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## PWR -- 1.0 IN GENERAL

### 1.0 IN GENERAL

#### 1.1 --- Definitions

##### 1.1.1 --- "Apprentice"

##### 1.1.2 --- "Construction"

□ A contractor's work that involved building concrete footings and a roof over an existing reservoir while under contract with a public agency was "construction" within the meaning of *former* Ors 279.348(3) and *former* OAR 839-016-004(5). ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 113 (2007).***

Appeal pending.

□ A contractor's work that involved building an entire public high school while under contract with a public agency was "construction" within the meaning of *former* Ors 279.348(3) and *former* OAR 839-016-004(5). ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 73 (2007).***

Appeal pending.

##### 1.1.3 --- "Fringe Benefits"

##### 1.1.4 --- "Intentional" (see also 16.2, 16.3)

□ The Oregon Court of Appeals has determined that, under *former* ORS 279.361, to "intentionally" fail to pay the prevailing rate of wage "the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it." The focus is on what the employer intentionally failed or refused to do, not what the employer intentionally did. The inclusion of the word "intentionally" in *former* ORS 279.361(1) implies a "culpable mental state," indicating that debarment should not be "triggered by merely innocent, or even negligent, failure to pay." This requires an assessment of an employer's state of mind at the time that its employees were not paid the prevailing wage in order to determine whether the employer "intentionally" failed or refused to pay the prevailing wage. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 123 (2007).***

Appeal pending.

□ To intentionally fail to pay the prevailing wage, the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 147 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

See also *In the Matter of Harkcom Pacific*, 27 BOLI 62, 81 (2005).

□ The forum must assess respondent's state of mind at the time that respondent's employees were not paid the prevailing wage in order to determine whether respondent "intentionally" failed or refused to pay the prevailing wage. ---- ***In the Matter of Harkcom Pacific*, 27 BOLI 62, 81 (2005).**

□ The inclusion of the word "intentionally" in ORS

279.361(1) implies a culpable mental state, indicating that debarment should not be triggered by merely innocent, or even negligent, failure to pay. ---- ***In the Matter of Harkcom Pacific*, 27 BOLI 62, 81 (2005).**

□ In the context of a prevailing wage rate debarment, this forum has previously defined "intentional" as being synonymous with "willful." The forum has also adopted the Oregon Supreme Court's interpretation of "willful" set out in *Sabin v. Willamette Western Corporation*, 276 Or 1083 (1976). "Willful," the court said, "amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." The forum declined to adopt the standard proposed by respondent – that respondent's subjective motivation, as determined by its conduct, should be considered as an element in determining whether a violation is "intentional." ---- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 290 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

See also *In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 163 (2001).

□ "Intentional" means that the person knows what he is doing, intends to do what he is doing, and is a free agent. ---- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 124 (2000).***

□ The terms "intentional" and "willful" are interchangeable and means only that the person knows what he is doing, intends to do what he is doing, and is a free agent. ---- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 160 (1999).*** See also *In the Matter of Haskell Tallent*, 13 BOLI 273, 280 (1994); *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241, 250 (1993).

##### 1.1.5 --- "Locality"

##### 1.1.6 --- "Prevailing Rate of Wage"

##### 1.1.7 --- "Public Agency"

□ A public school district that entered into two separate contracts, with two separate contractors, to build and provide equipment and furnishings for a high school, was a public agency. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 73 (2007).***

Appeal pending.

##### 1.1.8 --- "Public Contract"

□ The agency alleged in its notice that respondents performed two separate contracts. Respondents' answer alleged that it performed only one contract. At hearing, undisputed evidence established that the two contracts, though related, involved two different offers and acceptances, two separate purchase orders, two separate bids that took place on two different dates and involved two disparate bidding processes, two distinct jobs, and two distinct billings. Based on this evidence, the forum concluded that respondent performed two separate contracts. ---- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 151-52 (2001).***

##### 1.1.9 --- "Public Works"

□ Although the prime contractor had completed its construction of a high school that was a public works by the time a furniture contractor, through a subcontractor and respondent, commenced delivering and assembling furniture at the high school, the forum concluded that the high school remained a “public works.” The forum based this conclusion on three factors. First, the school district believed that the work performed under this contract was subject to the prevailing wage rate. Second, the work was performed in the same building that the prime contractor had just constructed, with no significant break in time between the end of construction and the installation of furniture. Third, the work performed by subcontractor and respondent’s workers was in fact the completion of the same project that the prime contractor had begun. The commissioner also took notice that the newly constructed public high school was unusable for the purpose for which it was intended without the equipment and furniture that respondent’s workers carried into the high school and assembled. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 73-74 (2007).***

Appeal pending.

□ When respondent contracted with the City of Warrenton to construct a road and install a drainpipe and catch basin related to the construction of the City’s new municipal building, the contract was a “public work.” ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 152 (2001).***

□ When respondent contracted with the City of Warrenton to demolish an old fire station that was being demolished to make room for the City’s new police station, and an old house that was being demolished to create space for a parking lot adjunct to the City’s new municipal building, the forum found that both demolition projects were “public works.” ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 152-53 (2001).***

**1.1.10 --- "Public Works Project"**

□ A public works “project” is “a large, multiphase endeavor that may encompass more than one contract.” The criteria for determining whether a prohibited division has occurred are set out in ORS 279.357(2)(A)-(D) and related agency administrative rules and published “Interpretations.” This language contemplates that the commissioner will examine various smaller public works undertakings – phases, parts, and structures – to determine whether they are, in fact, part of a single larger endeavor – a public works “project.” Flowing from this prohibition is the logical corollary that any contract for less than \$25,000 that is part of a larger public works “project” involving more than \$25,000 does not fall within the ORS 279.357(1)(a) exemption. ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 153 (2001).***

□ The forum held that two contracts let by a city for less than \$25,000 were part of a larger public works “project” involving more than \$25,000 when: (1) the work performed on the contracts was on the same project site as the larger project; (2) the work performed on the contracts constituted the first step of phase two of the larger project and phase two could not have taken

place without it; (3) the two contracts were part of a continuum that resulted in the completion of the larger project; (4) the work performed on the contracts was a necessary prerequisite, or integral to, continued construction on the larger project; and (5) the work performed on the contracts furthered the anticipated outcome of the larger project. ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 154-55 (2001).***

□ The term “project” in ORS 279.357(1)(a) does not refer to an individual contract as it is bid out by a contracting agency. Rather, it refers more abstractly to any group of public works contracts that properly are viewed as fitting together to form a single project. ----- ***In the Matter of the City of Klamath Falls, 19 BOLI 266, 282-83 (2000).***

□ The ORS 279.357(1)(a) exemption from the PWR laws for “[p]rojects for which the contract price does not exceed \$25,000.00” applies only when the cost of the entire project – not just a single contract – is \$25,000.00 or less. ----- ***In the Matter of the City of Klamath Falls, 19 BOLI 266, 282-83 (2000).***

□ To determine whether a group of public works contracts form a single public works project, the factors listed in the relevant statutes, rules and agency interpretations must be considered. Those factors are: (1) the physical separation of the project structures; (2) the timing of the work on project phases or structures and whether the work is performed in one time period or in several phases as components of a larger entity; (3) the continuity of project contractors and subcontractors working on project parts or phases and whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project; (4) the manner in which the public contracting agency and the contractors administer and implement the project; (5) whether a single public works project includes several types of improvements or structures and whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function; and (6) the anticipated outcome of the particular improvements or structures the agency plans to fund. ----- ***In the Matter of the City of Klamath Falls, 19 BOLI 266, 284-86 (2000).***

□ The forum held that five water improvement contracts let by a city together formed a single public works project when: (1) the five water improvements were part of a single municipal water system even though they were not directly connected; (2) the city contracted for the five improvements over a period of only a few months during a single construction season; (3) the city used several different contractors and engineering firms on the contracts, but only because the city could not bid out all the improvements in a single contract -- using a single contractor -- because that would have prevented the work from being completed by the year-end funding deadline; (4) a single line item in the city’s budget covered all five of the water system improvements and the funding for all five improvements came from the same source; (5) the five contracts involved work of a similar nature and involved water lines that were all part of a single, logical entity with

## PWR -- 2.0 AUTHORITY OF COMMISSIONER

an overall purpose or function – the city's municipal water system; and (6) performance of each of the five contracts helped further the city's goal of improving its municipal water system. ---- *In the Matter of the City of Klamath Falls, 19 BOLI 266, 284-86 (2000).*

### 1.1.11 --- "Retainage"

### 1.1.12 --- "Trade or Occupation"

□ Respondent's workers who assisted other workers who were applying sprayed on fireproofing material were properly classified as tenders to plasterers. ---- *In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 284-85 (2001).*

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ ORS 279.350 sets out a policy that, once a contract is executed, the prevailing wage rates are set. Logically, this policy must be also be applied to the creation of new trade classifications and establishment of new wage rates. Any new trade classification must have been approved prior to execution of the contract and commencement of work in order to apply to a particular public project. ---- *In the Matter of Intermountain Plastics, 7 BOLI 142, 158 (1988).*

□ When a contractor's defense to a charge that he intentionally failed to pay the prevailing wage rate was that the agency wrongfully determined that installation of seamless epoxy flooring, the work performed by the contractor's employees, should be paid at the same rate as workers performing different work – work done by cement masons – the forum found that the commissioner has the authority to make a job classification determination based on a "closest to" method, citing ORS 279.348(1). The forum held that, although the PWR guidebook did not contain a separate classification and wage rate for "architectural coatings finisher," the job title the contractor had given his workers, that fact did not constitute a defense to his failure to determine in advance of commencing work on the project which rate was required to be paid to his workers and to pay that rate. The forum also held it was not a defense that the agency had not responded to the contractor's request, made after the contractor had become a subcontractor on the public project, to list the craft of "architectural coatings finisher" in the guidebook. ---- *In the Matter of Intermountain Plastics, 7 BOLI 142, 155-58 (1988).*

### 1.1.13 --- "Worker"

□ Employees who performed work that included operating power equipment, building concrete forms, tying rebar, pouring and finishing concrete, and dismantling concrete forms at a public works project were "workers" who performed "manual" and "physical" duties within the meaning of former OAR 839-016-0004(29). ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 113-14 (2007).*

Appeal pending.

□ Employees who moved and assembled furniture using screwdrivers and wrenches at a public works

project were "workers" who performed "manual" and "physical" duties within the meaning of former OAR 839-016-0004(29). ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 74 (2007).*

Appeal pending.

### 1.1.14 --- "Other"

## 2.0 AUTHORITY OF COMMISSIONER

□ To prove five violations of ORS 279.350, the agency had to prove only that respondent had not paid five workers the prevailing wage rate as determined by the commissioner. The agency was not also required to prove that the commissioner followed proper statutory procedure in determining the prevailing wage rate. However, evidence in the record showed that the commissioner had acted within the scope of his authority. ---- *In the Matter of Northwest Permastore, 18 BOLI 1, 17 (1999), reconsidered 20 BOLI 37 (2000).*

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

□ The commissioner has authority to impose a civil penalty not to exceed \$5,000 for each violation of ORS 279.348 to 279.380 and the administrative rules adopted pursuant thereto. When respondent committed five violations of ORS 279.350(1), but had cooperated with the agency and had no prior violations, the forum assessed the minimum penalty allowable, consisting of \$1,557.71, the amount of the unpaid wages and the amount sought by the agency. ---- *In the Matter of Northwest Permastore, 18 BOLI 1, 19-20 (1999), reconsidered 20 BOLI 37 (2000).*

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

## 3.0 TRADE OR OCCUPATION

□ The forum determined that workers spraying on fireproofing were properly classified as plasterers and that workers who assisted them were properly classified as tenders to plasterers. ---- *In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 284-85 (2001).*

Reversed in part on other grounds, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ The forum rejected respondent's argument that the commissioner's classification of workers as boilermakers was faulty because it was based on union jurisdiction agreements, rather than on a field survey of industry practices, on the ground that respondent had agreed to be bound by the prevailing wage rate laws, including trade classification, when it entered into the public works contract. ---- *In the Matter of Northwest Permastore, 18 BOLI 1, 16 (1999), reconsidered 20 BOLI 37 (2000).*

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

## 4.0 APPRENTICES/TRAINEEES

□ Respondents' apprenticeship program was a sham when they paid only 70% of journeymen's wages but did not operate a registered apprenticeship program and offered no related training to workers. ---- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 79*

(1998).

**5.0 ART, INSTALLATION**

**6.0 BASIC HOURLY RATE OF WAGE**

□ When a contractor arranged to have some workers live in their own trailers at a closed recreational vehicle park that the contractor spent approximately \$1,000 to rehabilitate, the forum held that providing the recreational vehicle facility to some workers did not constitute a “fringe benefit” or “wages” under ORS 279.348 or under OAR 839-16-004. ----- *In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 159 (1986).*

**7.0 FRINGE BENEFITS**

□ The prevailing wage rate includes fringe benefits paid into a bona fide benefit plan. ----- *In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 161 (1999).*

□ For a fringe benefit plan to be bona fide, contributions must be: (1) irrevocable; (2) for the benefit of the employee; and (3) made to a trust or third party. -- -- *In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 161 (1999).*

□ Fringe benefits include the rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing benefits to workers. ----- *In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 161 (1999).*

□ A fringe benefits plan was not bona fide when contributions remaining in an employee’s account at year’s end were forfeited and credited back to the employer. Contributions made to that plan were not “fringe benefits” constituting part of the prevailing wage rate. ----- *In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 161-62 (1999).*

□ When a contractor arranged to have some workers live in their own trailers at a closed recreational vehicle park that the contractor spent approximately \$1,000 to rehabilitate, the forum held that providing the recreational vehicle facility to some workers did not constitute a “fringe benefit” or “wages” under ORS 279.348 or under OAR 839-16-004. ----- *In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 159 (1986).*

□ When a contractor’s defense to a charge that he failed to pay fringe benefits was that he was looking into setting up a health and welfare plan for his employees, the forum found that there was no “enforceable plan” or “written commitment to the workers” as required by ORS 279.348. The forum held that the contractor’s violation was not negated by the contractor’s eventual payment of the wage differential to the workers, nor was the contractor released from liability by the fact that the contractor eventually began to pay the appropriate prevailing wage rate. ----- *In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 159 (1986).*

□ A contractor testified he believed that the value of providing a housing opportunity in a rehabilitated recreational vehicle park would be enough, when added to the hourly wage, to equal the prevailing wage rate,

including fringe benefits. The forum rejected that defense to the charge of intentional failure to pay the prevailing wage rate because an employer has a duty to know the wages due to an employee and ignorance of the law as to what qualifies as a fringe benefit is not an excuse and because there was no reasonable or objective basis for the supposed belief that providing a recreational vehicle park hook-up was worth the difference between the prevailing wage rate and what the contractor was paying in actual wages. ----- *In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 158 (1986).*

**8.0 RECORDS**

**9.0 RECORDS AVAILABILITY**

**10.0 PUBLIC AGENCY LIABILITY**

**11.0 FEE FOR COSTS OF ADMINISTERING LAW**

□ Each contract for a public work must contain a provision stating that a fee is required to be paid to the commissioner unless the contract -- and any public works project of which the contract is a part -- has a total contract price of \$25,000.00 or less. When a city did not include the provision in the specifications for a public works contract that was part of a larger public works project with a cost exceeding \$25,000.00, the city violated ORS 279.352(2), even though the cost of the contract itself was less than \$25,000.00. ----- *In the Matter of the City of Klamath Falls, 19 BOLI 266, 286 (2000).*

**12.0 FAILURE TO PAY PREVAILING WAGE RATE**

□ Respondent’s tender of multiple checks to three workers in which their wages were calculated at the Laborer, Group 5 rate, a rate lower than the prevailing wage rates for their trades in Region 4, constituted three violations of former ORS 279.350(1) and former OAR 839-016-0035. ----- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 115-16 (2007).*

Appeal pending.

□ The prevailing wage requirement in former ORS 279.350 is violated when a contractor or subcontractor upon a public works tenders checks to workers less than the prevailing wage rate for an hour’s work in the same trade or occupation in the locality where such labor is performed. ----- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 115 (2007).*

Appeal pending.

□ Respondent’s failure to pay the prevailing rate of wage to four workers when it first issued paychecks to them constituted four violations of former ORS 279.350(1) and former OAR 839-016-0035. ----- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 75 (2007).*

Appeal pending.

□ To establish a violation of former ORS 279.350(1), the agency was required to prove: (1) The project at issue was a public work, as that term was defined in former ORS 279.348(3); (2) respondent was a

## PWR -- 12.0 FAILURE TO PAY PREVAILING WAGE RATE

subcontractor that employed workers on the public works project whose duties were manual or physical in nature; and (3) respondent failed to pay four workers at least the prevailing rate of wage for each hour worked on the project. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47,72 (2007).***

Appeal pending.

□ The forum found respondent committed one violation of ORS 279.350(1) by failing to pay a worker the applicable prevailing wage rate of \$43.83 when the worker's wages were initially due. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 138 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ When respondent failed to pay the prevailing wage rate to six workers on a public works project at the time their wages were initially paid, but subsequently issued back pay checks to five of the six workers, bringing their wages up to the prevailing wage rate, the forum found that respondent committed six violations of ORS 279.350(1). Respondent did not violate ORS 279.350(1) with regard to the sixth worker because his name was not included in the agency's list of eight underpaid workers in its notice of intent, and the notice was not amended to include it. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 136 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ To establish a violation of ORS 279.350(1), the agency must prove: (1) the project at issue was a public work, as that term is defined in ORS 279.348(3); (2) respondent was a contractor or subcontractor that employed workers on the public works project whose duties were manual or physical in nature; and (3) respondent failed to pay those workers at least the prevailing rate of wage for each hour worked on the project. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 135 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

See also *In the Matter of William George Allmendinger*, 21 BOLI 151, 169-70 (2000); *In the Matter of Keith Testerman*, 20 BOLI 112, 126-27 (2000).

