing wage rate for work actually performed.

(10) Every trainee, as defined in these rules, must be paid not less than the appropriate percentage of the applicable journeyman's wage rate and fringe benefits determined pursuant to ORS 279C.800 to 279C.870. Any worker listed on a payroll at a trainee wage rate, who is not a trainee as defined in these rules, must be paid not less than the applicable prevailing rate of wage for the classification of work actually performed. In addition, if the total number of trainees employed exceeds the ratio permitted in the applicable standards, all trainees so employed must be paid not less than the applicable journeyman's prevailing wage rate for work actually performed.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.350

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 7-1989(Temp), f. 10-2-89, cert. ef. 10-3-89; BL 5-1990, f. 3-30-90, cert. ef. 4-1-90; BL 8-1996, f. 8-26-96, cert. ef. 9-1-96; BL 1-1997(Temp), f. & cert. ef. 4-29-97; BL 4-1997, f. & cert. ef. 8-29-97; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0035, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0037**

#### **Residential Construction Projects**

(1)(a) For residential construction projects subject to ORS 279C.800 to 279C.870, public agencies shall use federal Davis-Bacon wage rates for residential construction projects unless there is no applicable federal rate for a particular trade or classification on the residential project.

(b) If the applicable federal Davis-Bacon wage rate determination does not include a rate for a particular trade or classification needed on a specific residential construction project, and the project is subject to ORS 279C.800 to 279C.870 but not the federal Davis-Bacon Act, the public agency is required to request a special wage rate, identifying the specific trade or classification, pursuant to OAR 839-025-0007.

(c) The commissioner may consider and approve a residential wage determination for a trade or classification issued by any federal agency within twelve months of the date of any request for a special wage rate pursuant to subsection (b) of this section.

(d) Requests for special wage rate determinations for projects subject to both ORS 279C.800 to 279C.870 and the federal Davis-Bacon Act shall be submitted pursuant to Title 29 CFR, Part 5.5(a)(1)(ii) as amended November 20, 2000.

(e) Copies of any special federal wage rate determinations requested and subsequent determination(s) issued pursuant to subsection (d) of this section must be provided to the commissioner by the public agency.

(2) Notwithstanding section (1) of this rule, the commissioner, consistent with statutory authority, may survey and issue residential rates.

(3) Requests for special wage rates for residential construction projects pursuant to section (1)(b) of this rule must be submitted to the Bureau of Labor and Industries by the public agency no fewer than fifteen (15) business days prior to the date the specifications for the project are first advertised.

(4) If a public agency fails to request special wage rates for a residential construction project pursuant to section (1)(b) of this rule at least fifteen (15) business days before the date the specifications for the project are first advertised for the project, the Prevailing Wage Rates for Public Contracts published by the Commissioner of the Bureau of Labor and Industries in effect when the specifications are first advertised shall apply to those trades or classifications for which there is no applicable federal residential rate.

(5) The federal Davis-Bacon wage rates apply to residential construction projects subject to ORS 279C.800 to 279C.870 regardless of whether federal law requires Davis-Bacon rates on the project.

(6) Notwithstanding any other provision of this rule, unless otherwise exempt, under no circumstances may a rate less than the minimum wage rate required by ORS 653.025 be paid to any worker on a residential construction project subject to ORS 279C.800 to 279C.870.

Stat. Auth.: ORS 279C & 651.060

Stats. Implemented: ORS 279C.800-279C.870

Hist.: BLI 19-2006(Temp), f. 5-12-06, cert. ef. 5-15-06 thru 11-10-06; BLI 39-2006, f. 11-8-06, cert. ef. 11-10-06; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

## **Fringe Benefits**

### **839-025-0040**

#### **Payment of Fringe Benefits**

(1) Each contractor and subcontractor required to pay workers the prevailing rate of wage must pay no less than the hourly rate of pay and fringe benefits as determined by the Commissioner.

(2) The rate of pay for fringe benefits paid to apprentices and trainees shall be not less than such rate paid to the majority of such apprentices and trainees in the same trade or occupation as determined by the commissioner. If there is no majority in the same trade or occupation, as determined by the commissioner, apprentices and trainees shall be paid the full amount of the fringe benefits.

(3) The requirements of section (1) of this rule are met when the amount of the fringe benefit or benefits is paid to the worker, in cash, in lieu of a third party administering a fringe benefit or benefits program.

(4) When a contractor or subcontractor pays an hourly rate of pay which exceeds that which is determined by the Commissioner, the amount by which the rate is exceeded may be credited toward payment of the amount of fringe benefits determined by the Commissioner for the trade or occupation.

(5) When a contractor or subcontractor pays a rate for any one fringe benefit which exceeds that which is determined for the fringe benefit, the amount by which the rate is exceeded may be credited toward payment of the amount to be paid for all fringe benefits as determined by the Commissioner for the trade or occupation.

(6) When a contractor or subcontractor pays an amount for fringe benefits which exceeds that which is determined by the Commissioner the amount by which it exceeds the determination may be credited toward payment of the hourly rate of pay as determined by the Commissioner.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.350

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 1-1997(Temp), f. & cert. ef. 4-29-97; BL 4-1997, f. & cert. ef. 8-29-97; Renumbered from 839-016-0040, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

**839-025-0043**

**Frequency of Payment of Fringe Benefits**

(1) Contributions made by a contractor or subcontractor to a fringe benefit program must be made on a regular basis and not less often than quarterly.

(2) Fringe benefit payments made directly to the worker in lieu of a contribution to a fringe benefit program must be paid to the worker as wages on the regularly scheduled pay date.