□ Fringe benefits are part of the prevailing rate of wage and respondent's failure to pay those benefits to seven workers constituted seven separate violations. ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 76-77 (2005).***

□ When the agency alleged that respondent failed to pay four workers the prevailing wage rate and the prime contractor paid those amounts on respondent's behalf, the agency's prima facie case consisted of reliable evidence that (1) the project at issue was a public work, as that term was defined in ORS 279.348(3); (2) respondent was a subcontractor that employed workers on the public work whose duties were manual or physical in nature; (3) respondent failed to pay those

workers the amounts required by ORS 279.350; and (4) the prime contractor, paid those workers on respondent's behalf. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 41 (2005).***

□ The agency established that respondent did not pay the correct prevailing wage rate by means of credible testimony that four workers regularly performed carpentry, masonry, and ironwork and respondent's payroll records, certified by respondent's president, showing that respondent classified and paid one worker as a laborer or carpenter and the three other workers as laborers for all of the work they performed. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 42 (2005).***

□ Respondents' tacit acknowledgment in their answer that the prime contractor paid the amount respondents owed to the workers, coupled with evidence that the prime provided BOLI with a check in the amount of \$12,674.28 that BOLI distributed amongst the four workers, established that the prime contractor paid to the four workers the amount of unpaid prevailing wages owed for work they performed. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 42 (2005).***

□ The forum found that the respondent corporate subcontractor intentionally failed to pay the prevailing wage rate on a public works and that its president Bruce D. Huhta was responsible for this failure when credible evidence in the record showed Huhta administered the subcontract, Huhta completed a certified payroll report that stated workers were paid \$22.68 per hour, the applicable prevailing wage rate, that workers were not paid the amounts certified by Huhta and were never paid the prevailing wage rate for any of the manual labor they performed during the course of the project, and that Huhta chastised the prime contractor's vice-president for having paid the workers' unpaid wages, stating it was "stupid" to have made the payment and that he purposely did not provide the agency investigator with payroll records to avoid having to pay more money to his workers. ----- ***In the Matter of Bruce D. Huhta, 21 BOLI 249, 258 (2001)***

□ When respondent admitted in a letter to the agency that he had paid only \$130.00 to one employee and only \$70.00 to another – far less than the prevailing wage, even if the two men had worked only 40 hours each, as respondent asserted -- and this admission corroborated the claims of the two employees that respondent did not pay them all wages due, the forum found the evidence in the record sufficient to establish that respondent committed two violations of ORS 279.350(1) by failing to pay the two employees the prevailing rate of wage for each hour they worked on the project. ----- ***In the Matter of William George Allmendinger, 21 BOLI 151, 170 (2000).***

□ The agency did not meet its burden of proving that respondent committed a third violation of ORS 279.350(1) by failing to pay a third employee the prevailing wage rate when the only evidence in the record concerning that employee's work on the subject project was the certified payroll report stating that the employee worked 30 hours and respondent's uncontroverted assertion that he paid the employee \$702.60 for that work – the exact amount he should

## PWR -- 13.0 FAILURE TO POST PREVAILING WAGE RATE

have been paid under the prevailing wage rate laws. ---- ***In the Matter of William George Allmendinger, 21 BOLI 151, 170 (2000).***

□ When the agency alleged that respondent violated ORS 279.350(1) eight times by intentionally failing to pay the prevailing rate of wage to eight different workers who subsequently filed wage claims with BOLI, the forum held that the agency's prima facie case consisted of credible evidence of the following: (1) respondent employed the eight claimants; and (2) the claimants performed work for which respondent did not pay them the prevailing rate of wage. ---- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 122 (2000).***

□ The agency established its prima facie case through respondent's own certified payroll reports showing that all eight wage claimants were employed by respondent on public works projects, and through credible witness testimony and time records as to the hours that seven claimants worked and that they worked hours for which they were paid nothing. The forum found that respondent committed seven violations of ORS 279.350(1), and rejected the allegation concerning the eighth claimant because it was not supported by credible evidence. ---- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 122-23 (2000).***

□ When respondent used a payroll company to write and issue checks to its employees, the payroll company was dependent on respondent's corporate president for payroll information concerning dates and hours that employees worked and their rate of pay, and there was no evidence presented that respondent was unaware of the wages due, the forum found that respondent's failure to pay the prevailing wage rate to its seven employees was intentional. ---- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 124-25 (2000).***

□ When respondent acknowledged it did not pay boilermakers' wages to five workers who performed standpipe erection work on a public works project, credible evidence in the record established that the Index of Prevailing Practice reflects the commissioner's prevailing practice determinations and the 1996/1997 Index classified standpipe erection workers as boilermakers, the forum inferred that the prevailing practice at all material times was to classify standpipe erectors as boilermakers and that respondent committed five violations of ORS 279.350(1). ---- ***In the Matter of Northwest Permastore Systems, Inc., 20 BOLI 37, 55 (2000).***

*Affirmed, Northwest Permastore Systems v. Bureau of Labor and Industries, 172 Or App 427 (2001).*

□ To prove five violations of ORS 279.350, the agency had to prove only that respondent had not paid five workers the prevailing wage rate as determined by the commissioner. The agency did that by demonstrating: 1) that the Index of Prevailing Practice classified standpipe erection workers as boilermakers; and 2) that respondent had not paid five of its standpipe erection workers the prevailing wage rate for boilermakers. ---- ***In the Matter of Northwest Permastore Systems, Inc., 20 BOLI 37, 57 (2000).***

*Affirmed, Northwest Permastore Systems v. Bureau*

*of Labor and Industries, 172 Or App 427 (2001).*

□ To prove five violations of ORS 279.350, the agency had to prove only that respondent had not paid five workers the prevailing wage rate set by the commissioner. ---- ***In the Matter of Northwest Permastore, 18 BOLI 1, 16-17 (1999), on reconsideration 20 BOLI 37 (2000).***

*Affirmed, Northwest Permastore Systems v. Bureau of Labor and Industries, 172 Or App 427 (2001).*

□ It is the agency's burden to prove that the respondent employer failed to pay the prevailing rate of wage. ---- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 162 (1999).***

□ The agency proved that respondent committed five violations of ORS 279.350(1) by failing to pay five standpipe erection workers the prevailing wage rate for boilermakers. ---- ***In the Matter of Northwest Permastore, 18 BOLI 1, 18 (1999), reconsidered 20 BOLI 37 (2000).***

*Affirmed, Northwest Permastore Systems v. Bureau of Labor and Industries, 172 Or App 427 (2001).*

□ When a contractor's defense to a charge that he failed to pay fringe benefits was that he was looking into setting up a health and welfare plan for his employees, the forum found that there was no "enforceable plan" or "written commitment to the workers" as required by ORS 279.348. The forum held that the contractor's violation was not negated by the contractor's eventual payment of the wage differential to the workers, nor was the contractor released from liability by the fact that the contractor eventually began to pay the appropriate prevailing wage rate. ---- ***In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 159 (1986).***

### 13.0 FAILURE TO POST PREVAILING WAGE RATE

□ When two workers credibly testified that they were on a relatively small jobsite every day and never saw any posted rates, and respondent offered no credible rebuttal evidence, the forum concluded that respondent failed to keep the prevailing wage rates posted on the jobsite as required by statute. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 120 (2007).***

*Appeal pending.*

□ The Oregon Court of Appeals has determined that former ORS 279.350(4) required every contractor and subcontractor engaged in a public project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 119-20 (2007).***

*Appeal pending.*

□ When respondent's branch manager testified that he did not post or keep posted any prevailing wage rates on a public works project on which respondent employed workers, and there was no evidence that anyone else posted or kept them posted on respondent's behalf, the forum concluded that respondent committed one violation of former ORS 279.350(4) and former OAR

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839-016-0033. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 80 (2007).*

Appeal pending.

□ When respondent's manager testified that she did not initially believe that a project was a public work, then tried to post the prevailing wage rates for the project by giving them to the prime contractor's foreman and asking him to post them, but did not post them herself or verify that they were posted or were kept posted, the forum held that respondent's failure to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project violated ORS 279.350(4). ---- *In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 133 (2005).*

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The proper interpretation of ORS 279.350(4) is that every contractor and subcontractor engaged on a project for which there is a contract for public work must personally post and keep posted the prevailing wage rates for the project for the period of time that the contractor or subcontractor is engaged in work on the project. ---- *In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 133 (2005).*

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

See also *In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 283 (2001)*, reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ When respondent's project manager credibly testified that respondent did not post the applicable prevailing wage rates during the performance of the subject contracts, the forum concluded that respondent intentionally failed to post the applicable prevailing wage rates on the subject contracts. ---- *In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 155 (2001).*

□ When respondent had obtained agency approval to post the prevailing wage rates on flagging jobs by placing the information in pilot cars and informing each employee where the information could be found, the forum held that respondent did not intentionally fail to post the prevailing wage rate. ---- *In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 164 (1999).*

### 14.0 OTHER VIOLATIONS

#### 14.1 --- Taking Action to Circumvent the PWR Laws

□ Respondent entered into two prevailing wage contracts while on the list of ineligible and paid its workers the prevailing wage rate. Respondent did not violate ORS 279.350(7) when the evidence did not establish that it entered into the contracts with the intent of not paying the prevailing wage rate and in fact paid the prevailing wage rate. ---- *In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 160-62 (2001).*

□ When the agency failed to prove that the respondents required or coerced anybody to report overtime hours as straight time, and the respondents took no adverse action against any employee who complained about not receiving the wages to which they were entitled, the forum found no violation of ORS 279.370(7). ---- *In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 167 (1999).*

□ The forum may penalize subcontractors for taking action to circumvent payment of the prevailing wage. ---- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 79-80 (1998).*

□ Respondent's requirement that workers accept less than the prevailing wage rate as part of a bogus apprenticeship program violated ORS 279.350(7). ---- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 79 (1998).*

#### 14.2 --- Dividing a Public Works Project for the Purpose of Avoiding Compliance with the PWR Laws

□ The Little Davis-Bacon Act includes a provision prohibiting contracting agencies from "divid[ing] a public works project into more than one contract for the purpose of avoiding compliance with ORS 279.348 to 279.380." When no evidence suggested that the respondent let five separate contracts, rather than a single contract covering all five improvements, "for the purpose of" avoiding compliance with the prevailing wage rate laws, section (2) of ORS 279.357 did not apply. ---- *In the Matter of the City of Klamath Falls, 19 BOLI 266, 282 (2000).*

#### 14.3 --- Failure to Make and Maintain Necessary Records

□ When the agency alleged that respondent failed to maintain records required by OAR 839-016-0025(2)(b), (c), (e) and (f) for workers, but only offered evidence consisting of testimony of an agency compliance specialist that these records were requested, but not provided, and that nine certified payroll reports were absent, the forum concluded that failure to make records available or provide those records and file certified payroll reports does not, *ipso facto*, prove that those records were not maintained. ---- *In the Matter of Johnson Builders, Inc., 21 BOLI 103, 127-28 (2000).*

□ To establish that a respondent violated OAR 839-016-0025(2)(f), the agency must prove: 1) that the respondent was a contractor or subcontractor on a public works contract subject to the Oregon prevailing wage rate laws; and 2) that the respondent failed to make and maintain records of the total daily and weekly hours worked by each employee. ---- *In the Matter of Labor Ready, Inc., 20 BOLI 73, 96 (2000).*

□ Respondent violated OAR 839-016-0025(2)(e) by failing to make and maintain records of the daily compensation it paid its employees. ---- *In the Matter of Labor Ready, Inc., 20 BOLI 73, 97 (2000).*

#### 14.4 --- Failure to Make Records Available to Wage and Hour Division

□ When the agency requested records deemed

necessary by the commissioner to determine if the prevailing wage rate was actually being paid by respondent on a public works project and respondent did not provide the requested records until five months later, the forum held that respondent had violated ORS 279.355 and OAR 839-016-0030. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 144-46 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ An agency compliance specialist credibly testified that he contacted respondents through letters and by telephone asking for payroll records and information related to the investigation and that, although respondent negotiated several extensions of time with which to provide the records, respondent ultimately failed to provide the requested information. Under those circumstances, the forum concluded that respondent failed to make its payroll records available for inspection in violation of ORS 279.355(2). ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 43 (2005).***

□ When the records sought by the agency were necessary to determine if respondent had paid the prevailing rate of wage to five wage claimants, the agency's demand that respondent provide those records within 10 days was reasonable and respondent's failure to provide those records constituted a violation of ORS 279.355(2) and OAR 839-016-0030(1) and (2). ----- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 128-29 (2000).***

□ Only the contractor or subcontractor that the Wage and Hour Division asks to provide records is responsible for providing those records. ----- ***In the Matter of Labor Ready, Inc., 20 BOLI 73, 98 (2000).***

#### 14.5 --- Failure to Complete and Return PWR Survey

□ The agency proved that respondent failed to complete and return the commissioner's prevailing wage rate survey by showing that: (1) respondent received the 2005 wage survey; (2) respondent was required to complete and return the survey by September 19, 2005; (3) the Employment Department received the completed wage survey from respondent on March 29, 2006; and (4) there was no credible evidence that the Employment Department received anything from respondent until it received the completed wage survey on March 29, 2006. ----- ***In the Matter of Wildfang, Inc., 28 BOLI 1, 7 (2006).***

□ To prove respondent violated ORS 279(C).815(3), the agency must establish: (1) respondent is a "person" as defined in ORS 279(C).815(1); (2) the commissioner conducted a survey in 2005 that required persons receiving the surveys to make reports or returns to the agency for the purpose of determining the prevailing wage rates; (3) respondent received the commissioner's 2005 survey; and (4) respondent failed to make the required reports or returns within the time prescribed by the commissioner. ----- ***In the Matter of Wildfang, Inc., 28 BOLI 1, 6 (2006).*** See also *In the Matter of Troy Wingate, 27 BOLI 282, 291 (2006); In the Matter of*

*Storm King Construction, Inc., 27 BOLI 46, 52 (2005); In the Matter of Emmert Industrial Corporation, 26 BOLI 284, 289 (2005); In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 292 (2002); In the Matter of Harney Rock & Paving Co., 22 BOLI 177, 183 (2001); In the Matter of Spot Security, Inc., 22 BOLI 170, 175 (2001); In the Matter of Landscape Company of Portland, LLC, 22 BOLI 69, 75 (2001); In the Matter of Landco Enterprises, Inc., 22 BOLI 62, 67 (2001); In the Matter of M. Carmona Painting, Inc., 22 BOLI 52, 59 (2001); In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 24 (2001); In the Matter of Green Planet Landscaping, Inc., 21 BOLI 130, 137 (2000); In the Matter of Schneider Equipment, Inc., 21 BOLI 60, 72 (2000); In the Matter of Martha Morrison, 20 BOLI 275, 278-79 (2000); In the Matter of F.R. Custom Builders, Inc., 20 BOLI 102, 109-110 (2000).*

□ The agency proved that the commissioner conducted a prevailing wage rate survey that required persons receiving the survey to make reports or returns to the agency for the purpose of determining the prevailing wage rates by submitting an affidavit by an employee of the Employment Department establishing that BOLI contracted with the Employment Department from 1999 to 2004 to conduct Construction Industry Occupational Wage Surveys and that those surveys were in fact conducted. ----- ***In the Matter of Storm King Construction, Inc., 27 BOLI 46, 53 (2005).***

□ Respondent's testimony that he filled out the 2004 wage survey and returned it after September 17, 2004, the submission deadline, established that respondent did not timely submit the 2004 wage survey. ----- ***In the Matter of Storm King Construction, Inc., 27 BOLI 46, 54 (2005).***

□ To resolve the issue of whether or not respondent had received the commissioner's 2000 wage survey when credible evidence showed it was sent by first class mail to respondent's correct address and respondent denied receiving it, the forum took guidance from the Oregon Rules of Evidence, specifically ORE 311(1)(q), which creates a rebuttable presumption that "[A] letter duly directed and mailed was received in the regular course of the mail." The forum found that testimony by respondent witnesses as to the lack of "recollection" by respondent's corporate officers who received respondent's mail and the lack of a "record" as legally insufficient to overcome the presumption that respondent received the wage surveys and reminder notices. ----- ***In the Matter of Harney Rock & Paving Co., 22 BOLI 177, 184 (2001).***

□ In a prevailing wage rate wage survey case, respondent's failure to deny that it received the 2000 survey forms was held to be an admission that respondent received the forms. ----- ***In the Matter of Spot Security, Inc., 22 BOLI 170, 176 (2001).*** See also *In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 20 (2001), amended 22 BOLI 27 (2001).*

□ In a prevailing wage rate wage survey case, respondent's failure to deny that it was an "employer" was held to be an admission that respondent was a "person" for purposes of ORS 279.359. ----- ***In the Matter of Spot Security, Inc., 22 BOLI 170, 176 (2001).***

## PWR -- 14.0 OTHER VIOLATIONS

See also *In the Matter of Landco Enterprises, Inc.*, 22 BOLI 62, 67 (2001).

□ In a default case, respondent asserted in its answer that it completed and returned the 2000 wage survey forms on August 23, 2000 and enclosed a completed copy of those forms bearing the purported signature of "Jody Van Damme" and a handwritten date of "8/23/2000" next to the signature. The agency rebutted respondent's assertion by providing credible testimony from an Employment Department employee, an affidavit from a research analyst in the Employment Department, and a print-out of records routinely maintained by the Employment Department establishing that no wage survey forms were mailed out prior to August 28, 2000, and that respondent's wage survey was received on January 17, 2001. This evidence was sufficient to overcome respondent's unsworn assertion that it timely returned completed 2000 wage survey forms on August 23, 2000. ---- *In the Matter of WB Painting and Decorating, Inc.*, 22 BOLI 18, 24-25 (2001), amended 22 BOLI 27(2001).

□ Respondent informed the Employment Department that its correct address was on the Odell Highway, an address that remained respondent's correct address through the time of hearing. The Employment Department mailed the 1999 wage survey and follow-up reminders to respondent at the correct Odell Highway address, and none of those documents was ever returned to the Employment Department as "undeliverable" or for any other reason. The forum inferred from these facts that respondent received the 1999 wage survey. Based on this evidence and respondent's admission that it never returned the 1999 wage survey by the deadline set by the commissioner, the agency proved that respondent violated ORS 279.359(2). ---- *In the Matter of Green Planet Landscaping, Inc.*, 21 BOLI 130, 138-39 (2000).

□ Persons are required to return the commissioner's wage surveys even if they performed only residential construction work and even if they did no work on public works projects. ---- *In the Matter of F.R. Custom Builders, Inc.*, 20 BOLI 102, 111 (2000).

### 14.6 --- Filing Incomplete, Inaccurate, or Untimely Certified Payroll Statements

□ When respondent's certified payroll reports lacked the certification language required by ORS 279.354 and contained on the agency's WH-38, did not state a "group" classification for respondent's workers, failed to list the location of the project, and reported overtime hours as straight time hours, the forum found one violation of ORS 279.354, the number of violations alleged by the agency. ---- *In the Matter of Labor Ready Northwest, Inc.*, 27 BOLI 83, 143 (2005).

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ When six of respondent's certified payroll reports lacked the certification language required by ORS 279.354 and contained on the agency's WH-38, none of the reports listed the location of the project, five of

respondent's payroll reports misclassified three workers, two payroll reports reported overtime work as straight time work, and one payroll report stated that an employee had worked days that he had not worked and did not report days that he did work, the forum found six violations of ORS 279.354. ---- *In the Matter of Labor Ready Northwest, Inc.*, 27 BOLI 83, 140-426 (2005).

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The Agency alleged and proved that respondent's payroll records for the weeks of March 2-8, 2003, March 9-15, 2003, March 16-22, 2003, March 23-29, 2003, March 30 to April 5, 2003, and April 6-12, 2003, failed to include the correct classification and pay rate for four workers, and that each worker should have been paid a higher rate than the amount respondent reported it paid them while misclassifying them as laborers. The forum concluded that respondent's payroll records for those periods were inaccurate and incomplete, in violation of ORS 279.354(1), and that respondent committed six violations. ---- *In the Matter of Design N Mind, Inc.*, 27 BOLI 32, 45 (2005).

□ Respondent violated ORS 279.354 and OAR 839-016-0010 when it failed to submit certified payroll statements within 15 days of the date it began work on two contracts subject to Oregon's prevailing wage rate laws. ---- *In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 157-58 (2001).

□ When the two certified payroll reports completed by respondent did not state the hours two employees worked each day, as required by ORS 279.354(1), the forum found two violations of ORS 279.354(1). ---- *In the Matter of William George Allmendinger*, 21 BOLI 151, 170-71 (2000).

□ Respondent committed three violations of ORS 279.354(1) by filing three certified payroll reports that did not include all information required by law and, in one case, certifying falsely that workers were paid all wages they earned. ---- *In the Matter of Keith Testerman*, 20 BOLI 112, 128 (2000).

□ Contractors and subcontractors on prevailing wage rate jobs are required to file certified payroll reports that "set out accurately and completely the payroll records for the prior week." ---- *In the Matter of Labor Ready, Inc.*, 20 BOLI 73, 97 (2000).

□ Respondent violated ORS 279.354(1) by filing certified payroll reports that contained inaccurate information regarding the projects on which its employees had worked. ---- *In the Matter of Labor Ready, Inc.*, 20 BOLI 73, 97 (2000).

□ Filing false certified statements is a serious violation. ---- *In the Matter of Southern Oregon Flagging, Inc.*, 18 BOLI 138, 166 (1999).

□ Respondents failed to accurately report hours and dates of work on 20 certified statements filed on a public works project. The filed statements reflected the respondents' impermissible practices of banking hours, counting hours worked after midnight as hours worked on a different day, and paying straight time for hours

worked in excess of eight in a day when workers worked on different jobs or projects in the same day. ----- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 166 (1999).***

□ The agency proved that respondent committed a single violation of ORS 279.354(1) by submitting a certified payroll record inaccurately stating that five workers on respondent's public works project were laborers when their correct classification was boilermakers. ----- ***In the Matter of Northwest Permastore, 18 BOLI 1, 18 (1999), reconsidered 20 BOLI 37 (2000).***

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

**14.7 --- Failure to File Certified Payroll Statements**

**14.8 --- Failure to Pay Fee for Costs of Administering Law**

□ When respondent entered into a public works contract subject to ORS 279.348 to 279.380 and did not pay the prevailing wage rate fee required by ORS 279.375 within 60 days after work on the contract began, these facts established a violation of ORS 279.375 as a matter of law and subjected respondent to a potential civil penalty. ----- ***In the Matter of Steven D. Harris, 21 BOLI 139, 143 (2000).***

**15.0 CIVIL PENALTIES**

**15.1 --- In General**

□ In determining an appropriate penalty, the forum must consider any aggravating circumstances alleged and proved by the agency, any mitigating circumstances, and prior final orders. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 116 (2007).***

Appeal pending.

See also *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 75 (2007), appeal pending; In the Matter of Harkcom Pacific, 27 BOLI 62, 77 (2005).*

□ When seeking more than the minimum civil penalty, the agency must establish aggravating circumstances to justify the increased amount. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 116 (2007).***

Appeal pending.

See also *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 75 (2007), appeal pending.*

□ ORS 279.370 authorizes the commissioner to impose a civil penalty not to exceed \$5,000 for each violation of the prevailing wage rate laws. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 44 (2005).***

□ When determining the civil penalty amount, the commissioner must consider the mitigating and aggravating circumstances set forth in OAR 839-016-0520(1). ----- ***In the Matter of Troy Wingate, 27 BOLI 282, 292 (2006).*** See also *In the Matter of Storm King Construction, 27 BOLI 46, 54 (2005); In the Matter of Design N Mind, Inc., 27 BOLI 32, 44 (2005).*

□ In determining an appropriate penalty, the forum must consider respondent's history, including prior

violations and respondent's actions in responding to the prior violations, the seriousness of the current violation, and whether respondent knew it was violating the law. The forum must also consider any mitigating circumstances offered by respondent. ----- ***In the Matter of Emmert Industrial Corporation, 26 BOLI 284, 289 (2005).*** See also *In the Matter of Spot Security, Inc., 22 BOLI 170, 176 (2001); also In the Matter of The Landscape Company of Portland, LLC, 22 BOLI 69, 76 (2001); In the Matter of Landco Enterprises, Inc., 22 BOLI 62, 68 (2001); In the Matter of M. Carmona Painting, Inc., 22 BOLI 52, 60 (2001); In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 77 (1998).*

□ In determining the amount of civil penalty, the forum must consider all aggravating and mitigating factors. Respondent bears the burden of proving mitigating circumstances. ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 155, 157 (2001).***

□ Civil penalties, liquidated damages, and debarment are distinct forms of sanctions the agency may impose for violations of prevailing wage rate laws. ----- ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 71 (1998).***

**15.2 --- Failure to Pay PWR**

□ When mitigating circumstances were outweighed by the aggravating circumstances, particularly respondent's 18 prior violations and failure to visit the jobsite to determine the type of work being performed by its workers, the commissioner imposed a \$5,000 civil penalty for each of respondent's three violations, for a total of \$15,000. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 119 (2007).***

Appeal pending.

□ Former OAR 839-016-0540(3)(a) establishes a minimum, not an upper limit, on the commissioner's authority to determine an appropriate civil penalty. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 116 (2007).***

Appeal pending.

See also *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 75 (2007), appeal pending.*

□ When mitigating circumstances were considerably outweighed by the gravity of aggravating circumstances that included 14 prior violations of the same statute, the commissioner imposed a \$5,000 civil penalty for each of respondent's four violations, for a total of \$20,000. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 79-80 (2007).***

Appeal pending.

□ Considering all the aggravating and mitigating circumstances, the forum assessed a \$5,000 civil penalty for respondent's single violation of ORS 279.350(1) when respondent's violation was properly classified as "second and subsequent repeated" violation under OAR 839-016-0540. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 139 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

## PWR -- 15.0 CIVIL PENALTIES

□ Considering all the aggravating and mitigating circumstances, the forum assessed a \$3,000 civil penalty for each of respondent's violations of ORS 279.350(1), for a total of \$15,000, when respondent's violations were properly classified as "first repeated" violations under OAR 839-016-0540. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 137 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The forum assessed \$2,000 per violation, for a total of \$14,000, for respondent's "first" violation of ORS 279.350(1). ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 77 (2005).***

□ The forum assessed civil penalties of \$2,000 per violation, for a total of \$8,000, for respondent's failure to pay four workers the prevailing wage rate on a public works. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 44-45 (2005).***

□ The minimum civil penalty per violation is \$1,000 or the amount of unpaid wages, whichever is less. When the agency seeks more than the minimum civil penalty, it must establish aggravating circumstances to justify the increased amount. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 44 (2005).***

□ When respondent failed to pay the prevailing wage rate to eight workers, it was respondent's first violation, and both aggravating and mitigating circumstances were present, the forum assessed civil penalties of \$1,500 for each violation, for a total of \$12,000. ----- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 283 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ The forum assessed a \$1,000 civil penalty for each of respondent's two violations of ORS 279.350(1). ----- ***In the Matter of William George Allmendinger, 21 BOLI 151, 171 (2000).***

□ OAR 839-016-0540(3)(a) requires the commissioner to assess a minimum civil penalty of "[A]n "equal amount of the unpaid wages or \$1,000, whichever is less, for the first violation" of ORS 279.350(1). When respondent's "first" three violations were of great seriousness and magnitude, and they were coupled with the other aggravating circumstances and the lack of any mitigating circumstances, the forum assessed \$2,000 in civil penalties for each violation, or \$6,000 in total. ----- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 124 (2000).***

□ OAR 839-016-0540(3)(b) requires the commissioner to assess a minimum civil penalty of "[T]wo times the amount of unpaid wages or \$3,000, whichever is less, for the first repeated violation" of ORS 279.350 regarding the payment of the prevailing rate of wage. When respondent's violation was a first repeated violation and two times the unpaid wages amounted to \$9,178, respondent's failure to pay its four workers any money whatsoever for their work was of great seriousness and

magnitude, and there were other aggravating circumstances and no mitigating circumstances, the forum assessed a \$3,750 civil penalty for each violation, or \$15,000 in total. ----- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 124 (2000).***

□ The commissioner imposed a \$1000 penalty for each of respondent's three violations of ORS 279.350(1) when respondent previously had violated the prevailing wage rate laws, respondent's workers went unpaid for a period of time, and the general contractor on the public works contract suffered a financial loss because it paid workers' wages on respondent's behalf. ----- ***In the Matter of Keith Testerman, 20 BOLI 112, 128 (2000).***

□ The forum assessed a minimum civil penalty sought by the agency in an amount equal to the unpaid wages for each of respondent's failures to pay the prevailing wage rate. ----- ***In the Matter of Northwest Permastore Systems, Inc., 20 BOLI 37, 60 (2000).***

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

□ The forum imposed no civil penalties for respondent's failure to pay the prevailing wage rate when: the agency had approved respondent's fringe benefit plan in 1996 and did not notify respondent until August 1997 that it saw problems with the plan; respondent promptly sought expert assistance in developing a bona fide plan; and respondent cooperated with the agency's investigation and made every effort to bring the plan into compliance. ----- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 164-65 (1999).***

□ The commissioner has authority to impose a civil penalty not to exceed \$5,000 for each violation of ORS 279.348 to 279.380 and the administrative rules adopted pursuant thereto. When respondent committed five violations of ORS 279.350(1), but had cooperated with the agency and had no prior violations, the forum assessed the minimum penalty allowable, consisting of \$1,557.71, the amount of the unpaid wages and the amount sought by the agency. ----- ***In the Matter of Northwest Permastore, 18 BOLI 1, 19-20 (1999), reconsidered 20 BOLI 37 (2000).***

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

□ "Repeated violations" are violations of a law or rule that the respondent has violated on more than one project within two years of the date of the most recent violation. ----- ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 76 (1998).***

□ A subcontractor who fails to pay the prevailing wage rate is subject to a penalty for each worker to whom it failed to pay the wage. The minimum penalty for a repeated violation of failing to pay the prevailing wage rate is twice the amount of unpaid wages owed the worker or \$3000, whichever is less. ----- ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 76-77 (1998).***

□ When respondents deliberately avoided complying with the prevailing wage rate laws, with the result that their workers did not receive the legally required wage,

the forum imposed a civil penalty of \$5000.00. ----- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 79-80 (1998).*

**15.3 --- Failure to Post PWR**

□ Considering the number of aggravating circumstances and absence of any mitigating circumstances, including respondent's four prior violations of former ORS 279.350(4), the commissioner imposed a \$5,000 civil penalty for Respondent's failure to post the prevailing wage rate. ----- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 123 (2007).*

Appeal pending.

□ Considering the number of aggravating circumstances that included three prior violations of the same statute and the absence of any mitigating circumstances, the commissioner imposed a \$5,000 civil penalty for respondent's single violation of former ORS 279.350(4). ----- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 79-80 (2007).*

Appeal pending.

□ Considering all the aggravating and mitigating circumstances, the forum assessed a \$5,000 civil penalty for respondent's third violation of ORS 279.350(4). ----- *In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 135 (2005).*

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Considering all the aggravating and mitigating circumstances, the forum assessed a \$4,000 civil penalty for respondent's second violation of ORS 279.350(4). ----- *In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 134 (2005).*

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ When respondent could have easily complied with the law and was aware of its violation, the forum assessed a civil penalty of \$2,000, the amount sought by the agency, based on respondent's failure to post the applicable prevailing wage rates on its job site. ----- *In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 284 (2001).*

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ The forum assessed a civil penalty of \$3,000 when respondent could have easily complied with the law, should have known of its obligation to post the prevailing wage rates, had committed a prior violation of the same statute and had responded inadequately to prevent subsequent violations, but cooperated with the agency's investigation and lacked actual knowledge that the subject contracts were subject to Oregon's prevailing wage rate laws. ----- *In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 157 (2001).*

□ The maximum penalty for failure to post prevailing wage rates is \$5000, and the amount of the penalty

depends on any aggravating or mitigating circumstances. ----- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 77 (1998).*

□ The agency views failure to post prevailing wage rates as a serious violation. The forum imposed a \$4000 civil penalty for such a violation when the respondents: took no action to correct their failure to post prevailing wage rates after the agency informed them of a similar violation on another site; failed to post prevailing wage rates for many months; did not show the rates to workers who asked about them; knew or should have known of their duty to post the rates; did show some cooperation with the agency's investigation; and sent their office manager to prevailing wage rate training. ----- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 77-78 (1998).*

**15.4 --- Failure to Pay Fee for Costs of Administering Law**

□ When the agency sought a \$2,500 civil penalty for one violation of ORS 279.375, the forum found that, under the facts of the case, a \$2,500 civil penalty was disproportionate to the violation and assessed the minimum civil penalty of \$1,000. ----- *In the Matter of Steven D. Harris, 21 BOLI 139, 150 (2000).*

**15.5 --- Failure to File Certified Payroll Statements**

□ The forum assessed civil penalties of \$1,250 for each of respondent's 23 violations of ORS 279.354 based on misclassification of workers or submission of certified statements without accompanying payroll, and \$2,000 for each of respondent's violations of failing to file any certified payroll report. ----- *In the Matter of Johnson Builders, Inc., 21 BOLI 103, 126-27 (2000).*

**15.6 --- Filing Incomplete, Inaccurate, or Untimely Certified Payroll Statements**

□ Considering all the aggravating and mitigating circumstances, the commissioner assessed a \$5,000 civil penalty for respondent's single violation of former ORS 279.354. ----- *In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 144 (2005).*

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Considering all the aggravating and mitigating circumstances, the commissioner assessed a \$4,000 civil penalty for respondent's single violation of former ORS 279.354. ----- *In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 142 (2005).*

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Considering all the aggravating and mitigating circumstances, the commissioner assessed \$3,000 per violation, for a total of \$18,000 in civil penalties, for respondent's six violations of former ORS 279.354. ----- *In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 141-42 (2005).*

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of*

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*Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Based on precedent and the aggravating factors present, the forum assessed \$1,000 per violation for respondent's 20 violations of ORS 279.354. ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 79-80 (2005).***

□ By not paying fringe benefits, respondent did not pay its workers the full weekly wages they earned and the forum concluded that the certification by respondent's president on each of the 20 certified payroll reports that no worker was paid less than the prevailing rate of wage was untruthful and a violation of ORS 279.354(1). ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 79 (2005).***

□ To comply with ORS 279.354(1), a contractor's certified payroll reports must include accurate complete payroll records for the prior week for each worker containing the information prescribed by statute, the hourly rate paid to each worker, a certification that no worker was paid less than the prevailing rate of wage, and certification that the contractor has read the statement and certificate, knows the contents, and that the certification and payroll records are true. ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 78 (2005).***

□ In summary, ORS 279.354(1) requires a contractor to provide: (a) truthful payroll information, and (b) a truthful certification that the payroll information is true and that no worker was paid less than the prevailing rate of wage. Truth is the key element. ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 78 (2005).***

□ The forum assessed civil penalties of \$2,000 per violation, for a total of \$12,000, for respondent's six inaccurate certified payroll reports. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 45 (2005).***

□ Respondent committed nine separate violations of ORS 279.354 and OAR 839-016-0010 when all nine misclassified workers as laborers, four of the statements either misstated the amount of straight time worked by respondent's workers on particular days or the total hours worked by those workers on particular days, and all nine were missing the certified statement contained on the agency's form WH-38. The commissioner assessed \$2,000 per violation, for a total of \$18,000 in civil penalties. ----- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 287 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ When respondent submitted untimely certified payroll statements, the forum assessed a civil penalty of \$1,000 based on all the aggravating and mitigating factors measured against civil penalties assessed for the same violation in prior cases. ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 158-59 (2001).***

□ The forum assessed \$1,000 each for respondent's two violations of ORS 279.354(1), finding the violations to be similar in magnitude to the violations committed by the subcontractor in *Testerman* and imposed the same

penalty as it did in that case. The forum disagreed with the agency's assertion that the maximum \$5000 penalty for each violation was appropriate, stating that the forum imposes that penalty in cases when the violations are widespread and the certified payroll reports include intentional falsification of hours worked and wages paid. ----- ***In the Matter of William George Allmendinger, 21 BOLI 151, 172 (2000).***

□ The forum assessed civil penalties of \$1,250 for each of respondent's 23 violations of ORS 279.354 based on misclassification of workers or submission of certified statements without accompanying payroll, and \$2,000 for each of respondent's violations of failing to file any certified payroll report. ----- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 126-27 (2000).***

□ For the single violation of ORS 279.354(1), the forum assessed a \$1,000 civil penalty.----- ***In the Matter of Northwest Permastore Systems, Inc., 20 BOLI 37, 60 (2000).***

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

□ The commissioner imposed a \$1000 penalty for each of respondent's three violations of ORS 279.354(1) when the agency previously had warned respondent about other violations of the prevailing wage rate laws, it would not have been difficult for respondent to complete the certified payroll reports accurately, and the reports contained relatively serious misstatements or omissions. ----- ***In the Matter of Keith Testerman, 20 BOLI 112, 128-29 (2000).***

□ The commissioner imposed a \$5000 penalty for respondent's violation of ORS 279.354(1) when the violation was aggravated by respondent's "less than impressive" response to the agency's prior investigations of it; respondent's persistent difficulties in ensuring that workers on prevailing wage rate jobs were paid overtime for work they did on weekends; the fact that respondent's failure to record daily hours worked resulted in one worker not receiving all wages due for several months; the ease with which respondent could have complied with the law; and the fact that respondent deliberately included possibly inaccurate information on the certified payroll reports. ----- ***In the Matter of Labor Ready, Inc., 20 BOLI 73, 100-01 (2000).***

□ The forum imposed a civil penalty of \$250 for each of 24 violations of ORS 279.354(7) when respondents should have known that their payroll methods, as reflected in their certified statements, were illegal. ----- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 166-67, 169 (1999).***

□ The forum imposed a \$5000 civil penalty for respondents' failure to file accurate and complete certified statements when aggravating factors included: respondents' response to their prior violations of the prevailing wage rate laws; the widespread and deliberate nature of the present violations; respondents' use of a sham apprenticeship program to circumvent paying prevailing wage rates; respondents' practice of banking hours and recording overtime and weekend hours as though they were worked on weekdays, for the same purpose; the certification of statements that

included deliberately falsified hours and rates of pay; and the fact that respondents knew or should have known of the violation. ----- ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 79 (1998).***

**15.7 --- Failure to Return PWR Survey**

□ Based on aggravating circumstances and the lack of mitigating circumstances, the forum assessed a civil penalty of \$1,000, the amount sought by the agency, for respondent's single violation of ORS 279C.815(3). ----- ***In the Matter of Wildfang, Inc., 28 BOLI 1, 9 (2006).***

□ When there were several aggravating factors, and only one mitigating factor, the commissioner assessed a civil penalty of \$750 for respondent's single violation of ORS 279C.815(3). ----- ***In the Matter of Troy Wingate, 27 BOLI 282, 294 (2006).***

□ Considering there were several aggravating circumstances and no mitigating circumstances, and that the amount of civil penalties sought by the agency was amply supported by the facts and prior final orders, the forum assessed a \$250 civil penalty for respondent's 2001 violation, a \$250 civil penalty for respondent's 2002 violation, and a \$500 civil penalty for respondent's 2004 violation, for a total of \$1,000. ----- ***In the Matter of Storm King Construction, 27 BOLI 46, 55 (2005).***

□ Considering all the aggravating and mitigating circumstances, the commissioner assessed a \$500 civil penalty for a respondent's single violation of ORS 279.359. ----- ***In the Matter of Emmert Industrial Corp., Inc., 26 BOLI 284, 290 (2005).***

□ Considering all the aggravating and mitigating circumstances, the commissioner assessed a \$350 civil penalty for a respondent's single violation of ORS 279.359. ----- ***In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 293-94 (2002).***

□ When respondent performed non-residential construction work in the period of time covered by the 2000 wage survey and untimely submitted the commissioner's wage survey form, failed to complete and return the commissioner's 1998 wage survey, and presented no credible evidence of mitigating factors, the commissioner assessed a civil penalty of \$750. ----- ***In the Matter of Harney Rock & Paving Co., 22 BOLI 177, 185 (2001).*** See also ***In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 25 (2001), amended 22 BOLI 27(2001).***

□ When respondent failed to return the 2000 wage survey, could have easily complied with the law and was given at least two reminder notices, but there was no evidence that respondent performed any non-residential construction work in the year 2000, the commissioner assessed a \$350 civil penalty. ----- ***In the Matter of Spot Security, Inc., 22 BOLI 170, 175 (2001).***

□ When respondent failed to return the 2000 wage survey, could have easily complied with the law, was given at least two reminder notices, did not complete or return the 1998 and 1999 wage surveys, and there were no mitigating circumstances present, the commissioner assessed a \$1,000 civil penalty. ----- ***In the Matter of The Landscape Company of Portland, LLC, 22 BOLI 69, 76-77 (2001).***

□ When respondent failed to return the 2000 wage survey, could have easily complied with the law, and was given at least two reminder notices, and there were no mitigating circumstances present, the commissioner assessed a \$500 civil penalty. ----- ***In the Matter of Landco Enterprises, Inc., 22 BOLI 62, 68 (2001).***

□ When respondent failed to return the 2000 wage survey, could have easily complied with the law, was given at least two reminder notices, did not complete or return the 1998 and 1999 wage surveys, and did not perform any non-residential construction work, the commissioner assessed a \$500 civil penalty. ----- ***In the Matter of M. Carmona Painting, Inc., 22 BOLI 52, 61 (2001).***

□ The forum assessed the \$500 civil penalty sought by the agency for one violation of ORS 279.359(2). ----- ***In the Matter of Green Planet Landscaping, Inc., 21 BOLI 130, 139 (2000).***

□ The forum assessed a \$500 civil penalty for each of respondent's two violations of ORS 279.359(2). ----- ***In the Matter of Schneider Equipment, Inc., 21 BOLI 60, 73 (2000).***

□ When respondent failed to complete and return a 1998 wage survey form in violation of ORS 279.359 but employed no construction workers in 1998, the commissioner assessed a \$250 civil penalty. ----- ***In the Matter of Martha Morrison, 20 BOLI 275, 286 (2000).***

□ When respondent's failure to complete and return a 1999 wage survey was aggravated by several factors and there were no mitigating factors present, the commissioner found that the \$500 sought by the agency was an appropriate civil penalty. ----- ***In the Matter of Martha Morrison, 20 BOLI 275, 287 (2000).***