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.348

Hist.: BL 1-1998, f. & cert. ef. 1-5-98; Renumbered from 839-016-0043, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

**839-025-0045**

**Youth Apprentices**

Youth apprentices, as defined in ORS 344.745, shall not be employed on public works construction projects (Reference: ORS 344.750(5)).

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0045, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

**Overtime Wages**

**839-025-0050**

**Overtime Wages Computations**

(1) As used in this rule "work day" or "day" means a period of 24 consecutive hours beginning with the time the employee regularly starts work. The beginning of the work day may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of ORS 279C.540. For purposes of overtime wages computation, each work day stands alone.

(2) Contractors and subcontractors required by ORS 279C.540 to pay overtime wages shall pay such wages as follows:

(a) Workers must be paid at least time and one-half the hourly rate of pay, excluding fringe benefits, for all hours worked:

(A) On Saturdays;

(B) On the following legal holidays:

(i) Each Sunday;

(ii) New Year's Day on January 1;

(iii) Memorial Day on the last Monday in May;

(iv) Independence Day on July 4;

(v) Labor Day on the first Monday in September;

(vi) Thanksgiving Day on the fourth Thursday in November;

(vii) Christmas Day on December 25.

(C) Over 40 hours in a week; and either

(D) Over eight (8) hours in a day; or

(E) Over 10 hours in a day provided:

(i) The employer has established a work schedule of four consecutive days (Monday through Thursday or Tuesday through Friday) pursuant to OAR 839-025-0034; and

(ii) The employer operates in accordance with this established work schedule.

(b) Where a worker performs work in one or more classifications which provide for one or more hourly rates of pay the worker must be paid, in addition to the straight time hourly earnings for all hours worked, a sum determined by multiplying one half the weighted average of the hourly rates by the number of overtime hours worked pursuant to subsection (a) of this rule;

(c) When determining the hourly wage rate for overtime purposes, the amount paid for fringe benefits shall be excluded from the computations. Though the amount paid for fringe benefits must be paid for all hours worked, such amount is not included when determining the overtime rate. For example, a worker who works a five-day work schedule and earns \$15 per hour plus \$3 per hour in fringe benefits and works ten hours in a day is entitled to \$195  $(\$15/\text{hr} \times 8 \text{ hours}) + (\$22.50/\text{hr} \times 2 \text{ hours}) + (\$3/\text{hr} \times 10 \text{ hours}) = \$195$  for that day.

(3) Examples of computing overtime wages: See **Appendix 3**.

[ED. NOTE: Appendices referenced are available from the agency.]

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.334

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1997(Temp), f. 7-31-97, cert. ef. 8-1-97; BL 1-1998, f. & cert. ef. 1-5-98; Renumbered from 839-016-0050, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

#### **839-025-0054**

##### **Exemption from Overtime Pay Requirements on Public Improvement Projects**

(1) As used in ORS 279C.540(4) and in this rule, unless the context requires otherwise:

(a) "A collective bargaining agreement in effect" means a collective bargaining agreement which is recognized as being binding on all parties by the National Labor Relations Board; which is enforceable within the geographic area in which the public improvement is located; and, the terms of which extend to workers who are working on the public improvement project;

(b) "Labor organization" means any organization certified as such by the National Labor Relations Board.

(2) ORS 279C.540(4) provides an exemption from the overtime pay requirements of ORS 279C.540(1), (2) and (3) under the following circumstances:

(a) The contract on which work is performed is a public improvement contract; and

(b) The contractor is a party to a collective bargaining agreement in effect with any labor organization.

(3) The exemption would not apply, for example, under the following circumstances:

(a) To workers employed on a public improvement who are not covered by the terms of a collective bargaining agreement;

(b) When the labor organization has no jurisdiction in the geographical area where work is being performed;

(c) Any other circumstance when the terms of the collective bargaining agreement is not enforceable for workers on public improvement projects.

Stat. Auth.: ORS 651.060

Stats. Implemented: ORS 279.342

Hist.: BL 7-1992, f. & cert. ef. 6-11-92; Renumbered from 839-016-0054, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

## **Apprentices and Trainees**

#### **839-025-0060**

##### **Apprentices**

(1) Apprentices will be permitted to work upon a public works project at less than the prevailing rate of wage for the work they performed when they are employed and individually registered in a bona fide apprenticeship program registered with:

(a) The U.S. Department of Labor, Bureau of Apprenticeship and Training, (BAT); or

(b) A State Apprenticeship Agency recognized by the BAT; or

(c) If a person is employed in probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State apprenticeship Agency to be eligible for probationary employment as an apprentice.

(2) The allowable ratio of apprentices to journeymen in any craft classification must conform to the apprenticeship standards filed with the Oregon Apprenticeship and Training Council for the particular craft or program in which the contractor's or subcontractor's apprentices are registered.

(3) The contractor or subcontractor will be required to furnish to the contracting officer or a representative of the Wage and Hour Division written evidence of the registration of the program and apprentices as well as the appropriate ratios and wage rates (expressed in percentages of the journeymen hourly rates) prescribed in that program. The commissioner has prepared a form, **WH-120**, which can be used by contractors or subcontractors in complying with this rule. Use of this form is optional.

(4) Notwithstanding section (1) of this rule, apprentices must be paid the full prevailing rate of wage when the program in which they are registered is located in a state contiguous to Oregon which does not recognize apprentices registered in a program approved by the Oregon State Apprenticeship and Training Council.

[ED. NOTE: Forms referenced are available from the agency.]

Stat. Auth.: ORS 651.060(4)

Stats. Implemented: ORS 279.348

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 7-1994, f. & cert. ef. 11-16-94; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0060, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

### **839-025-0065**

#### **Trainees**

(1) Trainees will not be permitted to work upon a public works project at less than the prevailing rate of wage for the work performed unless they are employed and individually registered in a program which has received prior approval of the U.S. Department of Labor, Bureau of Apprenticeship and Training.

(2) The ratio of trainees to journeymen must not be greater than permitted under the plan approved by the Bureau of Apprenticeship and Training.

(3) The contractor or subcontractor will be required to furnish the contracting officer or a representative of the Wage and Hour Division written evidence of the certification of the program, the registration of the trainees, and the ratios and wage rates prescribed in that program. The contractor or subcontractor may use form **WH-120** for this purpose. Use of this form is optional.

(4) In the event the Apprenticeship and Training Division withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable prevailing rate of wage for the work performed until an acceptable program is approved.

[ED. NOTE: Forms referenced are available from the agency.]

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0065, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

### **Enforcement**

#### **839-025-0080**

##### **Liability to Workers**

(1) Any contractor or subcontractor or any surety thereof who fails or refuses to pay at least the prevailing wages and fringe benefits as determined by the commissioner or any overtime wages as required by ORS 279C.540 is liable to the workers affected for all the unpaid prevailing wages, including fringe benefits, and unpaid overtime wages.

(2) The contractor or subcontractor or surety thereof, referred to in section (1) of this rule, is also liable to all unpaid workers for an amount equal to the unpaid prevailing wages, including fringe benefits, as liquidated damages.

(3) The contractor or subcontractor or surety thereof, referred to in section (1) of this rule, is also liable to all unpaid workers for an amount equal to the unpaid overtime wages as liquidated damages, except that if the unpaid overtime results from willful falsification of payroll records, these liquidated damages shall be twice the amount of unpaid overtime.

(4) Any public agency which fails to include a provision in the advertisement for bids, the request for bids, the contract specifications, the accepted bid or elsewhere in the contract documents that the contractor and any subcontractor shall comply with ORS 279C.840 shall be jointly and severally liable, with any contractor or subcontractor that had notice of the requirement to comply with ORS 279C.840, to the workers affected for any unpaid minimum wages.

(5) As used in section (4) of this rule, "minimum wages" means the prevailing wage, including fringe benefits, as determined by the commissioner. "Minimum wages" does not mean overtime wages required by ORS 279C.540 nor liquidated damages referred to in sections (2) and (3) of this rule.

(6) When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.) and a public agency fails to include the state and federal prevailing rates of wage in the specifications for the contract for public works as required under ORS 279C.830(1)(a), or fails to include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality as required under ORS 279C.830(1)(b), the public agency is liable to each affected worker for:

(a) The worker's unpaid minimum wages, including fringe benefits, in an amount that equals, for each hour worked, the difference between the applicable higher rate of wage and the lower rate of wage; and

(b) An additional amount, equal to the amount of unpaid minimum wages due under subsection (a) of this section, as liquidated damages.

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.334 & 279.356

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1997(Temp), f. 7-31-97, cert. ef. 8-1-97; BL 1-1998, f. & cert. ef. 1-5-98; Renumbered from 839-016-0080, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert .ef .1-1-08

### **839-025-0085**

#### **Contract Ineligibility**

(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that, for a period not to exceed three years, a contractor, subcontractor or any firm, limited liability company, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for a public work:

(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on a public works project as required by ORS 279C.840;

(b) The subcontractor has failed to pay the prevailing rate of wage to workers employed on a public works project as required by ORS 279C.840 and the contractor has paid the workers on the subcontractor's behalf; or

(c) The contractor or subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279C.840(4) and these rules.

(2) When the contractor or subcontractor is a corporation, the provisions of section (1) of this rule will apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing wage rates.

(3) As used in section (2) of this rule, any corporate officer or corporate agent responsible for the failure to pay or post the prevailing wage rates or for the failure to pay to a subcontractor's employees amounts required by ORS 279C.840 that are paid by the contractor on the subcontractor's behalf includes, but is not limited to, the following individuals when the individuals knew or should have known the amount of the applicable prevailing wages or that such wages must be posted:

(a) The corporate president;

(b) The corporate vice president;

(c) The corporate secretary;

(d) The corporate treasurer;

(e) Any other person acting as an agent of a corporate officer or the corporation.

(4) The Wage and Hour Division will maintain a written list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts and subcontracts. The list will contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest. Except as provided in OAR 839-025-0095, such names will remain on the list for a period not to exceed three (3) years from the date such names were first published on the list.

(5) Before placing a name on the ineligible list referred to in section (4) of this rule, the commissioner will serve a notice of intended action upon the contractor or subcontractor in the same manner as service of summons or by certified mail, return receipt requested. The notice will include:

(a) A reference to ORS 279C.840;

(b) A short and concise statement of the matters which constitute intentional failure or refusal to pay or post the prevailing rate of wage;

(c) A statement of the party's right to request a contested case hearing and to be represented by counsel at such hearing, provided that any such request must be received by the commissioner in writing within 20 days of service of the notice;

(d) A statement that the party's name will be published on a list of persons ineligible to receive public works contracts or subcontracts, unless the party requests a contested case hearing as provided in section (5)(c) of this rule;

(e) A statement that failure to make written request to the commissioner for a contested case hearing within the time specified will constitute a waiver of the right thereto; and

(f) A statement that if a hearing is requested, the contractor or subcontractor will be given information on procedures and rights as required by ORS 183.413(2).