□ The commissioner imposed a \$500 penalty for a violation of ORS 279.359(2) when there was no evidence that respondent had previously violated the prevailing wage rate laws; it would have been relatively easy for respondent to return the wage survey; and the agency gave respondent several warnings and opportunities to comply with the statute before issuing the notice of intent. ----- ***In the Matter of F.R. Custom Builders, Inc., 20 BOLI 102, 111 (2000).***

**15.8 --- Failure to Make Records Available to Wage and Hour Division**

□ Considering all the aggravating and mitigating circumstances, the commissioner assessed \$2,500 for a respondent's violation of ORS 279.355. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 146 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The forum imposes a maximum \$5,000 penalty when the violations are widespread and are of considerable magnitude, usually due to the number of workers affected by the violation. In cases when the forum has imposed the maximum penalty for failure to provide requested records to the agency, the subcontractor was found to have never filed certified payroll records as required. ----- ***In the Matter of Design***

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### *N Mind, Inc., 27 BOLI 32, 45 (2005).*

□ Based on aggravating circumstances – respondent had ample opportunity to comply provide requested records and could have done so without undue difficulty, but failed to do so -- the forum assessed a civil penalty of \$2,000 for respondent's single violation of 279.355(2). ---- *In the Matter of Design N Mind, Inc., 27 BOLI 32, 46 (2005).*

□ The forum assessed a \$3500 civil penalty against respondent for his single violation of ORS 279.355 based on the aggravating circumstances of the case. ---- *In the Matter of William George Allmendinger, 21 BOLI 151, 171-72 (2000).*

□ When respondent's violation of ORS 279.355(2) was aggravated and there were no mitigating factors, the forum assessed the maximum civil penalty of \$5,000. ---- *In the Matter of Johnson Builders, Inc., 21 BOLI 103, 129 (2000).*

### 15.9 --- Penalties for Other Violations

□ The commissioner imposed a \$4000 penalty for each of respondent's two violations of OAR 839-016-0025(2) when respondent's failure to make and maintain required records was not a deliberate attempt to circumvent the prevailing wage rate law, but the violations were aggravated by respondent's "less than impressive" response to the agency's prior investigations of it; respondent's persistent difficulties in ensuring that workers on prevailing wage rate jobs were paid overtime for work they did on weekends; the fact that respondent's failure to record daily hours worked resulted in one worker not receiving all wages due for several months; and the ease with which respondent could have complied with the law. ---- *In the Matter of Labor Ready, Inc., 20 BOLI 73, 99-100 (2000).*

□ The forum imposed no penalty for a city's failure to include a contract provision stating that a fee had to be paid to the commissioner when there was no evidence that any person was paid less than the prevailing wage rate or that the city previously had violated prevailing wage rate laws, and the city did not intentionally sever the contract from other water line improvement contracts to avoid having to comply with the prevailing wage rate laws. ---- *In the Matter of the City of Klamath Falls, 19 BOLI 266, 286-87 (2000).*

□ The forum imposed a civil penalty of \$5,000 based on respondent's requirement that workers accept less than the prevailing wage rate as part of a bogus apprenticeship program that violated ORS 279.350(7). -- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 79 (1998).*

### 15.10 --- Aggravating Circumstances

#### 15.10.1 --- Response to Prior Violations of Statutes and Rules

□ OAR 839-016-0520(1)(b) is intended to penalize contractors and subcontractors for actions taken after an actual determination that a previous violation occurred. It does not apply to actions taken before such a determination has been made. This rule is in contrast to the "prior violation" rule, which turns on the date the action constituting the violation occurred, not the date

the action was determined to be a violation. When December 13, 2001, was the first date on which respondent was determined to have committed a violation, the forum held that respondent's actions that took place in May 2001 could not be evaluated as responding to a subsequent determination. ---- *In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 130 (2005).*

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's failure to post the applicable prevailing wage rates was aggravated by its less than overwhelming response to its previous violations, including respondent's failure to send any of its employees to BOLI's prevailing wage rate seminars to obtain additional education in the law since a final order was issued regarding respondent's prior violations. ---- *In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 156 (2001).*

□ Respondent's failure to submit timely certified payroll statements was aggravated by the fact that its response to prior violations had "not been overwhelming." ---- *In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 158 (2001).*

□ Respondents' failure to post prevailing wage rates was aggravated by the failure to post after the agency informed them of a similar violation on another site. ---- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 77-78 (1998).*

#### 15.10.2 --- Prior Violations of Statutes and Rules

□ Respondent's failure to post the prevailing wage rate was aggravated by its four prior violations of former ORS 279.350(4) on four separate projects. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 120-21 (2007).*

Appeal pending.

□ Respondent's failure to pay the prevailing wage rate to three workers on a public works project in 2004 was aggravated by its 18 prior violations of former ORS 279.350(1), eight in 1998, six in 2000, and four in 2003. - *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 117 (2007).*

Appeal pending.

□ Respondent's failure to post the prevailing wage rate was aggravated by its three prior violations of former ORS 279.350(4) on three separate projects. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 80 (2007).*

Appeal pending.

□ Respondent committed 14 prior violations that were litigated at two different contested case hearings. Final orders were issued and respondent filed appeals in both cases, but did not assign error to the assessment of civil penalties for those 14 violations. In its exceptions, respondent argued that those violations should not be considered because of their remoteness in time and because the cases were on appeal. The commissioner

denied respondent's exceptions and considered the 14 prior violations as aggravating factors. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 76-77 (2007).***

Appeal pending.

□ Respondent's single violation of ORS 279.354 was aggravated by a prior violation of the same statute. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 143 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's filing of an untimely payroll report was aggravated by respondent's three prior violations of the same statute ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 142 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's filing of six inaccurate or incomplete payroll reports was aggravated by respondent's two prior violations of the same statute. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 141 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's failure to pay the applicable prevailing wage rates was aggravated because it was a "first repeated" violation. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 53-54 (2004).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's failure to post the applicable prevailing wage rates was aggravated by respondent's prior violation of the same statute. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 133 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The agency offered exhibits documenting a wage claim allegedly filed by an employee of respondent for the purpose of establishing a "prior violation." The forum rejected the exhibits on the grounds that the agency did not establish that the wage claim was filed against respondent. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 130 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The forum held that a wage claim in which the alleged unpaid wages became due and owing after the alleged violations in the agency's notice of intent occurred could not constitute a prior violation. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 129-30 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ When the agency's notice alleged that respondent's failure to return the commissioner's 1998 wage survey was an aggravating circumstance but did not charge in the notice that it was a specific violation and the issue was not previously litigated, the forum declined to consider it as a prior violation because there was no evidence that the agency ever investigated or cited respondent for its failure to return the 1998 wage survey and the facts giving rise to that violation were outside the substantive allegation in the notice. However, the forum considered this failure as an aggravating circumstance because it showed that respondent knew or should have known of the violation. ----- ***In the Matter of Harney Rock & Paving Co., 22 BOLI 177, 184 (2001).*** See also *In the Matter of M. Carmona Painting, Inc., 22 BOLI 52, 60 (2001).*

□ Respondent's failure to post the applicable prevailing wage rates was aggravated by its prior violations of Oregon's prevailing wage rate laws, including a violation of ORS 279.350(4), between 1995 and 1997, and a violation of ORS 279.359 in 1999. ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 156 (2001).***

□ Respondent's failure to submit timely certified payroll statements was aggravated by its prior violations of Oregon's prevailing wage rate laws. ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 157-58 (2001).***

□ An aggravating circumstance regarding respondent's five "first repeated violations" of ORS 279.350 was that respondent had violated ORS 279.350 on the previous project. ----- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 123-24 (2000).***

□ Aggravating respondent's 1999 violation of ORS 279.359 was the fact that it was her second violation. ----- ***In the Matter of Martha Morrison, 20 BOLI 275, 286 (2000).***

**15.10.3 --- Opportunity and Degree of Difficulty to Comply**

□ Respondent's failure to post was aggravated by the facts that respondent had ample opportunity to comply with Oregon's posting requirement, was aware of the posting requirement and still failed to post, and there was no evidence that it would have been difficult for respondent to post. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 121 (2007).***

Appeal pending.

□ When respondent, a temporary employment agency, failed to pay the prevailing wage rate, respondent's violations were aggravated by the fact that respondent did not take advantage of following opportunities to comply that would not have been difficult to pursue. About a week after they started work, respondent's two workers visited respondent's office for the first time to pick up their paychecks, described the duties they were performing, and complained they were underpaid. In response, respondent's customer service representative telephoned the contractor. As a result of that conversation and her review of BOLI's Prevailing Wage Rate booklet, the customer service representative concluded that the work being performed by the two

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workers was in a higher classification than the rate respondent was paying its workers and determined the higher classification at which she thought the workers should be paid. When the workers disagreed and suggested she investigate, respondent's customer service representative did not visit the job site or take any other action to determine the actual work that the workers were performing, despite her apparent conclusion that the contractor had misstated the classification of the work to be performed when first contracting for respondent's services. Furthermore, despite the customer service representative's conclusion that the workers should be paid in a higher classification, there was no evidence that she took any action, at any time during their employment, to see that they were reclassified and paid at the higher rate. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 117-18 (2007).***

Appeal pending.

□ When respondent failed to post, despite undisputed evidence that respondent's manager knew the correct job classification for respondent's workers and there was no evidence that posting posed any degree of difficulty for respondent, the forum found that respondent's violation was aggravated by respondent's ample opportunity and lack of difficulty in complying with the law. The forum rejected respondent's contention that posting is never "difficult, unless, for example, the work place is on a cliff or under water." ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 80 (2007).***

Appeal pending.

□ When respondent's manager understood that project was a prevailing wage rate job, but continued to pay respondent's workers the minimum wage of \$6.90 per hour for one day based on the excuse that he had not received written confirmation from BOLI, the forum concluded that respondent, through its manager, had the opportunity to comply with the law and elected not to do so, constituting an aggravating circumstance. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 77-78 (2007).***

Appeal pending.

□ Respondent had ample opportunity and a minimal degree of difficulty to comply with the prevailing wage rate laws when the commissioner's 2005 wage survey was mailed to respondent well over a month before the required due date, giving respondent ample opportunity to comply with the law; respondent had at least two reminders after the due date passed before the agency warned that sanctions were imminent; even after the agency's final warning letter, respondent remained unresponsive until the notice of intent to assess civil penalties issued; and respondent should have had little difficulty acquiring and providing the requested information. ----- ***In the Matter of Wildfang, Inc., 28 BOLI 1, 8 (2006).***

□ The forum found respondent had ample opportunity to comply with the law when respondent actually received the wage survey booklet mailed to him, the Employment Department mailed its pre-survey notice and two reminders to the same address, and the pre-

survey notice stated that the wage survey "is an annual mandatory survey of all employers with construction-related employment." ----- ***In the Matter of Troy Wingate, 27 BOLI 282, 292 (2006).***

□ The forum found it should have been simple for respondent to comply with *former* ORS 279.354 and *former* OAR 839-016-0010. The statute and rule are very specific about the information required, and BOLI provides a specific form that contractors or subcontractors may use to comply with the law. Instead, respondent opted to use its own form, which was fine so long as it contained all the elements of the agency's form, including a certified statement. Respondent's form did not contain all the required elements, and even respondent's corrected submissions lacked the required certified statement. Respondent's original submissions also incorrectly reported the classification of workers and hours worked. If respondent had original time records that were correct and had taken care to determine the type of work its workers were performing, these inaccuracies would not have occurred. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 141 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's violation was aggravated by the fact that respondent might have avoided its violations of ORS 279.350(1) and (4) entirely if it had inquired, when taking a job order, if the job was a public works, or if respondent had sent someone to visit the job site. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 136, 138 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent could have easily avoided its false certification that it paid its workers the prevailing wage rate simply by ascertaining the applicable rates in BOLI's prevailing wage rate booklet and paying those amounts and by paying its workers for the actual dates and hours worked. ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 79 (2005).***

□ Respondent's violation was aggravated because respondent did nothing to remedy the problem when the agency brought the unpaid wages to respondent's attention and the agency had to collect the unpaid wages from respondent's surety. ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 77 (2005).***

□ Had respondent wanted to pay the prevailing wage rate, it could have easily done so simply by ascertaining the applicable rates in BOLI's prevailing wage rate booklet and paying those amounts and by paying its workers for the actual dates and hours that they worked. ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 77 (2005).***

□ When respondent received multiple reminders of its obligation to submit wage surveys in 2001, 2002, and 2004, the forum concluded that respondent had ample opportunity to comply with the law. ----- ***In the Matter of Storm King Construction, 27 BOLI 46, 55 (2005).***

□ Respondent's violation was aggravated by the fact that it should not have been difficult to provide the records the agency requested because respondent was legally obligated to make and maintain them. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 45 (2005).***

□ Respondent had ample opportunity to pay its workers the correct prevailing wage rate and avoid the violations by correctly classifying its employees based on the work they were performing. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 44 (2005).***

□ In a wage survey case, the commissioner found it would have been relatively easy for respondent to comply with the law by simply returning the wage survey, and respondent was given several opportunities to do so. ----- ***In the Matter of Emmert Industrial Corporation, 26 BOLI 284, 289 (2005).***

□ Respondent's violation of ORS 279.359 was aggravated by the fact that it would have been relatively easy for respondent to comply with the law by returning the wage survey, and the agency gave respondent several opportunities to comply, in the form of reminder notices sent by the Employment Department, before issuing its notice. ----- ***In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 293 (2002).***

□ Respondent's certified payroll violation was aggravated by the fact that it would have been relatively simple for respondent to comply with the statute. All respondent had to do was list the same hours on its payroll statements as submitted on its invoices to its client, use the WH-38 certification attachment, and make a phone call to BOLI's prevailing wage unit to ascertain the correct classification for its workers and record that information. ----- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 287 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ When respondent failed to pay the prevailing wage rate to eight workers, respondent's violation was aggravated because it would have been relatively simple for respondent to comply with the law. All respondent had to do was to determine the specific duties performed by its workers, pick up the phone and call BOLI's prevailing wage unit, then follow the advice BOLI's prevailing wage unit would have given. Respondent did none of these things. ----- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 285 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ Respondent's failure to post the applicable prevailing wage rates was aggravated by the fact that it would have been simple for respondent to comply with the statute; all it would have taken was a visit by respondent's local branch manager to the job site to post a copy of the prevailing wage rate for respondent's workers in a place conspicuous and accessible to them. ----- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 283 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ Respondent's failure to return the commissioner's 2000 wage survey was aggravated by the fact that it would have been relatively easy for respondent to comply with the law by returning the wage survey, and the agency gave respondent several opportunities to comply, in the form of reminder notices sent by the Employment Department, before issuing its notice. ----- ***In the Matter of Harney Rock & Paving Co., 22 BOLI 177, 184 (2001).*** See also *In the Matter of Spot Security, Inc.*, 22 BOLI 170, 176 (2001); *In the Matter of The Landscape Company of Portland, LLC*, 22 BOLI 69, 76 (2001); *In the Matter of Landco Enterprises, Inc.*, 22 BOLI 62, 68 (2001); *In the Matter of WB Painting and Decorating, Inc.*, 22 BOLI 18, 25 (2001), amended 22 BOLI 27(2001); *In the Matter of Green Planet Landscaping, Inc.*, 21 BOLI 130, 139 (2000).

□ Respondent's failure to post the applicable prevailing wage rates was aggravated by the fact that it could have easily complied with the law by having an employee attach the rates to a stake and drive the stake into the ground on the job site, a practice respondent had used in the past. ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 155-56 (2001).***

□ Respondent's failure to submit timely certified payroll statements was aggravated by the facts that respondent had seven days to complete and submit the reports after it acquired actual knowledge that they were required and the completed, late report had only two names on it, with no evidence being presented to show it could not have been timely completed and submitted. --- -- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 157-58 (2001).***

□ Respondent's violation of ORS 279.355(2) was aggravated by evidence showing that he provided very few payroll records to the agency and no records related to the work performed by two employees on the subject project, the ease with which respondent could have provided records requested by the agency, and the ample opportunity he had to comply with the agency's request. ----- ***In the Matter of William George Allmendinger, 21 BOLI 151, 171-72 (2000).***

□ An aggravating factor in respondent's violation of ORS 279.375 was respondent's ample opportunity to comply based on BOLI's four warning letters stating that the \$100 fee was due and where to send it. ----- ***In the Matter of Steven D. Harris, 21 BOLI 140, 149-50 (2000).***

□ When respondent committed 32 violations of ORS 279.354, the violations were aggravated by the ease with which respondent could have complied with the law. ----- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 126-27 (2000).***

□ An aggravating factor in respondent's violation of ORS 279.355(2) was that respondent was required by law to maintain the records of the type requested by the agency; there was no evidence that respondent could not have easily provided the records; and respondent

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had ample time in which to comply with the agency's request for records. ---- *In the Matter of Johnson Builders, Inc., 21 BOLI 103, 129 (2000).*

□ Respondent's 1998 violation of ORS 279.359 was aggravated by the ease of complying with the law and respondent's failure to comply after BOLI sent her two reminders of her failure to comply. In addition, the fact that respondent only employed two construction workers in 1999 for a total of 45 reportable hours showed it would have been relatively simple for respondent to complete the wage survey and return it. ---- *In the Matter of Martha Morrison, 20 BOLI 275, 286-87 (2000).*

### 15.10.4 --- Magnitude and Seriousness of Violation

□ The requirement that every contractor or subcontractor post the prevailing wage rates for its employees promotes the statutory purpose of assuring compliance by informing employees of the rate of pay they should be receiving. When contractors or subcontractors do not post, this directly undermines the legislature's intent of ensuring that workers on public works be paid the prevailing wage rate. Consequently, the forum considers failure to post to be a serious matter. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 121 (2007).*

Appeal pending.

□ In determining the magnitude of respondent's violation of failure to pay the prevailing wage rate, the forum considered the following facts: (1) Over a two week period, respondent underpaid its three workers the total amount of \$1,529.82; (2) Two of the workers knew they were being underpaid and filed complaints with BOLI that resulted in all three workers receiving their full back pay a little more than one month after their last day of work; (3) Respondent's corporate office did not provide its local office with a posting ready rate sheet until the last day that two of its workers worked on the project, more than two weeks after respondent's local office provided respondent's corporate office with the requisite paperwork, and after one of its workers had already completed his employment with respondent. Based on these facts, the forum concluded that respondent's violations were of moderate magnitude. --- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 121-22 (2007).*

Appeal pending.

□ The commissioner considers violations of former ORS 279.350(1) to be a serious matter. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 118 (2007).*

Appeal pending.

See also *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 78 (2007), appeal pending.*

□ In determining the magnitude of respondent's violation of failing to pay the prevailing wage rate, the forum considered the following facts: (1) Over a two week period, respondent initially underpaid its three workers the total amount of \$1,529.82; (2) In making the underpayments, respondent paid its three workers \$27.65 per hour instead of one of four applicable

prevailing wage rates that ranged from \$29.06 per hour to \$40.28 per hour; and (3) Respondent's workers did not receive their back pay until 5-7 weeks after that pay was due. Based on these facts, the forum concluded that respondent's violations were of moderate magnitude. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 118-19 (2007).*

Appeal pending.

□ In determining the magnitude of respondent's violation of failing to post the prevailing wage rate, the forum considered the following facts: (1) Respondent did not provide its workers with any way of finding out they were being underpaid due to its failure to post or otherwise inform its workers of the prevailing wage rate they were entitled to receive; (2) Respondent still did not post when it learned the project it dispatched workers to was a prevailing wage rate job; (3) Over a three week period, respondent initially underpaid 15 workers the total amount of \$10,630.83. Respondent's workers were unaware of this underpayment primarily because of respondent's failure to post, and three of respondent's workers did not become aware of the underpayment until 10 months later due to the fact that they were no longer working for respondent when respondent finally began paying the prevailing wage. Based on these facts, the forum concluded that respondent's violations were of substantial magnitude. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 81 (2007).*

Appeal pending.

□ In determining the magnitude of respondent's violation of failing to pay the prevailing wage rate, the forum considered the following facts: (1) Over a three week period, respondent initially underpaid 15 workers the total amount of \$10,630.83; (2) In making the underpayments, respondent only paid its workers \$6.90 per hour instead of \$28.29 per hour, the applicable prevailing wage rate; and (3) As a direct result of respondent's initial underpayment, three of respondent's workers did not receive their back pay until 10 months after they earned that pay. Based on these facts, the forum concluded that respondent's violations were of substantial magnitude. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 78-79 (2007).*

Appeal pending.