(6) Upon the failure of the contractor or subcontractor to request a contested case hearing within the time specified, the commissioner or the commissioner's designee will enter an order supporting the bureau's action.

(7) If a contractor or subcontractor makes a timely request for a contested case hearing a hearing will be held in accordance with the Attorney General's Model Rules of Procedure under the Administrative Procedure Act by the commissioner or the commissioner's designee.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0085, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0090**

#### **List of Ineligibles**

(1) The name of the contractor, subcontractor or other persons and the names of any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest whom the commissioner has determined to be ineligible to receive public works contracts shall be published on a list of persons ineligible to receive such contracts or subcontracts.

(2) The list of persons ineligible to receive contracts or subcontracts on public works shall be known as the List of Ineligibles. In addition to names referred to in section (1) of this rule, the list shall contain the date the name was placed on the list and the period of time for which the person is ineligible.

(3) The List of Ineligibles shall be published quarterly and amended as needed at any time. Such list shall be furnished to the public upon request, and made available to public agencies as published or amended.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.361

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; Renumbered from 839-016-0090, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07. cert. ef. 1-1-08

### **839-025-0095**

#### **Removal of Names from List**

(1) The names of the contractor, subcontractor or other persons and the names of any firm, corporation, partnership or association in which the contractor, subcontractor or other persons have a financial interest shall remain on the list for a period not to exceed three (3) years from the date of publication of such name on the list.

(2) The names referred to in section (1) of this rule shall be removed from the list after three (3) years.

(3) The commissioner may, for good cause shown, direct the removal of a name from the list before the expiration of three (3) years. If the commissioner determines good cause has been shown, the commissioner shall issue an order directing the removal of such name or names.

(4) Contractors, subcontractors or other persons, or any firm, corporation, partnership or association in which the contractor, subcontractor or other persons have a financial interest who desire to be removed from the list before the expiration of three (3) years must show good cause for such removal. Such persons may petition the commissioner at any time during the period of ineligibility.

(5) In reviewing such petitions, the commissioner shall consider the following matters:

(a) The past history of the petitioner in taking all necessary measures to prevent or correct violations of statutes or rules;

(b) Prior violations, if any, of statutes or rules;

(c) Magnitude and seriousness of the violation;

(d) Other matters which indicate to the commissioner that the petitioner is not likely to violate ORS 279C.800 to 279C.870 and these rules in the future.

(6) The commissioner shall grant or deny the petition.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.361

Hist.: BL 14-1982, f. 10-19-82, ef. 10-20-82; BL 4-1984, f. & ef. 3-13-84; Renumbered from 839-016-0095, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

## **Exemptions**

### **839-025-0100**

#### **Exemptions**

(1) All public works are regulated under ORS 279C.800 to 279C.870 except as follows:

(a) Projects for which the total price does not exceed \$50,000. As used in this section, the price of a project includes, but is not limited to, the value of work performed by every person paid by a contractor or subcontractor in any manner for the person's work on the project, but does not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay. If the price of a project exceeds \$50,000 at any time during the project, the project is not exempt from ORS 279C.800 to 279C.870.

(b) Contracts of a People's Utility District, which are regulated under ORS 261.345.

(c) Projects for which no funds of a public agency are directly or indirectly used.

(d) Projects:

(A) That are privately owned;

(B) That use funds of a private entity;

(C) In which less than 25 percent of the square footage of a completed project will be occupied or used by a public agency; and

(D) For which less than \$750,000 of funds of a public agency are used.

(E) For purposes of this rule, if none of the square footage of a completed project will be occupied or used by a public agency and no funds of a public agency are used, the provisions of paragraphs (C) and (D) of this subsection will be deemed to have been met.

(e) Projects for residential construction that are privately owned and that predominantly provide affordable housing. As used in this paragraph:

(A) "Affordable housing" means housing that serves occupants whose incomes are no greater than 60 percent of the area median income or, if the occupants are owners, whose incomes are no greater than 80 percent of the area median income.

(B) "Predominantly" means 60 percent or more.

(C) "Privately owned" includes:

(i) Affordable housing provided on real property owned by a public agency if the real property and related structures are leased to a private entity for 50 or more years; and

(ii) Affordable housing owned by a partnership, nonprofit corporation or limited liability company in which a housing authority, as defined in ORS 456.005, is a general partner, director or managing member and the housing authority is not a majority owner in the partnership, nonprofit corporation or limited liability company.

(2) The provisions of ORS 279C.840 and these rules that regulate payment of the prevailing rate of wage do not apply to:

(a) Inmates of the Oregon Department of Corrections assigned to:

(A) A work release program or otherwise working in gainful private employment pursuant to ORS 144.480, relating to prison inmate labor; or

(B) State Parks and Recreation Department projects to improve, maintain and repair buildings and property at state parks and recreation areas pursuant to ORS 390.195(1).

(b) Oregon Youth Conservation Corps members.

(3) A public agency is not subject to ORS 279C.800 to 279C.870 if the public agency only provides funds for a public works project that are not "funds of a public agency" as that phrase is defined in OAR 839-025-0004(9), or, if the public agency will use or occupy less than 25% of the square footage of the completed public works project and less than 25% of combined square footage of the completed project will be used or occupied by public agencies.

[Publications referenced are available from the agency.]

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.357, 390.195(1) & OL Ch. 628 (2001)

Hist.: BL 4-1984, f. & ef. 3-13-84; BL 3-1996, f. & cert. ef. 1-26-96; BL 1-1998, f. & cert. ef. 1-5-98; BLI 15-2001, f. & cert. ef. 11-14-01; Renumbered from 839-016-0100, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 18-2006, f. 5-12-06, cert. ef. 5-15-06; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

## **Installation of Art on Public Works Projects and the Payment of the Prevailing Rate of Wage**

**839-025-0150**

### **Definitions**

(1) For purposes of this rule and OAR 839-025-0155, notwithstanding the definitions in OAR 839-025-0004:

- (a) "Construction," "reconstruction," and "major renovation" do not include the installation of applied art.
- (b) "Worker" does not include an individual whose primary duty consists of the performance of work that is original and creative in character in a recognized field of artistic endeavor (as contrasted to work which can be produced by an individual endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the individual.
- (2) The installation of applied art includes, but is not limited to, the installation of pictures (including paintings, etchings, drawings and photographs), all hangings, pieces of sculpture, statues and other artistic pieces which are independent unto themselves and are not necessary to the structural integrity of the public work.
- (3) Installation work necessary to the structural integrity of a public work includes, but is not limited to, the installation of windows, ceiling tiles, brick and concrete masonry, sheet metal or other fascia materials, siding of any kind, lights, support beams and any item necessary to the construction of the actual public work itself, or to the health and safety of persons who use or will use the public work. The painting of a public work, or any of its parts is considered necessary to the structural integrity of the public work.
- (4) Work considered to be "de minimus" means work not regulated under ORS 279C.800 to 279C.870 or these rules.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.363

Hist.: BL 8-1984, f. & ef. 6-21-84 ; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0150, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0155**

#### **Payment of Prevailing Rate of Wage for the Installation of Art on Public Works Projects**

- (1) Workers engaged in the installation of art necessary to the structural integrity of the public work, as defined in these rules, must be paid no less than the applicable prevailing rate of wage as determined by the Commissioner.
- (2) Workers engaged in the installation of applied art, as defined in these rules, are not required to be paid the prevailing rate of wage when such work is the only work in which the worker is engaged while employed on the public work project. Such work is considered de minimus as defined in these rules.
- (3) Any artist who meets the definition of an individual in OAR 839-025-0150(2) is not required to be paid the prevailing rate of wage, even when the artist is engaged in the installation of art necessary to the structural integrity of the public work when the art is of the artist's own creation.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.342

Hist.: BL 8-1984, f. & ef. 6-21-84; Renumbered from 839-016-0155, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

### **Fees on Public Works Contracts**

#### **839-025-0200**

##### **Fees to Be Paid by Public Agency**

- (1) A public agency must pay a fee to the Prevailing Wage Rate Unit for every contract awarded to a contractor for a public work which is regulated under the Prevailing Wage Rate Law (ORS 279C.800 to 279C.870).
- (2) The amount of the fee is one tenth of one percent (.001) of the contract price. However, the fee must be no less than \$100 nor more than \$5,000 regardless of the contract price. [Note: Pursuant to Or Laws 2007, ch. 844, sec. 8, for public works contracts first advertised or solicited on or after January 1, 2008 and before January 1, 2011, the fee must be no less than \$250 nor more than \$7,500 regardless of the contract price.]
- (3) The public agency must pay the fee at the time the public agency enters into the public works contract.
- (4) In order to assist public agencies in the proper calculation of the fee, the bureau has prepared a form for this purpose. The form is available, on request, from the Prevailing Wage Rate Unit.
- (5) As used in this rule, "contract price" means the dollar amount of the contract on the date it was awarded to the contractor and the dollar amount of any subsequent change orders or other adjustments.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0200, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0210**

#### **Adjustment of Fees**

(1) Within 30 days of the final progress payment to the contractor by the public agency after completion of the contract, the public agency must determine the final contract price. The public agency must consider all change orders or other adjustments to the contract price in making the determination.

(2) The public agency must calculate the fee in accordance with OAR 839-025-0200(2) and must credit the amount paid pursuant to OAR 839-025-0200(3). The difference, if any, must be determined as follows:

(a) In the case of a reduction of more than \$100 in the amount of the fee, the public agency may submit a request to the bureau for a refund of the difference and the bureau will pay a refund to the public agency;

(b) In the case of an increase of more than \$100 in the amount of the fee, the public agency must pay the difference to the bureau.

(3) Requests for refunds and additional payments must be submitted with sufficient documentation to show how the amount to be refunded or to be paid was calculated. All such requests or payments must be made to the Prevailing Wage Rate Unit within 30 days after the date the final progress payment was made to the contractor by the public agency after completion of the contract.

(4) In order to assist public agencies in the proper calculation of the fee, the bureau has prepared a form for this purpose. The form is available, on request, from the Prevailing Wage Rate Unit.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0210, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0220**

#### **Fees for Contract Without Specific Award Amounts**

(1) When a project is a public work subject to ORS 279C.800 to 279C.870, but the contract is awarded without stating any specific amount, the contract price for purposes of calculating the fee shall be based on the amount the public agency anticipates to be the guaranteed maximum amount of the project.

(2) When the contract is completed, adjustments in the fees shall be calculated and paid or a refund may be requested as provided in OAR 839-025-0210.

(3) When the public agency has not determined the guaranteed maximum amount, the agency shall make a good faith estimate of the contract price. The fee shall be calculated on this estimated amount.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0220, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 42-2007, 12-28-07, cert. ef. 1-1-08

### **839-025-0230**

#### **Special Circumstances**

(1) When a public agency enters into an agreement for construction management services or chooses to act as its own general contractor or construction manager in connection with a public works project subject to ORS 279C.800 to 279C.870, the contract price for purposes of determining whether the project is regulated under the law shall be the sum of all contracts associated with the project or, if the actual sums are not known at the time work begins, the contract price shall be the guaranteed maximum amount for the project or the agency's good faith estimate of the contract price of the project if there is no guaranteed maximum amount.