□ When respondent's prevailing wage rate survey data would have been considered in the 2005 survey because the evidence showed respondent performed non-residential work during 2005, the forum found respondent's non-compliance to be serious because it undermines the commissioner's ability to complete his statutory duty to accurately determine the prevailing wage rates. ---- *In the Matter of Wildfang, Inc., 28 BOLI 1, 9 (2006).*

□ Based on the fact that the commissioner's wage survey asks contractors to state whether or not they performed non-residential construction, the forum inferred that the survey was intended to be the commissioner's source of information as to whether or not surveyed contractors were required to submit wage data and that, in the absence of respondent fulfilling his legal obligation to complete and return the survey, the

commissioner had no way of knowing if respondent had wage data that might affect the calculation of prevailing wage rates. If all contractors imitated respondent's non-compliance, it would be impossible for the commissioner to carry out his statutory duty of determining the prevailing wage rates. Consequently, even though respondent would not have provided any wage data because he only performed residential work during the survey period, the commissioner found respondent's violation to be serious. ----- ***In the Matter of Troy Wingate, 27 BOLI 282, 293 (2006).***

□ The seriousness of respondent's violation of ORS 279.355 was considerable because the agency was unable to perform its statutorily mandated duty of determining that workers have been paid the prevailing wage rate without obtaining these records. The magnitude was high because of the number of workers involved in the audit. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 146 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The magnitude of respondent's violation of ORS 279.354 was increased because of the number of workers involved, the fact that the inaccuracies and inconsistencies in respondent's reports caused the agency to expend considerable time in determining that respondent had in fact paid its workers the prevailing wage rate, and the existence of several reports, each of which would comprise a separate violation had the agency chosen to plead multiple violations, that were compressed by the charging document into one violation. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 143 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's failure to file a certified payroll report until prompted by the agency was serious. However, the magnitude was limited, in that it only affected one worker. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 142 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's certified payroll violations were serious, as the inaccurate information provided affected the agency's ability to determine if respondent's workers had been paid properly. The magnitude was also substantial, in that respondent's submissions contained inaccurate information about at least six workers. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 141 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The magnitude of respondent's ORS 279.350(1) violation was substantial because of the extreme contrast between the wage respondent's worker was initially paid -- \$6.75 per hour, and the wage he was entitled to -- \$43.83 per hour, and the fact that he did not

receive his full back pay until it was four months overdue. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 138 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Failure to pay the applicable prevailing wage rates is a serious violation that requires placement on the commissioner's list of ineligible if the commissioner finds that the violation was intentional. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 136 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The magnitude of respondent's ORS 279.350(1) violation was substantial because it resulted in the underpayment of six workers, three of whom did not receive their full pay until five months after their pay was due, and a fourth who was still owed wages at the time of the hearing. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 136 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Failure to post the applicable prevailing wage rates is a serious violation that requires placement on the commissioner's list of ineligible if the commissioner finds that the violation was intentional. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 133-34 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The magnitude of respondent's failure to post was substantial when respondent did not provide its worker with any way of finding out he was being underpaid and the workers were initially paid less than the prevailing wage rate. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 134 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The magnitude of respondent's failure to post was substantial when respondent did not provide its workers with any way of finding out they were being underpaid and six workers were initially paid less than the prevailing wage rate. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 133 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The commissioner considers inaccurate or falsified certified payroll reports to be a serious matter. ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 79 (2005).***

□ Respondent's untruthful certification of its certified payroll reports was serious, in that it disguised respondent's failure to pay its workers \$15,898 in earned wages. ----- ***In the Matter of Harkcom Pacific, 27 BOLI***

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62, 79 (2005).

□ Respondent's failure to pay the prevailing wage rate resulted was serious, in that it resulted in an underpayment of wages amounting to \$15,898. ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 77 (2005).***

□ Respondent's failure to complete and return the commissioner's wage surveys was serious, in that the commissioner would be unable to complete his statutorily required duty of determining Oregon's prevailing wage rates if all survey recipients did not return the wage surveys or only returned them after it was too late to consider them. Respondent's data, if timely submitted, would have been included in the data used to set prevailing wage rates. The agency also alleged that respondent's three violations resulted in a skewing of the established prevailing wage rates, but offered insufficient evidence to prove that allegation. ----- ***In the Matter of Storm King Construction, 27 BOLI 46, 55 (2005).***

□ Respondent's failure to provide requested records was serious because a subcontractor's failure to provide requested records undermines the agency's ability to enforce the prevailing wage laws and ensure that workers are properly paid. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 45 (2005).***

□ Respondent's certified payroll report violations were serious because a subcontractor's failure to maintain and provide required records undermines the agency's ability to ensure that laborers on Oregon public works projects are paid the wages to which they are statutorily entitled. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 45 (2005).***

□ Respondent's failure to pay the prevailing wage rate to four workers was a serious violation because it resulted in an underpayment to four workers that the prime contractor ultimately paid on respondent's behalf and required placing respondent on the list of ineligible. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 44 (2005).***

□ Respondent's violation was serious because the commissioner would be unable to complete his statutory duty of determining Oregon's prevailing wage rates if all survey recipients failed to return the wage survey until it was too late to be considered. ----- ***In the Matter of Emmert Industrial Corporation, 26 BOLI 284, 289 (2005).***

□ The forum declined to speculate on the magnitude of respondent's violation when the agency offered no evidence from which the forum could gauge the extent to which, if any, respondent's failure to return the 2004 wage survey skewed the commissioner's determination of the prevailing wage rates. ----- ***In the Matter of Emmert Industrial Corporation, 26 BOLI 284, 289 (2005).***

□ Respondent's violation of ORS 279.359 was aggravated by its seriousness, in that the commissioner would be unable to complete his statutorily mandated duty of determining Oregon's prevailing wage rates if all survey recipients failed to return the wage survey until it was too late to be considered. However, the forum

could only speculate as to the magnitude of respondent's violation, inasmuch as the agency offered no evidence from which the forum could gauge the extent, if any, to which respondent's failure to return the 2001 wage survey skewed the commissioner's determination of the prevailing wage rates. ----- ***In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 293 (2002).***

□ Respondent's violations of the certified payroll requirements were serious, in that the misclassification of workers and inaccurate statements of hours worked made it impossible for BOLI to determine, based on the payroll statements, just what the workers should have been paid. The magnitude of the violation was substantial, given that there were nine defective statements involving eight workers and over \$3,000 in unpaid wages. ----- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 287-88 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ Respondent's failure to pay the prevailing wage rate to eight workers was a serious one that requires debarment if the commissioner finds that the violation was intentional. The magnitude was high because it resulted in the underpayment of eight workers. ----- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 285-86 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ Failure to post the applicable prevailing wage rates is a serious violation that requires debarment if the commissioner finds that the violation was intentional. The magnitude of respondent's violation was high because respondent itself did not provide its workers with any way of finding out that they were being underpaid and because respondent did not post prevailing wage rates at any of the 134 prevailing wage rate jobs on which it employed workers in the year 2000. ----- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 283-84 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ Respondent's failure to return the commissioner's 2000 wage survey was deemed serious because the commissioner's statutorily mandated duty of determining Oregon's prevailing wage rates would be impossible if all survey recipients failed to return the wage survey until they were too late to be considered. The forum declined to speculate as to the magnitude of respondent's violation because the agency offered no evidence from which the forum could gauge the extent to which respondent's failure to return the 2000 wage survey skewed the commissioner's determination of the prevailing wage rates. ----- ***In the Matter of Harney Rock & Paving Co., 22 BOLI 177, 185 (2001).*** See also *In the Matter of Spot Security, Inc., 22 BOLI 170,*

176 (2001).

□ The agency argued that the accuracy of the commissioner's prevailing wage determinations depends on receiving completed surveys from all contractors and a contractor's failure to comply could result in skewing the established rates. However, respondent performed only residential work and the agency did not offer evidence to show how respondent, who was not required to provide any data for the survey, could adversely affect the accuracy of the commissioner's prevailing wage rate determinations by not signing and returning the wage survey form. ---- *In the Matter of M. Carmona Painting, Inc., 22 BOLI 52, 60-61 (2001)*.

□ The forum has found wage survey violations not as serious as violations involving the failure to pay or post the prevailing wage rate. ---- *In the Matter of Landco Enterprises, Inc., 22 BOLI 62, 68 (2001)*. See also *In the Matter of M. Carmona Painting, Inc., 22 BOLI 52, 61 (2001)*.

□ The forum considers failure to post prevailing wage rates as a serious violation. ---- *In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 156 (2001)*.

□ Respondent's violation of ORS 279.355(2) was aggravated by its seriousness. ---- *In the Matter of William George Allmendinger, 21 BOLI 151, 171-72 (2000)*.

□ An aggravating factor in respondent's violation of ORS 279.375 was the seriousness and magnitude because respondent failed to pay a fee dedicated to paying the costs of determining the prevailing wage rate, enforcing the prevailing wage rate laws, and educating the public on prevailing wage rate laws, all significant concerns. ---- *In the Matter of Steven D. Harris, 21 BOLI 140, 150 (2000)*.

□ Respondent's 32 violations of ORS 279.354 were aggravated by their seriousness and considerable magnitude. ---- *In the Matter of Johnson Builders, Inc., 21 BOLI 103, 126 (2000)*.

□ Respondent's failure to pay its four workers any money whatsoever for their work was of great seriousness and magnitude. ---- *In the Matter of Johnson Builders, Inc., 21 BOLI 103, 124 (2000)*.

□ An aggravating factor in respondent's violation of ORS 279.355(2) was that the violation was serious and of considerable magnitude, in that the project contractor and the agency had to conduct an extensive investigation to determine whether or not respondent had paid the prevailing rate of wage; and the contractor ultimately had to pay respondent's workers. ---- *In the Matter of Johnson Builders, Inc., 21 BOLI 103, 129 (2000)*.

□ Filing false certified statements is a serious violation. ---- *In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 166 (1999)*.

□ Respondent's violation of ORS 279.350(7), consisting of respondent's requirement that workers accept less than the prevailing wage rate as part of a bogus apprenticeship program, was particularly serious because it was a deliberate effort to avoid complying

with the law, and its effect was to cheat the workers out of the minimum wage required by law. ---- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 80 (1998)*.

#### 15.10.5 --- Knowledge of Violation

□ The forum concluded that respondent knew or should have known of its failure to post the prevailing wage rate when the evidence was undisputed that respondent's corporate and local offices knew that Oregon law required respondent to post the prevailing wage rates on all public works projects to which it dispatched workers, both offices knew that respondent was employing workers on the a public works project, and respondent's local office did not post and respondent's corporate office did not provide the means for respondent's local office to timely post. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 122 (2007)*.

Appeal pending.

□ Weeks before respondent dispatched workers to a prevailing wage rate job, the Oregon Court of Appeals held that "ORS 279.350(4) requires every contractor and subcontractor engaged in a public project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project." Respondent was a party in that case and appealed that very issue. Despite this unequivocal statement of Oregon's prevailing wage rate posting requirement, respondent did not train its branch manager on the posting requirement and there was no evidence that respondent took any action to develop a consistent policy with regard to Oregon's posting requirements until several months after the court's decision. Once developed, the actual policy was not posted on respondent's intranet and available to respondent's Oregon employees until 10 months after the court's decision. Under these circumstances, the forum concluded that respondent's failure to post was aggravated by its knowledge of the posting requirement and the fact that its branch manager should have and would have known of the requirement, had respondent provided him with any training on that requirement. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 81-82 (2007)*.

Appeal pending.

□ Respondent's knowing failure to return the commissioner's 2004 prevailing wage rate survey demonstrated respondent's knowledge of its 2005 violation and showed that respondent did not take its legal obligation seriously, aggravating respondent's violation. ---- *In the Matter of Wildfang, Inc., 28 BOLI 1, 8 (2006)*.

□ Respondent knew or should have known of his violation when he received the wage survey booklet mailed to him before the survey was due, and a pre-survey notice and two reminders were mailed to the same address. ---- *In the Matter of Troy Wingate, 27 BOLI 282, 292 (2006)*

□ Based on OAR 839-016-0500, the forum imputed knowledge to respondent that a public works project on which respondent employed a worker was a prevailing

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wage rate job and concluded that respondent knowingly failed to file a certified payroll report. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 142 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent was on notice and had knowledge that its practices regarding certified payroll reports required by former ORS 279.354 were defective when all of respondent's reports were prepared by staff employed by respondent's corporate parent; that corporate parent was previously notified by the agency that its certified payroll reports must contain the following language: "I have read this certified statement, know the contents thereof and it is true to my knowledge"; and there was no evidence that respondent had modified its forms to meet that requirement. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 141 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ When respondent's work ticket indicated that its worker was referred to work at a "high school," this should have alerted respondent's branch manager to inquire if its worker would be working on a public works project, and the forum imputed knowledge to respondent pursuant to OAR 839-016-0500. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 138 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's failure to pay workers the prevailing wage rate was aggravated by respondent's failure to pay full back pay to four workers until several months after respondent acquired actual knowledge that the subject project was a prevailing wage rate job. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 136 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ When respondent failed to inquire if a project was a public works until three weeks after the job had started, the forum applied OAR 839-016-0500 and concluded that respondent should have known of its violation. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 136 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's failure to post the applicable prevailing wage rates was aggravated by respondent's failure to take adequate steps to post the rates once it learned the project was a public works. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 133 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent, through its president, knowingly signed a false certification on all 20 certified payroll reports certifying that respondent's employees had been paid their full weekly wages. ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 79 (2005).***

□ Respondent, through its president, knew that fringe benefits were part of the prevailing rate of wage in Oregon and entered into a contract with Clatskanie School District that contained a statement of the applicable prevailing wage rates for the Clatskanie Project. Respondent, again through its president who signed the certified payroll reports, knew that fringe benefits and overtime were not paid to its workers on the Clatskanie Project. ----- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 77 (2005).***

□ The forum concluded that respondent knew or should have known of its failure to respond to the commissioner's wage surveys when evidence showed that respondent received the 2001, 2002, and 2004 wage surveys, as well as information accompanying those surveys stating that respondent was required by law to complete and return the surveys. The forum held that respondent's argument that the wage surveys were indistinguishable from "junk mail" and his implied failure to read the mail from BOLI is not a defense to the agency's allegation that respondent knowingly failed to return the 2001 and 2002 wage surveys and knowingly failed to return the 2004 survey in time to have it considered. The forum also held that respondent's belief that ORS 279.359(2) did not apply to him was not a defense to the agency's charge that respondent knew or should have known of the violation. ----- ***In the Matter of Storm King Construction, 27 BOLI 46, 54 (2005).***

□ Respondent knew or should have known of the agency's request for records because the agency's request was directed to respondent's president and secretary, who subsequently asked for and received several extensions of time to provide them to the agency. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 45 (2005).***

□ When respondent's president knew of and regularly performed work on the subcontract and supervised the workers at the job site, so that he knew or should have known the type of work respondent's workers performed each day, and he prepared and signed all of the payroll records and must have known the records contained information contrary to his own knowledge of the job site, this constituted reliable evidence that respondent knew or should have known of its failure to pay the correct prevailing wage rate and that respondent knew or should have known of its failure to pay the correct prevailing wage rate and, despite that knowledge, misclassified and underpaid each worker. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 44-45 (2005).***

□ Evidence that respondent received at least two reminders beforehand of the commissioner's wage survey and disregarded them established that respondent knew of the violation before the agency issued its notice of intent. ----- ***In the Matter of Emmert Industrial Corporation, 26 BOLI 284, 289 (2005).***

□ Respondent's violation of ORS 279.359 was

aggravated because it received reminder notices from the agency and therefore knew or should have known of its violation. ---- ***In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 293-94 (2002).***

□ Respondent's violations of the certified payroll requirements were aggravated because respondent knew or should have known of the violations based on an agency letter dated January 26, 2000. ---- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 288 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries, 188 Or App 346, 71 P3d 559 (2003)*, rev den 336 Or 534, 88 P3d 280 (2004).

□ Respondent's failure to post the applicable prevailing wage rates on its job site was aggravated by its knowledge of its violation and the fact that, at the time of hearing, respondent still did not post prevailing wage rates on public works projects subject to Oregon's prevailing wage rate laws when respondent employs workers. ---- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 284 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries, 188 Or App 346, 71 P3d 559 (2003)*, rev den 336 Or 534, 88 P3d 280 (2004).

□ When the agency's notice alleged that respondent's failure to return the commissioner's 1998 wage survey was an aggravating circumstance, the forum considered this failure as an aggravating circumstance because it showed that respondent knew or should have known of the violation. ---- ***In the Matter of Harney Rock & Paving Co., 22 BOLI 177, 185 (2001).*** See also *In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 25 (2001)*, amended 22 BOLI 27(2001).

□ Respondent's failure to return the commissioner's 2000 wage survey was aggravated by the fact that it knew or should have known of the violation because it received reminder notices from the agency. ---- ***In the Matter of Harney Rock & Paving Co., 22 BOLI 177, 185 (2001).***

□ Respondent's admitted failure to complete and return two previous wage surveys, though outside the scope of the charging document, was considered as an aggravating circumstance because it demonstrated knowledge of the violation charged by the agency – respondent's failure to complete and return the 2000 wage survey. ---- ***In the Matter of The Landscape Company of Portland, LLC, 22 BOLI 69, 76 (2001).***

□ Respondent's failure to post the applicable prevailing wage rates was aggravated by the forum's conclusion that respondent and its managerial employees should have known of the violation, in that the circumstances of the project were such that a reasonable person would have made a more diligent inquiry, including taking the initiative to ask the contracting city's representative on the project if the proposed contracts were part of a larger project, then calling BOLI if there was any question that those contracts were subject to the prevailing wage rate before entering into the contracts. ---- ***In the Matter of Larson***

***Construction Co., Inc., 22 BOLI 118, 156 (2001).***

□ Respondent's failure to submit timely certified payroll statements was aggravated by the fact that it knew of the violation. ---- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 158 (2001).***

□ Respondent's violation of ORS 279.355(2) was aggravated by the fact that he knew or should have known of the violation. ---- ***In the Matter of William George Allmendinger, 21 BOLI 151, 171-72 (2000).***

□ An aggravating factor in respondent's violation of ORS 279.375 was respondent's knowledge of his legal obligation to pay the fee based on his prior fee payment to BOLI on three previous public works contracts, the contract language, and from BOLI's four warning letters. ---- ***In the Matter of Steven D. Harris, 21 BOLI 140, 150 (2000).***

□ Respondent's 32 violations of ORS 279.354, the violations were aggravated by respondent's president's knowledge of the violations. ---- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 126 (2000).***

□ Respondent's violation of ORS 279.350(1) was aggravated by the fact that respondent's president, who was in charge of payroll, knew or should have known of respondent's failure to pay the wages and intentionally failed to pay them. ---- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 123 (2000).***

□ An aggravating factor in respondent's violation of ORS 279.355(2) was that respondent knew of the agency's request for records, yet ignored it. ---- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 129 (2000).***

□ An aggravating factor in respondent's failure to respond to BOLI's 1998 wage survey was respondent's awareness of the wage survey and deliberate choice not to complete and return it. ---- ***In the Matter of Schneider Equipment, Inc., 21 BOLI 60, 73 (2000).***

□ Respondent's failure to return BOLI's 1999 wage survey was aggravated by the fact that respondent failed to comply after receiving reminder notices. ---- ***In the Matter of Martha Morrison, 20 BOLI 275, 286 (2000).***

□ When respondents knew or should have known that their payroll methods were illegal, the forum considered that an aggravating circumstance. ---- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 166 (1999).***

□ Respondent's violation of ORS 279.350(7), consisting of respondent's requirement that workers accept less than the prevailing wage rate as part of a bogus apprenticeship program, was aggravated by the fact that respondent knew or should have known that his action violated the law, given his years in the construction trades, and the plain language of certified statements that apprentices must be in registered programs. ---- ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 80 (1998).***

□ Respondents' failure to post prevailing wage rates was aggravated by the fact that respondent knew or should have known of its duty to post the rates. ---- ***In the Matter of Larson Construction Co., Inc., 17 BOLI***

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54, 77-78 (1998).