(2) When a public agency contracts with a contractor to act as the general manager of a public works project, the contract for general manager services is a public works contract for purposes of these rules and a fee is required just as it is for any other public works contract, since the contract would not have been entered into but for the public works project.

(3) When a public agency acts as its own general contractor and enters into one or several contracts in connection with a public works project subject to ORS 279C.800 to 279C.870, the public agency is required to pay the fee in connection with each contract awarded to each contractor. The fee is required on all contracts, regardless of the contract price of any individual contract, so long as the combined price of all contracts awarded on the project is \$50,000 or more.

(4) When a project is a public works project pursuant to ORS 279C.800(6)(a)(B) and no public agency awards a contract to a contractor for the project, the public agency or agencies providing public funds for the project shall pay the required fee at the time the public agency or agencies commit(s) to the provision of funds for the project. When the amount of the project is not known by the public agency or agencies providing public funds

for the project, the public agency or agencies shall pay the required fee pursuant to the provisions of OAR 839-025-0220.

(5) When a project is a public works project pursuant to ORS 279C.800(6)(a)(C) and no public agency awards a contract to a contractor for the project, the public agency or agencies that will occupy or use the completed project shall pay the required fee when the agency or agencies enter(s) into an agreement to occupy or use the completed project. When the amount of the project is not known by the public agency or agencies that will occupy or use the completed project, the public agency or agencies shall pay the required fee pursuant to the provisions of OAR 839-025-0220.

(6) When more than one public agency is required to pay a fee pursuant to section (4) or (5) of this rule, the amount of the fee owed by each public agency shall, if not otherwise previously agreed upon by the agencies, be pro-rated proportionately based on the amount of public funds provided or space occupied or used by each agency.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0230, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

## **Actions that Circumvent Payment of Prevailing Wages Prohibited**

### **839-025-0300**

#### **Generally**

No person shall take any action which circumvents the payment of the prevailing wage rate to workers on public works projects.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0300, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

### **839-025-0310**

#### **Division of Projects**

(1)(a) A public agency may not divide a public works project into more than one project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

(b) When making a determination of whether the public agency divided a public works project to avoid compliance with ORS 279C.800 to 279C.870, the commissioner will consider the facts and circumstances in any given situation including, but not limited to, the following matters:

(A) The physical separation of project structures;

(B) Whether a single public works project includes several types of improvements or structures;

(C) The anticipated outcome of the particular improvements or structures the agency plans to fund;

(D) Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;

(E) Whether the work on the project is performed in one time period or in several phases as components of a larger entity;

(F) Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;

(G) The manner in which the public agency and the contractors administer and implement the project;

(H) Other relevant matters as may arise in any particular case.

(c) When the commissioner determines that a public agency has divided a public works project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner will issue a written order compelling compliance with ORS 279C.800 to 279C.870. The order will offer the public agency the opportunity to contest the order pursuant to OAR 839-050-0000 through 839-050-0420.

(2) If a project is a public works of the type described in ORS 279C.800(6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in section (1)(b) of this rule to separate the parts of the project that include funds of a public agency or that will be occupied or used by a public agency from the parts of the project that do not include funds of a public agency and that will not be occupied or used by a public agency. If the commissioner divides the project, any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency is not subject to ORS 279C.800 to 279C.870.

(3) If a project includes parts that are owned by a public agency and parts that are owned by a private entity, the commissioner shall divide the project, if appropriate, after applying the considerations set forth in sections (1)(b) and (2) of this rule to separate the parts of the project that are public works from the parts of the project that are not public works. If the commissioner divides the project, parts of the project that are not public works are not subject to ORS 279C.800 to 279C.870.

(4) When a private project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that is already underway becomes a public works project by virtue of the provisions of ORS 279C.800(6)(a)(B) or (C), the provisions of 279C.800 to 279C.870 apply prospectively to the project once any public agency commits to the provision of funds for the project or any public agency enters into an agreement to occupy or use any portion of the completed project. If a public agency delays a commitment to the provision of funds or delays entry into an agreement for occupancy or use for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner may determine that the provisions of 279C.800 to 279C.870 shall apply to the entire public works project under section (1) of this rule.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0310, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0315**

#### **Use of Multiple Wage Rate Determinations on Projects**

(1) The commissioner may authorize the use of multiple wage rate determinations on projects comprised of more than one construction type. For example, on a project consisting of the construction of both residential units and commercial space, the commissioner may authorize residential wage rates to be paid for work performed in connection with the construction of the residential units pursuant to OAR 839-025-0037 and non-residential prevailing wage rates to be paid for work performed in connection with the construction of the commercial space.

(2) A public agency, developer or prime contractor may request authorization to use multiple wage determinations on a project. Requests for authorization to use multiple wage determinations on a project must be in writing, describe all relevant details of the project or proposed project, and be submitted to: Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon St., #1045, Portland, OR, 97232.

(3) The requester will be advised if the commissioner determines that multiple wage rate determinations are appropriate and may be used on a project.