### 15.10.6 --- Other

□ When the agency had to expend significant resources trying to obtain respondent's compliance with the law – the Employment Department sent two reminder notices to respondent after mailing its survey booklet; the agency sent a follow-up letter indicating its intent to issue a notice of intent and assess civil penalties if respondent failed to comply; and respondent still failed to submit the 2005 wage survey, necessitating an enforcement action, Respondent's violation was aggravated by his failure to take appropriate action, after having its violation pointed out, to remedy the violation or prevent its recurrence. ---- *In the Matter of Troy Wingate, 27 BOLI 282, 293 (2006).*

□ Respondent's violation of ORS 279.355 was aggravated by respondent's lack of cooperation. It took respondent five months to comply with the agency's initial request for payroll and time records, whereas it should have been relatively simple to comply with the agency's straightforward request to provide those records within two weeks. Instead, the agency had to make multiple requests. There was no evidence that respondent even attempted to provide any records other than payroll reports until more than two months after the agency's initial request. ---- *In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 146 (2005).*

*Affirmed, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).*

□ When the Employment Department, which was under contract with BOLI to conduct wage surveys, had to send reminder notes and a second wage survey packet to respondent in 2001, 2002, and 2004, and BOLI itself sent a letter to respondent in an attempt to gain respondent's compliance before issuing its notice, respondent's violations were aggravated. ---- *In the Matter of Storm King Construction, 27 BOLI 46, 54-55 (2005).*

□ The forum did not consider respondent's submission of a completed wage survey with a false date as an aggravating factor because it was not alleged as an aggravating factor in the agency's notice of intent. ---- *In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 26 (2001), amended 22 BOLI 27(2001).*

□ Aggravating circumstances regarding respondent's three "first violations" of ORS 279.350(1) were as follows: (1) respondent not only paid its three employees less than the prevailing wage rate, it paid them nothing at all for periods of time; (2) In those time periods, respondent failed to pay its three employees a total of \$5,785.39 in prevailing wages; (3) respondent's president, who was in charge of payroll, knew or should have known of respondent's failure to pay the wages and intentionally failed to pay them; and (4) in the same time period respondent failed to pay its employees, it also committed 32 violations of ORS 279.354 and OAR 839-016-0010 by filing inaccurate or uncertified payroll reports or no reports at all, as well as one violation of ORS 279.355(2). ---- *In the Matter of Johnson Builders, Inc., 21 BOLI 103, 123 (2000).*

□ Aggravating factors in respondent's violation of ORS 279.355(2) consisted of the following: (1) respondent also committed seven violations of ORS 279.350 and 32 violations of ORS 279.354; (2) respondent was required by law to maintain the records of the type requested by the agency; there is no evidence that respondent could not have easily provided the records; and respondent had ample time in which to comply with the agency's request for records; (3) respondent knew of the request, yet ignored it; and (4) the violation was serious and of considerable magnitude, in that the project contractor and the agency had to conduct an extensive investigation to determine whether or not respondent had paid the prevailing rate of wage; and the contractor ultimately had to pay respondent's workers. ---- *In the Matter of Johnson Builders, Inc., 21 BOLI 103, 129 (2000).*

□ Aggravating factors in respondent's failure to respond to BOLI's 1998 wage survey were respondent's failure to produce reliable evidence to support its contention that timely completion of the wage survey was extremely difficult, imposing a burden so onerous that respondent was essentially required to suspend its business operations during the peak construction season; respondent's employment of workers on non-residential construction projects in 1998, which could adversely affect the accuracy of the agency's prevailing wage determination, the whole purpose of the wage survey; and respondent's awareness of the wage survey and deliberate choice not to complete and return it. The forum found that a \$500 penalty was appropriate under the circumstances. ---- *In the Matter of Schneider Equipment, Inc., 21 BOLI 60, 73 (2000).*

□ Respondent's violation of ORS 279.359 by failing to complete and return BOLI's wage survey form in 1999 was aggravated by the fact that respondent employed construction workers in 1999 whose wages would have been included in the commissioner's calculation of prevailing wage rates in the Medford area and would have potentially affected those rates. ---- *In the Matter of Martha Morrison, 20 BOLI 275, 286-87 (2000).*

□ When respondent committed two violations of OAR 839-016-0025(2), the commissioner found the violations were aggravated by respondent's "less than impressive" response to the agency's prior investigations of it; respondent's persistent difficulties in ensuring that workers on prevailing wage rate jobs were paid overtime for work they did on weekends; the fact that respondent's failure to record daily hours worked resulted in one worker not receiving all wages due for several months; and the ease with which respondent could have complied with the law. ---- *In the Matter of Labor Ready, Inc., 20 BOLI 73, 99-100 (2000).*

□ When respondent committed one violation of ORS 279.354(1), the commissioner found the violation was aggravated by respondent's "less than impressive" response to the agency's prior investigations of it; respondent's persistent difficulties in ensuring that workers on prevailing wage rate jobs were paid overtime for work they did on weekends; the fact that respondent's failure to record daily hours worked resulted in one worker not receiving all wages due for several months; the ease with which respondent could

have complied with the law; and the fact that respondent deliberately included possibly inaccurate information on the certified payroll reports. ----- ***In the Matter of Labor Ready, Inc., 20 BOLI 73, 100-01 (2000).***

□ When respondents failed to post the prevailing wage rate, aggravating factors included their failure to post prevailing wage rates for many months and failure to show the rates to workers who asked about them. ----- ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 77-78 (1998).***

### 15.11 --- Mitigating Circumstances

□ Although respondent's development of intranet training for its Oregon employees on Oregon prevailing wage rate law and its posting requirements that includes corporate procedures and policies for posting was a mitigating circumstance to respondent's failure to post, it was rendered moot by the fact that respondent's corporate office did not even mail a posting-ready rate sheet to its local office until the last day that respondent employed workers on the project, 17 days after respondent's local office faxed it to the corporate office. - ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 122 (2007).***

Appeal pending.

□ Respondent's issuance of partial back pay checks to its three workers two weeks after their last day of work on the project and immediate issuance of back pay checks to the same workers upon learning from BOLI that the three workers had been misclassified and underpaid for their work were mitigating circumstances regarding respondent's failure to pay the prevailing wage rate. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 119 (2007).***

Appeal pending.

□ Respondent's subsequent development of intranet training for its Oregon employees on Oregon prevailing wage rate law and its posting requirements was a mitigating circumstance regarding respondent's failure to post, but it was offset by the fact that respondent had not trained its branch manager on Oregon's posting requirement before the job at issue ended, despite an earlier Court of Appeals decision, to which respondent was a party, that clearly stated respondent was required to post. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 82 (2007).***

Appeal pending.

□ Respondent's failure to pay the prevailing wage rate was mitigated by three circumstances. First, credible evidence shows that respondent's manager made a diligent effort to determine if the project was a prevailing wage rate job on the first day that respondent dispatched workers to the job site. Second, respondent issued back pay checks to all underpaid workers within a week after BOLI informed respondent that the project was a prevailing wage rate job. Third, respondent promptly sent BOLI a check to cover back pay to four workers when BOLI's investigator informed respondent that the earlier paychecks issued to those four individuals had not cleared. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 79 (2007).***

Appeal pending.

□ The forum concluded that respondent presented no mitigating circumstances when respondent's claim that she submitted the commissioner's wage survey before it was due on September 19, 2005, was contradicted by other credible evidence, including evidence that the Employment Department received respondent's completed survey well over six months past the date designated by the commissioner. ----- ***In the Matter of Wildfang, Inc., 28 BOLI, 7 (2006).***

□ Respondent's violation was partially mitigated because respondent performed only residential work during the wage survey period and his failure to timely submit the wage survey therefore had no statistical impact on the commissioner's ability to carry out his statutory duty of accurately determining the prevailing wage rates. ----- ***In the Matter of Troy Wingate, 27 BOLI 282, 293 (2006).***

□ Based on the fact that he performed only residential work, respondent's belief that he was not required to complete the survey based on the following statement conspicuously printed on the front cover of the 2005 wage survey booklet: "FOR PUBLIC AND PRIVATE PROJECTS (DOES NOT INCLUDE RESIDENTIAL PROJECTS)." Respondent's belief was not considered mitigation because of the language in the commissioner's pre-survey postcard stating that the survey was a "mandatory survey of all employers with construction-related employment." ----- ***In the Matter of Troy Wingate, 27 BOLI 282, 293 (2006).***

□ Respondent's violation of ORS 279.355 was mitigated by two facts. First, when respondent eventually provided the requested records, the agency was able to determine that all workers had been paid the correct prevailing wage rate. Second, respondent has eliminated deductions for equipment and transportation on prevailing wage rate jobs, making it marginally easier for an auditor to determine if respondent has correctly paid its workers. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 146 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's violation of ORS 279.354 was mitigated by the fact that no workers were underpaid as a result of respondent's defective payroll reports, respondent's reformat of its certified payroll reports to reflect fringe benefits and elimination of deductions for equipment and transportation on prevailing wage rate jobs, and respondent's new requirement that prevailing wage rate work must be reported on a daily, instead of a weekly basis, in order to ensure that its reporting of hours and days worked by workers is accurate. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 143-44 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's single violation of ORS 279.354 was mitigated by the creation of an audit team in respondent's prevailing wage rate department that

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conducts daily reviews of two reports in an attempt to minimize the possibility that Respondent has unknowingly sent workers to prevailing wage rate jobs. -- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 142 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's six violations of ORS 279.354 were mitigated by respondent's eventual submission of payroll reports that showed the correct hours and wages earned by its workers, its reformat of reports to include a separate box for fringe benefits, and its new requirement that prevailing wage rate work must be reported on a daily, instead of a weekly basis, in order to ensure that its reporting of hours and days worked by workers is accurate. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 141 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The forum found that respondent's failure to pay the prevailing wage rate was mitigated to a limited degree by two facts. First, respondent sent the agency a check for the full amount of back pay owed to its worker shortly after the agency notified respondent of the underpayment. Second, respondent's prevailing wage unit manager has created an audit team in her department that conducts daily reviews of two reports in an attempt to minimize the possibility that respondent has unknowingly sent workers to prevailing wage rate jobs. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 139 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ The forum found that respondent's failure to pay the prevailing wage rate was mitigated by two facts. First, respondent eventually paid full back pay to five workers and all but \$34.50 in back pay to a sixth. Second, respondent's prevailing wage unit manager has created an audit team in her department that conducts daily reviews of two reports in an attempt to minimize the possibility that respondent has unknowingly sent workers to prevailing wage rate jobs. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 137 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's subsequent payment of back wages may be considered as a mitigating factor, but is not a defense to respondent's failure to pay the prevailing wage rate. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 135 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's failure to post the applicable prevailing wage rates was not mitigated by its branch manager's visit to the job site with a copy of the prevailing wage rates because there was no evidence

that she or anyone else employed by respondent took any steps to ascertain that the rates were in fact posted and kept posted. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 133-34 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ When respondent credibly testified that his serious illness in October 2004 affected his ability to perform administrative tasks, but the deadline for submission of the 2004 wage survey was September 17, 2004, by which time respondent already had five weeks to complete and return the survey, and respondent did not testify that he would have submitted the 2004 wage survey in October 2004, had he not become ill, the forum did not consider his illness to be a mitigating circumstance. Likewise, the forum did not accept respondent's belief that the wage survey was "junk mail" or his mistaken belief that respondent was not required to complete and return the wage surveys as mitigating circumstances. ---- ***In the Matter of Storm King Construction, 27 BOLI 46, 55 (2005).***

□ A respondent is responsible for providing the commissioner with evidence any mitigating circumstances. ---- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 44 (2005).***

□ When determining the civil penalty amount, the commissioner must consider the mitigating and aggravating circumstances set forth in OAR 839-016-0520(1). ---- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 44 (2005).***

□ Respondent's assertions that its payroll manager was inexperienced in prevailing wage rate matters and "accidentally submitted the wrong survey" did not mitigate respondent's violation. Employers cannot avoid their legal responsibilities by the selective ignorance or inattention of themselves or their employees. ---- ***In the Matter of Emmert Industrial Corporation, 26 BOLI 284, 289 (2005).***

□ Respondent's violation of ORS 279.359 was partially mitigated by two circumstances. First, respondent had fired the manager who was responsible for respondent's failure to return the 2001 wage survey. Second, respondent stated it had enacted new procedures to avoid noncompliance in the future. Although respondent did not specify what those procedures are, the forum considered respondent's representation as mitigation because the agency did not contest respondent's assertion. ---- ***In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 293 (2002).***

□ Respondent's failure to pay eight workers the prevailing wage rate was mitigated by three factors -- respondent's subsequent cooperation with the agency in paying the \$3,442.91 in back wages that the agency asserted was owed to respondent's eight workers; respondent's revised policy requiring that its Oregon district manager must now visit the job site of all public works projects in Oregon before respondent can send workers to it; and the lack of any prior violations by respondent of ORS 279.350(1). ---- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 286***

(2001).

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ When respondent failed to post the applicable prevailing wage rate, a mitigating factor was that respondent's parent company advises branch managers to do a site visit and look for postings on the job site. Respondent's adoption of a contract addenda that requires clients on prevailing wage rate jobs to provide respondent, a temporary employment service, with "a copy of the proper wage classification schedule," warrant that it has been posted appropriately at the jobsite, and to "reimburse [respondent] for underpayment of wages, penalties, and other losses due to [the client's] failure to do so," was not a mitigating factor because it does nothing to insure that respondent will post the rates. Likewise, the fact that prevailing wage rates were posted at the job were not considered a mitigating factor because respondent itself did not post the rates and there was no evidence that respondent took any action on the job site to ensure that the rates were posted. ---- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 283 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ The forum did not consider respondent's eventual submission of the 2000 wage survey forms as a mitigating factor for the reason that the submission came too late to be included in the data used in the commissioner's prevailing wage rate determinations. ---- ***In the Matter of Harney Rock & Paving Co., 22 BOLI 177, 185 (2001).***

□ In a wage survey case, the forum did not accept as mitigation respondent's claim that one principal was ignorant of the other's failure to timely complete and return the 2000 wage survey and that therefore the civil penalty should be abated. The forum stated that it had never given any weight to the fact that a respondent's internal affairs were in disarray, noting that employers cannot avoid their legal responsibilities by selective ignorance or inattention. ---- ***In the Matter of The Landscape Company of Portland, LLC, 22 BOLI 69, 76 (2001).*** See also *In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 25 (2001), amended 22 BOLI 27(2001).*

□ OAR 839-016-0520(4) mandates that "the commissioner shall consider all mitigating circumstances presented by the contractor \* \* \* for the purpose of reducing the amount of the civil penalty to be assessed." ---- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 156 (2001).***

□ Based on the unique circumstances of the case, the forum considered respondent's lack of actual knowledge that two subject contracts were subject to Oregon's prevailing wage rate laws as a mitigating factor in assessing a civil penalty based on respondent's failure to post the applicable prevailing wage rate while performing work on the two subject contracts. ---- ***In the***

***Matter of Larson Construction Co., Inc., 22 BOLI 118, 156 (2001).***

□ When respondent submitted untimely certified payroll statements, the contracting agency's deliberate failure to inform respondent that the subject contracts were subject to the prevailing wage rate was not a mitigating factor because respondent had adequate time to comply after it acquired actual knowledge of the requirement. ---- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 158 (2001).***

□ The single factor mitigating the seriousness of respondent's violation was the lack of evidence that respondent had committed violations of the prevailing wage rate laws on previous occasions. ---- ***In the Matter of William George Allmendinger, 21 BOLI 151, 172 (2000)***

□ Mitigating respondent's single violation of ORS 279.375 was the fact that it was respondent's first violation of Oregon's prevailing wage rate laws. ---- ***In the Matter of Steven D. Harris, 21 BOLI 139, 150 (2000).***

□ Mitigating respondent's single violation of ORS 279.359(2) was the absence of evidence that respondent previously has violated the prevailing wage rate laws and the fact that, although the accuracy of the agency's prevailing wage rate determinations depends on receiving completed surveys from all contractors, respondent's violation was not as serious as violations like failure to pay or post the prevailing rate of wage. ---- ***In the Matter of Green Planet Landscaping, Inc., 21 BOLI 130, 139 (2000).***

□ Respondent's January, 2000, submission of BOLI's 1999 wage survey was not a mitigating factor because: (1) it was only submitted after respondent received the notice of intent and the agency's threat to impose a larger penalty if it was not submitted; and (2) there was no evidence that it was submitted in time for the commissioner to use its data in carrying out his statutory mandate of calculating the prevailing wage rate. ---- ***In the Matter of Schneider Equipment, Inc., 21 BOLI 60, 73 (2000).***

□ A mitigating factor in respondent's failure to respond to BOLI's 1998 wage survey was evidence that respondent had not previously violated the prevailing wage rate laws. ---- ***In the Matter of Schneider Equipment, Inc., 21 BOLI 60, 73 (2000).***

□ The forum found that respondent's failure to include a contract provision stating that a fee had to be paid to the commissioner was mitigated by the absence of evidence that any person was paid less than the prevailing wage rate; the absence of evidence that the city previously had violated prevailing wage rate laws; and the fact that the city did not intentionally sever the contract from the other water line improvement contracts to avoid having to comply with the prevailing wage rate laws. ---- ***In the Matter of the City of Klamath Falls, 19 BOLI 266, 286-87 (2000).***

□ When respondents failed to post prevailing wage rates, mitigating factors included respondents' partial cooperation with the agency's investigation and the fact

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that they sent their office manager to prevailing wage rate training, indicating that respondents were less likely to violate prevailing wage rate laws in the future. ----- ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 78 (1998).***

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#### 16.1 --- In General

□ ORS 279.361 provides that debarment shall be for “a period not to exceed three years.” Although that statute and the agency’s administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the entire three-year period allowed by law. Aggravating factors may also be considered. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 152 (2005).***

Appeal pending.

See also *In the Matter of Design N Mind, Inc., 27 BOLI 32, 43 (2005); In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 152 (2005), affirmed, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007); In the Matter of Design N Mind, Inc., 27 BOLI 32, 43 (2005).*

□ Although the agency’s administrative rules interpreting ORS 279.361 do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the entire three-year period allowed by law. ----- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 290-91 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

See also *In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 165 (2001); In the Matter of Keith Testerman, 20 BOLI 112, 129 (2000); In the Matter of Southern Oregon Flagging, 18 BOLI 138, 162, 169 (1999).*

□ In a prevailing wage rate debarment, the phrase “should have known” is synonymous with constructive knowledge or notice. ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 164 (2001).***

□ The commissioner does not consider aggravating and mitigating factors in making the initial determination whether to debar a subcontractor. ----- ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 76 (1998).***

□ Civil penalties, liquidated damages, and debarment are distinct forms of sanctions the agency may impose for violations of prevailing wage rate laws. ----- ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 71 (1998).***

#### 16.2 --- Intentional Failure to Pay PWR

□ Respondent made a conscious choice not to determine the prevailing wage and a corresponding intentional failure to pay the prevailing rates of wage to its three workers under the following circumstances: (1) Respondent’s local customer service representative Barrera believed that either Woods or Rand, two of respondent’s three workers employed on the prevailing wage rate project at issue, had been performing the duties of a power equipment operator on the project; (2) Barrera believed that they had been misclassified and the duties they were performing fit into the higher paying Laborer, Group 1 classification; (3) Barrera believed Rand and Woods should be paid at the higher Laborer, Group 1 rate; (4) Barrera had received information from Rand and Woods that they had been operating power equipment, tying rebar, and building forms on the project and that they were not performing general labor as respondent’s client had represented. This evidence established that Barrera had actual knowledge that respondent had misclassified and had been underpaying its workers and that she was told by respondent’s workers that they were doing work that was not in the Laborer classification. Armed with this knowledge, Barrera and respondent failed to take any subsequent action to “investigate” or otherwise verify the actual job duties that respondent’s workers were performing and continued to pay them as Laborers, Group 5, the lowest classification possible. There was no evidence in the record as to a reason or reasons why Barrera and respondent failed to take any additional action and no evidence that Barrera and respondent failed to take any additional action because of a “mistake.” Rather, the evidence was that respondent recklessly disregarded facts and circumstances that would have led a reasonable employer to make a further inquiry to determine if workers it employed upon a public work were being paid correctly. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 124-26 (2007).***

Appeal pending.