(4) If the commissioner determines that multiple wage rate determinations may be used on a project, continued authorization to use the multiple wage rate determinations shall be contingent upon compliance with the following requirements:

(a) The project/contract specifications must clearly delineate the portions of the project subject to each applicable wage rate determination;

(b) All applicable wage rate determinations must be posted at the site of work pursuant to the provisions of OAR 839-025-0033, with an explanation of the portions of the project to which each wage rate determination applies;

(c) The developer or prime contractor must establish adequate controls to ensure that all workers on the project are paid in accordance with the applicable wage rates; and

(d) Each and every contractor employing workers on the project must prepare, submit and maintain accurate time and payroll records to demonstrate compliance with all wage rate determinations applicable to the project.

Stat. Auth.: ORS 651.060(4), 279C

Stats. implemented: ORS 279c.800 - 279C.870

Hist.: BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0320**

#### **Payment of Prevailing Wage by Persons Other than Contractors or Subcontractors Prohibited**

(1) Except as provided herein, no person, other than the contractor or subcontractor, shall pay or contribute any portion of the prevailing rate of wage specified in the contract to workers employed on the public works contract.

(2) Section (1) of this rule does not apply to payments to workers who are enrolled in government-subsidized training or retraining programs.

(3) For purposes of this rule, a person pays or contributes to the payment of the prevailing rate of wage when a contractor or subcontractor receives monies pursuant to a program, plan or other agreement that includes a provision that contributions by members of a labor organization of a part of their wages will be made to the labor organization for the purpose of paying contractors or subcontractors the difference in the wage rate negotiated under the collective bargaining agreement and the wage rate used by the contractor or subcontractor in obtaining a contract. However, a person does not pay or contribute to the payment of the prevailing rate of wage when the contractor or subcontractor receives monies pursuant to such program plan or agreement if the collectively bargained wage rate exceeded the prevailing rate of wage in effect at the time the contractor or subcontractor made a bid on a contract.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0320, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

### **839-025-0330**

#### **Wage Averaging Prohibited**

(1) No contractor or subcontractor shall reduce a worker's regular rate of pay for work on projects not subject to the Prevailing Wage Rate Law (ORS 279C.800 to 279C.870) when the reduction in pay has the effect of the worker not receiving the prevailing rate of wage for work performed on the public works project.

(2) As used in this rule, "regular rate" has the same meaning as that defined in OAR 839-020-0030(2)(b).

(3) When making a determination of whether a contractor or subcontractor has reduced a worker's regular rate in violation of section (1) of this rule, the bureau shall consider:

(a) The timing of the wage rate reduction;

(b) Whether the wage rate reduction was made pursuant to an established plan;

(c) Whether the wage rate reduction is applied equally to all workers in similar job classifications;

(d) Whether the wage rate reductions are applied to workers employed on public works projects but not to workers employed only on projects not subject to the Prevailing Wage Rate Law (ORS 279C.800 to 279C.870);

(e) Other considerations as the facts and circumstances of a particular matter may reveal.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0330, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

### **839-025-0340**

#### **Circumventions of the Prevailing Wage Rate Law**

(1) A public agency circumvents the payment of the prevailing rate of wage when it knowingly or intentionally:

(a) Fails or refuses to include a provision stating the existing prevailing rate of wage in the contract specifications in violation of ORS 279C.830;

(b) Fails or refuses to include a provision in the contract that workers on the contract shall be paid no less than the specified minimum hourly rate of wage in violation of ORS 279C.830;

(c) Divides a project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870 in violation of OR Laws 2007, ch. 764, sec. 44.

(d) Awards a contract to a contractor whose name appears on the list of ineligible contractors maintained pursuant to ORS 279C.860.

(2) The "specified minimum hourly rate of wage" as used in section (1)(b) of this rule means the applicable prevailing rate of wage.

(3) A contractor circumvents the payment of the prevailing rate of wage when it knowingly or intentionally awards a contract to a contractor whose name appears on the list of ineligible contractors maintained pursuant to ORS 279C.860.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0340, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

## **Civil Penalties for Violation of Prevailing Wage Rates on Public Works Matters**

### **839-025-0500**

#### **Definitions**

As used in OAR 839-025-0500 to 839-025-0540, a person acts knowingly when the person has actual knowledge of a thing to be done or omitted or should have known the thing to be done or omitted. A person should have known the thing to be done or omitted if the person has knowledge of facts or circumstances that would place the person on reasonably diligent inquiry. A person acts knowingly if the person has the means to be informed but elects not to do so. For purposes of the rule, the contractor, subcontractor and public agency are presumed to know the circumstances of the public works construction project.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0500, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0510**

#### **Violations Separate and Distinct**

Each violation is separate and distinct. In the case of continuing violations, each day's continuance is a separate and distinct violation.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0510, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05

### **839-025-0520**

#### **Criteria to Determine Civil Penalty**

(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or public agency and shall cite those the commissioner finds to be applicable:

(a) The actions of the contractor, subcontractor or public agency in responding to previous violations of statutes and rules;

(b) Prior violations, if any, of statutes and rules;

(c) The opportunity and degree of difficulty to comply;

(d) The magnitude and seriousness of the violation;

(e) Whether the contractor, subcontractor or public agency knew or should have known of the violation.

(2) It shall be the responsibility of the contractor, subcontractor or public agency to provide the commissioner with evidence of any mitigating circumstances set out in section (1) of this rule.