□ When there was no evidence that respondent had contemporaneous knowledge of the correct prevailing wage rates for the four classifications of work that its workers performed and consciously chose not to pay those rates, the forum considered the following factors in determining whether or not respondent consciously chose not to determine those prevailing wage rates: (1) The circumstances of the project that were known by respondent’s employees; (2) When respondent’s employees acquired that knowledge; (3) The action or failure to take action by respondent’s employees in response to that knowledge; and (4) The reason or reasons, if any were given, for the action or failure to take action by respondent’s employees. Under this analysis, the forum imputed the knowledge possessed by, action taken by, and failure to take action by respondent’s employees to respondent. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 124 (2007).***

Appeal pending.

□ The Oregon Court of Appeals has determined that, under former ORS 279.361, to “intentionally” fail to pay the prevailing rate of wage “the employer must either consciously choose not to determine the prevailing wage

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or know the prevailing wage but consciously choose not to pay it.” The focus is on what the employer intentionally failed or refused to do, not what the employer intentionally did. The inclusion of the word “intentionally” in former ORS 279.361(1) implies a “culpable mental state,” indicating that debarment should not be “triggered by merely innocent, or even negligent, failure to pay.” This requires an assessment of an employer’s state of mind at the time that its employees were not paid the prevailing wage in order to determine whether the employer “intentionally” failed or refused to pay the prevailing wage. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 123 (2007).***

Appeal pending.

□ The commissioner placed respondent on the list of ineligible for one year based on respondent’s intentional failure to pay the prevailing wage rate on a public works project. The commissioner also placed respondent on the list of ineligible for one year based on respondent’s intentional failure to post the prevailing wage rate on the same project, with the one year debarments to run concurrently. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 153 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent sent one worker to a public works project for one day but was unaware that the project was a public works project and did not pay that worker the prevailing wage until later notified of that fact by BOLI. When BOLI notified respondent of that fact, respondent immediately sent a check for the total amount of unpaid prevailing wages due to its worker. Although respondent’s job order indicated that its worker would be working at a high school, there was no evidence that respondent knew the project was a public work until notified by BOLI or that respondent made a conscious choice not to determine that the project was a public work. The forum concluded that respondent’s failure to pay its worker the prevailing wage was not an intentional failure. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 149-50 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ When respondent failed to pay a worker \$34.50 in earned and due prevailing wages on a public works project, respondent was aware that the project was a public works project when the wages earned, and respondent admitted owing the \$34.50 but claimed it had not paid the wages because the agency told respondent not to pay it, the forum did not believe respondent’s explanation and concluded that respondent intentionally failed to pay the \$34.50 to the worker and was subject to debarment. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 149 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ When respondent initially failed to pay its workers the prevailing wage rate on a public works project and

was five months late in issuing back pay checks to three workers, but no evidence was presented at hearing to explain this failure, the forum concluded that respondent’s failure to timely pay the prevailing wage rate was not intentional because there was no evidence that respondent made a conscious choice not to pay the prevailing wage rate when it was initially due or to timely issue back pay checks once respondent became aware that back pay was due. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 148-49 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ To intentionally fail to pay the prevailing wage, the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it. The inclusion of the word intentionally in ORS 279.361(1) implies a culpable mental state, indicating that debarment should not be triggered by merely innocent, or even negligent, failure to pay. Under this standard, the forum must assess respondent’s state of mind at the time that its employees were not paid the prevailing wage in order to determine whether respondent “intentionally” failed or refused to pay the prevailing wage. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 147 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent’s president knew: (1) that respondent’s project was a prevailing wage rate job; (2) that the applicable prevailing wage rates were posted in the commissioner’s prevailing wage rate booklet; (3) that respondent’s workers were entitled to fringe benefits, in addition to an hourly wage, and had worked overtime. When respondent’s president did not pay fringe benefits and directed his office manager not to show overtime on the certified payroll reports and there was no evidence that he took any action to make sure respondent’s employees were paid all the wages they earned, the forum concluded this reflected a conscious and intentional choice not to pay the prevailing wage rate and held that respondent and its corporation president were both subject to debarment based on the president’s intentional choice not to pay the prevailing wage rate. ---- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 81-82 (2005).***

□ The forum must assess respondent’s state of mind at the time that respondent’s employees were not paid the prevailing wage in order to determine whether respondent “intentionally” failed or refused to pay the prevailing wage. ---- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 81 (2005).***

□ The inclusion of the word “intentionally” in ORS 279.361(1) implies a culpable mental state, indicating that debarment should not be triggered by merely innocent, or even negligent, failure to pay. ---- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 81 (2005).***

□ To “intentionally” fail to pay the prevailing rate of wage, the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it. ---- ***In the***

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### ***Matter of Harkcom Pacific, 27 BOLI 62, 81 (2005).***

□ When the forum found that the prime contractor paid respondent's four workers wage amounts owed by respondent to those workers and that respondent's corporation president was responsible for respondent's failure to pay the correct amounts owed to those workers, the commissioner was required to place respondent and respondent's corporation president on the list of ineligible. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 43 (2005).***

□ When respondent, a subcontractor, failed to exercise reasonable diligence in determining the proper classification and pay rate for its workers and thereby acted knowingly in classifying and paying its workers as laborers instead of tenders to plasterers, a classification that paid \$5.00 per hour, including fringe benefits, more than the laborer classification, the forum was required by law to debar respondent for a period of time not to exceed three years. ----- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 290 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ The commissioner placed respondent on the list of ineligible for three years because his failure to pay the prevailing wage rate was intentional and because the contractor paid the unpaid wages on respondent's behalf. ----- ***In the Matter of William George Allmendinger, 21 BOLI 151, 173 (2000).***

□ ORS 279.361(1) requires that a subcontractor be placed on the commissioner's list of ineligible for a period not to exceed three years when the commissioner determines, through a contested case proceeding, that the subcontractor has intentionally failed to pay the prevailing rate of wage to workers employed upon public works, or when the subcontractor has failed to pay the prevailing rate of wage to its employees and the contractor has paid those amounts on the subcontractor's behalf. When the forum determined that both situations occurred, respondent was placed on the list of ineligible for three years. ----- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 125 (2000).***

□ When the commissioner determines that a contractor or subcontractor has intentionally failed to pay the prevailing rate of wage, the commissioner must place the contractor or subcontractor and any firm, corporation, partnership or association in which the contractor or subcontractor has an interest on the list of those ineligible to receive public works contracts or subcontracts for a period not to exceed three years. The commissioner must also place on the list of ineligible any subcontractor that has failed to pay the prevailing rate of wage, whether or not that failure was intentional, if the contractor has paid the wages on the subcontractor's behalf. ----- ***In the Matter of Keith Testerman, 20 BOLI 112, 129 (2000).***

□ The commissioner placed respondent on the list of ineligible for three years when no mitigating factors were present; respondent had previously violated the prevailing wage rate laws; respondent's current failure to

pay the prevailing wage rate was blatant and not the result of a misunderstanding between respondent and the agency; respondent did not cooperate with the agency's investigation; and respondent made no attempt to rectify the underpayment of wages. ----- ***In the Matter of Keith Testerman, 20 BOLI 112, 129-30 (2000).***

□ Under ORS 279.361(1), the commissioner must debar a respondent for a period not to exceed three years when there is a finding that the respondent intentionally failed to pay the prevailing rate of wage to workers employed on public works projects. ----- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 157, 159, 162, 169 (1999).***

□ Any corporate officer responsible for the intentional failure to pay or post the prevailing wage rate shall be placed on the list of ineligible for a period of up to three years. ----- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 159-60, 162-63 (1999).*** See also *In the Matter of Larson Construction*, 17 BOLI 54, 75 (1998).

□ The commissioner placed respondent on the ineligible list for a period of only one month when respondent had intentionally failed to pay the prevailing wage rate to workers on public works projects by using a fringe benefits plan that was not "bona fide," but: took immediate action to correct the plan once the agency informed her of the problem; cooperated with the agency investigation; and paid the underlying fringe benefits as back wages. The commissioner also found it notable that three agencies previously had approved the fringe benefits plan that the agency later found defective. ----- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 157 (1999).***

□ A subcontractor that has intentionally failed to pay or post prevailing wage rates "shall be ineligible" for up to three years to receive any public works contract or subcontract. It is no defense that, after an agency investigation, the subcontractor paid the back wages owed. ----- ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 75 (1998).***

□ The words "intentionally" and "willfully" are interchangeable. "Willful" means that the person knows what he is doing, intends to do what he is doing, and is a free agent. ----- ***In the Matter of Haskell Tallent, 13 BOLI 273, 280 (1994).*** See also *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241, 250 (1993).

□ The commissioner held that respondent intentionally failed to pay the prevailing wage rate to his workers on two public works, in violation of ORS 279.350(1), when he bid on and received subcontracts on two public works projects, knew that the prevailing wage rate was required to be paid on the projects, intentionally paid his 12 workers wage rates under the appropriate prevailing wage rates, and acted as a free agent. ----- ***In the Matter of Haskell Tallent, 13 BOLI 273, 277-79 (1994).***

□ When a corporation's president and secretary knew they were paying employees less than the prevailing wage rate on four public projects, intended to pay the employees such wages, and were free agents, the commissioner held that the corporation intentionally failed to pay the prevailing wage rate in violation of ORS

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279.350(1). ---- *In the Matter of Sealing Technology, Inc., 11 BOLI 241, 250-51 (1993).*

□ When a contractor contended that the failure to pay the prevailing wage rate was not intentional because the contractor did pay the wages owed once the "errors were pointed out," the forum held that the contractor's violation was not negated by the contractor's eventual payment of the wage differential to the workers, nor was the contractor released from liability by the fact that the contractor eventually began to pay the appropriate prevailing wage rate. ---- *In the Matter of Loren Malcom, 6 BOLI 1, 11 (1986).*

□ When a contractor relied on the defense that the company was expanding and the contractor was "not schooled in bookkeeping or record keeping and did not check the project for payroll records or audit those records in a manner consistent with the contract, the forum held that a failure to check or audit records or maintain a business about which the contractor was sufficiently knowledgeable did not establish "inadvertence" or an "unintentional miscalculation." ---- *In the Matter of Loren Malcom, 6 BOLI 1, 11 (1986).*

□ The law imposes a duty upon an employer to know the wages due its employees. A faulty payroll system is no defense to a failure to pay wages owed and certainly does not allow the employer's actions to be characterized as unintentional. Respondent's violation was intentional, even if it was the result of this type of bookkeeping error, because respondent knew the law regarding the prevailing wage rate, but disregarded it and failed to take steps reasonably calculated to assure compliance. ---- *In the Matter of Loren Malcom, 6 BOLI 1, 10 (1986).*

□ The forum held that a contractor's argument at hearing that his failure to pay the prevailing wage rate was a bookkeeping error, and therefore not an intentional failure to pay, would not be successful even if true. The forum stated that the definition of "willful" excludes "unintentional miscalculation," but found that the contractor's bookkeeping error was far from an unintentional miscalculation when the contractor was aware of his obligation to pay the prevailing wage rate, was performing other public works contracts at the time, and incorrectly entered the rate of pay for six employees on six different time cards over a period of several months. ---- *In the Matter of Loren Malcom, 6 BOLI 1, 10 (1986).*

□ When the public agency's invitation to bid contained a provision regarding the requirement that, pursuant to ORS 279.350, workers on the public works project be paid no less than the prevailing wage rate; the contractor's proposal contained a statement that the provisions of ORS 279.350 would be included in the contract; a copy of the PWR book was attached to the contract; and the contractor paid the workers the prevailing wage rate during the first phase of the public project but failed to pay them the prevailing wage rate during the second phase, which took place after a five month break due to winter weather; the forum found that the contractor, having knowledge of the legal requirements of ORS 279.310 to 279.356 and the contractor's contractual obligations, intentionally failed to

pay the prevailing wage rate to workers employed on the public project in violation of ORS 279.350 and was subject to the provisions of ORS 279.361, which authorized the commissioner to place the contractor on a list of persons ineligible to receive public contracts. ---- *In the Matter of Loren Malcom, 6 BOLI 1, 7-8 (1986).*

□ In a prevailing wage rate case in which the only issue was whether the contractor's failure to pay the prevailing wage rate was intentional under ORS 279.361, the forum found that the terms "intentional" and "willful" have been determined to be interchangeable. ---- *In the Matter of Loren Malcom, 6 BOLI 1, 9-10 (1986).*

□ A contractor testified he believed that the value of providing a housing opportunity in a rehabilitated recreational vehicle park would be enough, when added to the hourly wage, to equal the prevailing wage rate, including fringe benefits. The forum rejected that defense to the charge of intentional failure to pay the prevailing wage rate because an employer has a duty to know the wages due to an employee and ignorance of the law as to what qualifies as a fringe benefit is not an excuse and because there was no reasonable or objective basis for the supposed belief that providing a recreational vehicle park hook-up was worth the difference between the prevailing wage rate and what the contractor was paying in actual wages. ---- *In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 158 (1986).*

□ When respondent bid on and received subcontracts on two public works projects and intentionally paid his 12 workers less than the appropriate prevailing wage rates, the commissioner placed respondent's name on the list of contractors ineligible for public contracts for a period of three years. ---- *In the Matter of Haskell Tallent, 13 BOLI 273, 277-79 (1994).*

□ When a corporation's president and secretary intentionally paid employees less than the prevailing wage rate on four public projects, the commissioner held that the corporation intentionally failed to pay the prevailing wage rate, in violation of ORS 279.350(1), and placed respondent's name on the list of contractors ineligible for public contracts for a period of three years. - ---- *In the Matter of Sealing Technology, Inc., 11 BOLI 241, 250-51 (1993).*

□ An individual respondent who intentionally failed to pay prevailing wage rate, including overtime, to workers on a public works project was placed on the list of contractors ineligible for public contracts for a period of 18 months. ---- *In the Matter of Intermountain Plastics, 7 BOLI 142, 160 (1988).*

□ When respondents -- a corporation, its president, and its secretary -- were subcontractors on a public works, the forum found the corporation and its secretary were responsible for a failure to pay the prevailing wage rate. However, the record did not establish that the corporate president, who was participate owner of the corporation, knew or should have known that the applicable prevailing wage rates were not being paid on the project. The forum placed the names of the corporation and its secretary on the list of contractors

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ineligible for public contracts for a period of three years. -  
---- ***In the Matter of Jet Insulation, Inc., 7 BOLI 133, 141-42 (1988).***

□ When two partners who owned respondent's company intentionally failed to pay the prevailing wage rate to workers employed on a public works project in violation of ORS 279.350, both partners were placed on the list of contractors ineligible for public contracts for a period of three years. ---- ***In the Matter of Loren Malcom, 6 BOLI 1, 7-8 (1986).***

□ When a corporate respondent intentionally failed to pay the prevailing wage rate to workers on two public works projects and the corporation's two owners and officers were responsible for the failure to pay the prevailing wage rate, the corporation and both owner/officers were placed on the commissioner's list of contractors ineligible for public contracts for a period of three years. ---- ***In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 159 (1986).***

### 16.3 --- Intentional Failure to Post PWR

□ When the forum concludes that respondent failed to post the applicable prevailing wage rates on a prevailing wage rate job, the commissioner is required to place respondent on the list of ineligibles if that failure was "intentional." ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 127 (2007).***

Appeal pending.

See also *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 83 (2007), appeal pending.*

□ In determining whether respondent's failure to post was intentional, the forum focused on what respondent failed to do, not what respondent did. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 127 (2007).***

Appeal pending.

□ When the Oregon Court of Appeals held, in a case in which respondent was a party, that subcontractors were required to post the prevailing wage rates at all public works on which they employed workers, and the Oregon Supreme Court denied review of the same case before respondent sent workers to a public works project, there could be no question that respondent knew that it was required to post all prevailing wage rate jobs at that time it sent workers to the project. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 127 (2007).***

Appeal pending.

□ When respondent's local office and corporate office knew that respondent's local office had dispatched workers to a prevailing wage rate job and there was no dispute about the classification of work that respondent's three workers performed on a prevailing wage rate job or that the classification could have been determined by observing the workers and reading BOLI's PWR booklet, respondent's failure to take any action whatsoever to post the prevailing wage rates amounted to a conscious choice not to post the prevailing wage rates and subjected respondent to debarment. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 127-28***

(2007).

Appeal pending.

□ All subcontractors and contractors on prevailing wage rate jobs are accountable for knowing the classifications of work performed by their employees. The fact that respondent was a temporary employment agency and had no supervisory workers on the job site does not relieve it of the same obligation. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 127-28 (2007).***

Appeal pending.

□ If respondent, a temporary employment agency, had any doubt about the appropriate classifications for its workers, it could have fulfilled its posting obligation by simply posting BOLI's entire PWR booklet that respondent's local customer service representative testified was in respondent's local office. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 128 (2007).***

Appeal pending.

□ The forum concluded that respondent intentionally failed to post the prevailing wage rates as required by former ORS 279.350(4) when (1) respondent's branch manager who was responsible for posting and respondent's corporate office knew that the project to which respondent dispatched its workers to was a prevailing wage rate job and knew the correct classification for respondent's workers, and the correct prevailing wage rate that applied to those workers; and (2) no evidence was presented to show that anyone else had posted the prevailing wage rate or that the branch manager or respondent believed that anyone else had posted the prevailing wage rate. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 84-85 (2007).***

Appeal pending.

□ Respondent, through its branch manager, knew that its workers would be performing manual and physical duties on a high school when its workers were initially dispatched. In the first few days that respondent's workers were employed at the high school, the branch manager was proactive in attempting to determine if respondent needed to pay the prevailing wage rate. He spoke with two managers employed by JBH, the company that was using respondent as a subcontractor and with the prime contractor's office, and was assured by the prime contractor that construction was complete and by JBH that the work was not subject to the prevailing wage rate because JBH was a "vendor." Although the branch manager could have called BOLI for a definitive answer, under the circumstances, the forum concluded that respondent did not intentionally fail to post before the date that BOLI told the branch manager that the job was a prevailing wage rate job. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 83 (2007).***

Appeal pending.