(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or public agency for the purpose of reducing the amount of the civil penalty to be assessed.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; Renumbered from 839-016-0520, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0530**

#### **Violations for Which a Civil Penalty May Be Assessed**

(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279C.800 to 279C.870) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

(2) Civil penalties may be assessed against any contractor, subcontractor or public agency regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

(a) Failure to pay the applicable prevailing rate of wage in violation of ORS 279C.840;

- (b) Failure to post the applicable prevailing wage rates in violation of ORS 279C.840(4);
  - (c) Failure to post the notice describing the health and welfare or pension plans in violation of ORS 279C.840(5);
  - (d) Failure to include a provision in a subcontract that workers shall be paid not less than the specified minimum hourly rate of wage in violation of ORS 279C.830(1)(c);
  - (e) Failure to include in a subcontract a provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt, in violation of ORS 279C.830(3);
  - (f) Failure to file with the Construction Contractors Board a public works bond, as required under ORS 279C.836, before starting work on a contract or subcontract for a public works project subject to the provisions of ORS 279C.800 to 279C.870;
  - (g) Failure to verify that a subcontractor has filed a public works bond as required or has elected not to file a public works bond under ORS 279C.836 prior to permitting a subcontractor to start work on a public works project;
  - (h) Failure to file certified statements in violation of ORS 279C.845;
  - (i) Filing inaccurate or incomplete certified statements in violation of ORS 279C.845;
  - (j) Failure to retain 25 percent of the amount the first-tier subcontractor earned when the first-tier subcontractor fails to submit payroll and certified statement forms to the public agency in violation of ORS 279C.845;
  - (k) Paying the prevailing rate of wage in violation of ORS 279C.840(6);
  - (l) Reducing an employee's pay in violation of ORS 279C.840(7);
  - (m) Taking action to circumvent the payment of the prevailing wage, other than subsections (i) and (k) of this section, in violation of ORS 279C.840(7);
  - (n) Failure to submit reports and returns in violation of ORS 279C.815(3);
  - (o) Failure to certify the accuracy of reports and returns in violation of ORS 279C.815(3);
  - (p) Failure to timely pay the fee required by ORS 279C.825 on public works contracts first advertised or solicited prior to January 1, 2008;
  - (q) Receiving a public works contract or subcontract while on the list of ineligible in violation of ORS 279C.860;
  - (r) Awarding a contract to a contractor whose name appears on the list of ineligible maintained pursuant to ORS 279C.860.
- (4) The commissioner may assess a civil penalty against a public agency for any of the following violations:
- (a) Failure to include a contract provision stating that workers must be paid the applicable prevailing rate of wage in violation of ORS 279C.830(1)(c);
  - (b) Failure to include in the contract specifications a provision stating the applicable existing prevailing wage rate in violation of ORS 279C.830(1);
  - (c) Failure to include in the specifications for a contract for a public works stating that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt, in violation of ORS 279C.830(3);
  - (d) Failure to include in a contract for a public works a provision requiring the contractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt, in violation of ORS 279C.830(3)(a);
  - (e) Failure to include in a contract for a public works a provision requiring the contractor to include in every subcontract a provision requiring the contractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt, in violation of ORS 279C.830(3)(b);
  - (f) Failure to notify the commissioner when a contract is awarded in violation of ORS 279C.835;
  - (g) Dividing a public works project in violation of Or Laws 2007, ch. 764, sec. 44;
  - (h) Failure to include a copy of the disclosure of first-tier subcontractors with the Notice of Award in violation of ORS 279C.835;
  - (i) Failure to retain 25 percent of the amount the contractor earned when the contractor fails to submit payroll and certified statement forms to the public agency in violation of ORS 279C.845;
  - (j) Failure to timely pay the fee required in violation of ORS 279C.825;
  - (k) Awarding a contract to a contractor whose name appears on the list of ineligible maintained pursuant to ORS 279C.860.

Stat. Auth.: ORS 279 & 651.060

Stats. Implemented: ORS 279.370

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; BL 1-1998, f. & cert. ef. 1-5-98; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-

02; Renumbered from 839-016-0530, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 29-2005, f. 12-29-05, cert. ef. 1-1-06; BLI 20-2007(Temp), f. 7-30-07, cert. ef. 8-1-07 thru 1-27-08; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08

### **839-025-0540**

#### **Schedule of Civil Penalties**

- (1) The civil penalty for any one violation may not exceed \$5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.
- (2) For purposes of this rule, "repeated violations" means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.
- (3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279C.840 regarding the payment of the prevailing rate of wage, the minimum civil penalty will be calculated as follows:
  - (a) An equal amount of the unpaid wages or \$1,000, whichever is less, for the first violation;
  - (b) Two times the amount of the unpaid wages or \$3,000, whichever is less, for the first repeated violation;
  - (c) Three times the amount of the unpaid wages or \$5,000, whichever is less, for second and subsequent repeated violations.
- (4) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279C.825, or OAR 839-025-0200, or 839-025-0220 regarding fees to be paid by a public agency, the minimum civil penalty to be assessed will be calculated as follows:
  - (a) An equal amount of the unpaid fee or \$1,000, whichever is greater, for the first violation;
  - (b) Two times the amount of the unpaid fee or \$3,000, whichever is greater, for the second violation;
  - (c) Three times the amount of the unpaid fee or \$5,000, whichever is greater, for the third and subsequent violations.
- (5) The civil penalty for all other violations will be set in accordance with the determinations and considerations referred to in OAR 839-025-0520.
- (6) The civil penalties set out in this rule are in addition to any other penalty assessed or imposed by law or rule.

Stat. Auth.: ORS 279 & 651

Stats. Implemented: ORS 279.348 - 279.380

Hist.: BL 3-1996, f. & cert. ef. 1-26-96; BLI 5-2002, f. 2-14-02, cert. ef. 2-15-02; Renumbered from 839-016-0540, BLI 7-2005, f. 2-25-05, cert. ef. 3-1-05; BLI 42-2007, f. 12-28-07, cert. ef. 1-1-08