□ The commissioner placed respondent on the list of ineligibles for one year based on respondent's failure to pay and post the prevailing wage rate on a public works

project. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 153 (2005).***

*Affirmed, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).*

□ Respondent employed one worker for one day on a public work and did not post the prevailing wage rate, but was unaware that the project was a public work until contacted by BOLI several months later. Although respondent's job order indicated that its worker would be working at a high school, there was no evidence that respondent knew the project was a public work until notified by BOLI or that respondent made a conscious choice not to determine that the project was a public work. Under these circumstances, the forum concluded that respondent's failure to post the prevailing wage rate was not intentional. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 151-52 (2005).***

*Affirmed, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).*

□ When respondent failed to post the prevailing wage rates after respondent's manager was aware that posting was required, respondent's failure to personally post and maintain that posting was a conscious choice and an intentional failure within the meaning of ORS 279.261(1), subjecting respondent to debarment. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 151 (2005).***

*Affirmed, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).*

□ A negligent or otherwise inadvertent failure to post the prevailing wage rate is insufficient to require debarment. A heightened level of culpability must be proven before an employer can be debarred based on an intentional failure to post. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 150 (2005).***

*Affirmed, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).*

□ When respondent, a subcontractor, knew it had not posted applicable prevailing wage rates on its job site, intended not to post them, and was under no restrictions that would have prevented it from posting the rates, the forum was required by law to debar respondent for a period up to three years. ---- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 290 (2001).***

*Reversed in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).*

□ When respondent and its agents knew they had not posted the applicable prevailing wage rates on the subject contracts, intended not to post them, and were under no restrictions that would have prevented them from posting the rates, the forum was required to place respondent on the list of ineligible for a period of time not to exceed three years. ---- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 163 (2001).***

□ When respondent failed to post the applicable prevailing wage rates during the performance of a subject contract, in violation of ORS 279.350(4), the commissioner had no choice but to debar respondent, based on this determination and the mandatory language in the statute. The commissioner's only discretion in this matter is the length of the debarment. -- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 165 (2001).***

#### 16.4 --- Liability of Corporate Officers or Agents

□ When there were no mitigating circumstances and multiple aggravating circumstances, including knowledge by respondent's corporation president that respondent's project was a prevailing wage rate job and that fringe benefits and overtime must be paid; his falsification of 20 certified payroll reports in an apparent attempt to deceive the contracting agency and to avoid paying almost \$16,000 in earned wages to respondent's workers; his directive to respondent's office manager to falsify respondent's certified payroll reports so they did not show overtime; the seriousness of the respondent's violations, in that they resulted in an underpayment of wages of \$15,898 to respondent's workers; and respondent's failure to correct the problem when the agency brought it to respondent's attention, the commissioner debarred respondent and its president for three years. ---- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 82-83 (2005).***

□ Based on several key facts, the forum concluded that respondent's president was integrally involved and responsible for respondent's failure to pay the prevailing rate of wage on a public works project. First, as corporate president and supervisor on projects, the forum inferred that he was aware of the extent of the work being performed by respondent's employees on the project. Second, he was an experienced Oregon and Washington contractor on prevailing wage rate projects and was presumed to know the law, including the requirements of paying fringe benefits and overtime. Third, he knew that respondent was required to pay fringe benefits on the project. Fourth, the forum disbelieved his testimony that he did not know that respondent's employees worked overtime, including Saturdays and Sundays, on the project due to the fact that he supervised the project. Fifth, he signed all certified payroll reports, none of which reflected any payment for fringe benefits to any of respondent's employees. Finally, the forum regarded his lack of credibility under oath at the hearing as a further indication of his capacity to knowingly make a false certification. ---- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 79-80 (2005).***

□ The agency presented credible evidence of aggravating circumstances, proving that respondent's president was actively and regularly engaged on the job site, entered and certified all of the information contained within the payroll records, and wrote out the checks payable to respondent's workers on respondent's corporate account. These actions were imputed to respondent and both respondent and its corporation president were placed on the list of ineligible for three years. ---- ***In the Matter of Design N Mind, Inc., 27***

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**BOLI 32, 44 (2005).**

□ Respondent's corporate president, was "responsible" for respondent's failure to post the applicable prevailing wage rate and subject to debarment if he "knew or should have known \* \* \* that such wages must be posted." ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 163 (2001).***

□ Whether respondent's corporate president "knew" that the applicable prevailing wage rates must be posted was dependent on whether he had actual knowledge that the subject contracts were subject to the prevailing wage rate. If he had this knowledge, the forum would automatically conclude that he was aware that of the legal requirement to post the applicable prevailing wage rates based on his prior experience as a contractor on public works. When there was no evidence that he had that actual knowledge prior to work on the subject contracts being completed, the forum could not conclude that he "knew" that the prevailing wage rates must be posted on the subject contracts. ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 163-64 (2001).***

□ The forum concluded that respondent's corporate president "should have known" that the applicable prevailing wage rates must be posted on the subject contracts when he was an experienced contractor who had to know that any contract involving the contracting agency was a public works subject to the prevailing wage rate unless it was for less than \$25,000 or was regulated by the Davis-Bacon Act, when he visited the actual job site before the contracts were awarded to respondent and observed that a larger project was taking place in the same immediate area, and when he was well aware of BOLI's interpretation of the scope of debarment stating that contracts for less than \$25,000 were not exempt if they were part of a larger project and had relied on it for the prior 16 months in determining respondent's eligibility to bid on projects. The forum concluded that a person of common prudence would have inquired further into the circumstances of the prospective contracts, and respondent's corporate president did not do that, instead relying solely on the contracting agency's determination, which turned out to be both misleading and erroneous. ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 164-65 (2001).***

□ When respondent failed to post the applicable prevailing wage rates and respondent's corporate president was responsible for this failure during the performance of a subject contract, in violation of ORS 279.350(4), the commissioner had no choice, based on this determination and the mandatory language in the statute, but to debar respondent's corporate president. The commissioner's only discretion in this matter is the length of the debarment. ----- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 165 (2001).***

□ A respondent subcontractor's corporate president was placed on the list of ineligible for three years when credible evidence on the record showed that he knew the amount of the applicable prevailing wage rate and was responsible for the subcontractor's failure to pay

that wage rate. ----- ***In the Matter of Bruce D. Huhta, 21 BOLI 249, 258 (2001).***

□ When respondent's wife, who was named as a co-respondent, was not a contractor or subcontractor who intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works, the forum lacked the authority to place her on the list of ineligible unless her consent to such placement was part of a settlement agreement arrived at pursuant to OAR 839-050-0220. The forum dismissed the charges against her. ----- ***In the Matter of William George Allmendinger, 21 BOLI 151, 174 (2000).***

□ When the forum determined that respondent intentionally failed to pay the prevailing rate of wage to seven claimants, and credible testimony from the agency's witnesses established that respondent's corporate president was personally responsible for providing records of dates and hours worked by respondent's employees to respondent's payroll service and sending funds to that service so that it could issue paychecks to respondent's employees, the forum found respondent's corporate president responsible for failing to provide records and funds that would have allowed the payroll service to pay the seven claimants. ----- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 125 (2000).***

□ Respondent's corporate president was found to be directly responsible for respondent's failure to pay the prevailing wage rate and was placed on the list of ineligible for three years. ----- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 125-26 (2000).***

□ Any corporate officer responsible for the intentional failure to pay or post the prevailing wage rate shall be placed on the list of ineligible for a period of up to three years. ----- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 159-60, 162-63 (1999).*** See also ***In the Matter of Larson Construction, 17 BOLI 54, 75 (1998).***

□ A corporate officer responsible for a corporation's failure to pay and post prevailing wages was placed on the ineligible list for a period of one month. ----- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 157 (1999).***

□ When a corporation's president signed four contracts for public works projects, all of which mentioned that the prevailing wage rate applied and some of which had the PWR booklet attached, and when the corporation never paid the workers the correct prevailing wage rate, including the wage rate for the classifications the president claimed were correct even after the agency repeatedly advised the president of the correct classification and wage rate, the commissioner found that the president knew or should have known the amount of the applicable prevailing wages, that the corporation was not paying them, and that the president was responsible for that failure. The commissioner placed the president's name on the list of contractors ineligible for public contracts for three years. ----- ***In the Matter of Sealing Technology, Inc., 11 BOLI 241, 251-53 (1993).***

□ When a corporate secretary was also the

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bookkeeper and prepared the payroll, was aware of the agency's investigation and correspondence concerning the correct wage rates, prepared prevailing wage rate "bonus" checks for the corporation's employees, and the corporation submitted falsified certified payroll records to the agency, the commissioner found that the secretary knew or should have known the amount of the applicable prevailing wages and that the corporation was not paying them. The commissioner placed the secretary's name on the list of contractors ineligible for public contracts for three years. ----- ***In the Matter of Sealing Technology, Inc., 11 BOLI 241, 253 (1993).***

□ When respondents -- a corporation, its president, and its secretary -- were subcontractors on a public works, the forum found the corporation and its secretary were responsible for a failure to pay the prevailing wage rate. However, the record did not establish that the corporate president, who was part owner of the corporation, knew or should have known that the applicable prevailing wage rates were not being paid on the project. The forum placed the names of the corporation and its secretary on the list of contractors ineligible for public contracts for a period of three years. - ----- ***In the Matter of Jet Insulation, Inc., 7 BOLI 133, 141-42 (1988).***

□ When two partners who owned respondent's company intentionally failed to pay the prevailing wage rate to workers employed on a public works project in violation of ORS 279.350, both partners were placed on the list of contractors ineligible for public contracts for a period of three years. ----- ***In the Matter of Loren Malcom, 6 BOLI 1, 7-8 (1986).***

□ When a corporate respondent intentionally failed to pay the prevailing wage rate to workers on two public works projects and the corporation's two owners and officers were responsible for the failure to pay the prevailing wage rate, the corporation and both owner/officers were placed on the commissioner's list of contractors ineligible for public contracts for a period of three years. ----- ***In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 159 (1986).***

### 16.5 --- Aggravating Circumstances

□ Aggravating factors may be considered in determining the length of debarment. The aggravating circumstances considered may include those set out in former OAR 839-016-0520(1). ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 128 (2007).***

Appeal pending.

See also ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 85 (2007), appeal pending.***

□ When the commissioner determined that respondent intentionally failed to pay and post the prevailing wage rate, aggravating circumstances in a prevailing wage rate debarment case included respondent's 18 prior violations of former ORS 279.350(1) on four separate projects and respondent's four prior violations of former ORS 279.350(4) on four separate projects. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 128 (2007).***

Appeal pending.

□ When the commissioner determined that respondent intentionally failed to post the prevailing wage rate, aggravating circumstances in a prevailing wage rate debarment case included: the magnitude and seriousness of the violation -- 15 workers were initially underpaid a total of \$10,630.83; at least three workers remained unpaid for ten months; respondent's failure to post despite ample opportunity to comply and the relative ease of compliance; respondent's failure to train its manager of Oregon's prevailing wage posting requirement, despite clear direction from the Oregon Court of Appeals; respondent's failure to post despite its corporate headquarters having knowledge that the project to which it dispatched its workers was a prevailing wage rate job; and respondent's three prior violations of former ORS 279.350(4) in the previous five years, including one intentional violation. ----- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 85 (2007).***

Appeal pending.

□ When the forum was required to debar respondent based on respondent's violations of ORS 279.350(1) and (4) on a public works project, the forum considered the following aggravating factors in determining the appropriate length of debarment: (1) respondent's failure to pay three workers the prevailing wage for five months *after* it learned its workers were entitled to the prevailing wage rate and failure to pay one worker the prevailing wage by the time of the hearing; (2) respondent's initial failure to pay the prevailing wage to eight workers employed a previous public works project; (3) respondent's six violations of ORS 279.354 on the project; (4) respondent's single violations of ORS 279.354 and ORS 279.355 on another public works project; (5) respondent's initial failure to pay the prevailing wage on another public works project; (6) respondent's failure to post on another public works project; and (7) respondent's failure, despite a prior warning, to correct the certification statement attached to its payroll report. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 152 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Aggravating factors may be considered in determining the length of debarment. ----- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 152 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ To determine the length of time a respondent's name should remain on the list of ineligibles, the forum may consider mitigating and aggravating circumstances. ----- ***In the Matter of Design N Mind, Inc., 27 BOLI 32, 43 (2005).***

□ The agency presented credible evidence of aggravating circumstances, proving that respondent's president was actively and regularly engaged on the job site, entered and certified all of the information contained within the payroll records, and wrote out the checks payable to respondent's workers on respondent's

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corporate account. These actions were imputed to respondent. ----- *In the Matter of Design N Mind, Inc., 27 BOLI 32, 44 (2005).*

□ Respondent and its corporate president were placed on the list of ineligible for three years when respondent's president was responsible for respondent's failure to pay its workers the prevailing wage rate, the violation was aggravated, and there were no mitigating factors. ----- *In the Matter of Design N Mind, Inc., 27 BOLI 32, 44 (2005).*

□ In determining the length of respondent's debarment, the forum considered several aggravating factors: respondent's lack of reasonable diligence in determining the specific job duties of its workers and their correct classification that resulted in significant underpayment of wages to respondent's workers; respondent's corporate policy of not posting prevailing wage rates at job sites; the total number of violations; respondent's failure to correct the certification statement attached to its certified payroll -- despite a warning from BOLI; the relative ease with which respondent could have avoided the violations; and the seriousness and magnitude of the violations. ----- *In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 291 (2001).*

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

### 16.6 --- Mitigating Circumstances

□ Mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the maximum three-year period allowed by law. ----- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 128 (2007).*

Appeal pending.

See also *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 85 (2007)*, appeal pending.

□ Mitigating circumstances in a prevailing wage rate debarment case based on respondent's failure to pay and post to prevailing wage rate included respondent's payment of back wages in full to the three workers who were underpaid and respondent's creation of an intranet site where its Oregon employees can review Oregon's posting requirements. ----- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 128 (2007).*

Appeal pending.

□ Mitigating circumstances in a prevailing wage rate debarment case based on respondent's failure to post included respondent's prompt issuance of checks to the 15 workers once respondent learned the project was a prevailing wage rate job and respondent's development of a corporate policy and intranet training site for Oregon employees on the subject of Oregon prevailing wage rate laws, including the posting requirement. The former was partially abated by the fact that three workers did not receive their checks until 10 months after the wages were earned. The latter was abated because respondent did not even begin developing its policy and intranet training site until two and one half months after the Court of Appeals held, in a case to which respondent

was a party, that respondent was required to post. ----- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 85-86 (2007).*

Appeal pending.

□ To determine the length of time a respondent's name should remain on the list of ineligible, the forum may consider mitigating and aggravating circumstances. ----- *In the Matter of Design N Mind, Inc., 27 BOLI 32, 43 (2005).*

□ In mitigation, the forum considered that respondent: (1) had paid back wages in full to all but one worker; (2) had made changes to its payroll records and reports that make them easier to audit and less likely to contain errors concerning hours and dates worked; (3) promptly paid back wages owed to its worker on a public works project when the agency made a demand for payment; (4) created a corporate "audit team" that conducts daily reviews designed to identify prevailing wage rate projects; and (5) had given its manager who failed to post the prevailing wage rate on a public works project, some training on prevailing wage rate jobs. ----- *In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 152-53 (2005).*

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ ORS 279.361 provides that debarment shall be for "a period not to exceed three years." Although that statute and the agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the entire three-year period allowed by law. ----- *In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 152 (2005).*

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

See also *In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 290-91 (2001)*, reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004); *In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 165 (2001); *In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging*, 18 BOLI 138, 162, 169 (1999).

□ In determining the length of respondent's debarment, the forum considered several mitigating factors: respondent's current policy that its district manager must visit prevailing wage rate job sites before respondent can send workers to those sites; respondent's advisory that branch managers should do a site visit and look for postings; respondent's prompt payment of back wages owed to its eight workers when BOLI made a demand for payment; and the prevailing wage rate training to which respondent's parent company, currently subjects its managers. ----- *In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245,*

**291 (2001).**

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

**16.7 --- Length of Debarment**

□ The forum found that three years was an appropriate period of debarment based on respondent's intentional failure to pay the prevailing rate of wage to three workers employed on a prevailing wage rate job that three years was also an appropriate period of debarment based on respondent's intentional failure to post the prevailing wage rates as required by former ORS 279.350(4) on that same job. The forum stated it would impose the same three-year debarment for either violation independently but chose, in its discretion, to run the two three-year debarment periods concurrently rather than consecutively. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 128-29 (2007).***

Appeal pending.

□ Considering all the aggravating and mitigating circumstances, the commissioner debarred respondent for three years based on respondent's intentional failure to post. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 86 (2007).***

Appeal pending.

□ The commissioner was required to debar respondent based on its intentional failure to post the prevailing wage rate on a prevailing wage rate project, with the only question being the length of the debarment. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 85 (2007).***

Appeal pending.

□ ORS 279.361 provides that debarment shall be for "a period not to exceed three years." Although that statute and the agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the entire three-year period allowed by law. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 152 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

See also *In the Matter of Harkcom Pacific, 27 BOLI 62, 82 (2005); In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 290-91 (2001), reversed in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004); In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 165 (2001); In the Matter of Keith Testerman, 20 BOLI 112, 129 (2000); In the Matter of Southern Oregon Flagging, 18 BOLI 138, 162, 169 (1999).*

□ Considering all aggravating and mitigating circumstances, the commissioner imposed a one-year

debarment for respondent's intentional violations of ORS 279.354(1) and (4) on a public works project. ---- ***In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 153 (2005).***

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ When there were no mitigating circumstances and multiple aggravating circumstances, including knowledge by respondent's corporation president that respondent's project was a prevailing wage rate job and that fringe benefits and overtime must be paid; his falsification of 20 certified payroll reports in an apparent attempt to deceive the contracting agency and to avoid paying almost \$16,000 in earned wages to respondent's workers; his directive to respondent's office manager to falsify respondent's certified payroll reports so they did not show overtime; the seriousness of the respondent's violations, in that they resulted in an underpayment of wages of \$15,898 to respondent's workers; and respondent's failure to correct the problem when the agency brought it to respondent's attention, the commissioner debarred respondent and its president for three years. ---- ***In the Matter of Harkcom Pacific, 27 BOLI 62, 82-83 (2005).***

□ The forum debarred respondent, a subcontractor, for one year based on its intentional failure to post and pay prevailing wage rates when numerous aggravating factors and several mitigating factors existed. ---- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 291 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ Based on "unique circumstances," the forum limited the length of debarment of respondent and its corporate president to one month based on respondent's failure to post the applicable prevailing wage rate. ---- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 166 (2001).***

□ A respondent subcontractor's corporate president was placed on the list of ineligible for three years when credible evidence on the record showed that he knew the amount of the applicable prevailing wage rate and was responsible for the subcontractor's failure to pay that wage rate. ---- ***In the Matter of Bruce D. Huhta, 21 BOLI 249, 258 (2001).***

□ The commissioner placed respondent on the list of ineligible for three years because his failure to pay the prevailing wage rate was intentional and because the contractor paid the unpaid wages on respondent's behalf. ---- ***In the Matter of William George Allmendinger, 21 BOLI 151, 173 (2000).***

□ ORS 279.361(1) requires that a subcontractor be placed on the commissioner's list of ineligible for a period not to exceed three years when the commissioner determines, through a contested case proceeding, that the subcontractor has intentionally failed to pay the prevailing rate of wage to workers employed upon public works, or when the subcontractor has failed to pay the

## PWR -- 17.0 LIQUIDATED DAMAGES

prevailing rate of wage to its employees and the contractor has paid those amounts on the subcontractor's behalf. When the forum determined that both situations occurred, respondent was placed on the list of ineligible for three years. ----- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 125 (2000).***

□ When respondent's corporate president was directly responsible for respondent's failure to pay the prevailing wage rate, he was placed on the list of ineligible for three years. ----- ***In the Matter of Johnson Builders, Inc., 21 BOLI 103, 125-26 (2000).***

□ The commissioner placed respondent on the list of ineligible for three years when no mitigating factors were present; respondent had previously violated the prevailing wage rate laws; respondent's current failure to pay the prevailing wage rate was blatant and not the result of a misunderstanding between respondent and the agency; respondent did not cooperate with the agency's investigation; and respondent made no attempt to rectify the underpayment of wages. ----- ***In the Matter of Keith Testerman, 20 BOLI 112, 129-30 (2000).***

□ In determining how long a debarred respondent should remain on the list of ineligible, the commissioner may consider such mitigating factors as the respondent's cooperation with the agency, the respondent's efforts to comply with the prevailing wage rate laws, the respondent's history of correcting violations, and the likelihood that the respondent will violate the law in the future. ----- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 162, 169 (1999).***

□ When respondent bid on and received subcontracts on two public works projects and intentionally paid his 12 workers less than the appropriate prevailing wage rates, the commissioner placed respondent's name on the list of contractors ineligible for public contracts for a period of three years. ----- ***In the Matter of Haskell Tallent, 13 BOLI 273, 277-79 (1994).***

□ When a corporation's president and secretary intentionally paid employees less than the prevailing wage rate on four public projects, the commissioner held that the corporation intentionally failed to pay the prevailing wage rate, in violation of ORS 279.350(1), and placed respondent's name on the list of contractors ineligible for public contracts for a period of three years. - ---- ***In the Matter of Sealing Technology, Inc., 11 BOLI 241, 250-51 (1993).***

□ An individual respondent who intentionally failed to pay the prevailing wage rate, including overtime, to workers on a public works project was placed on the list of contractors ineligible for public contracts for a period of 18 months. ----- ***In the Matter of Intermountain Plastics, 7 BOLI 142, 160 (1988).***

□ When respondents -- a corporation, its president, and its secretary -- were subcontractors on a public works, the forum found the corporation and its secretary were responsible for a failure to pay the prevailing wage rate. However, the record did not establish that the corporate president, who was participate owner of the corporation, knew or should have known that the applicable prevailing wage rates were not being paid on the project. The forum placed the names of the

corporation and its secretary on the list of contractors ineligible for public contracts for a period of three years. - ---- ***In the Matter of Jet Insulation, Inc., 7 BOLI 133, 141-42 (1988).***

□ When two partners who owned respondent's company intentionally failed to pay the prevailing wage rate to workers employed on a public works project in violation of ORS 279.350, both partners were placed on the list of contractors ineligible for public contracts for a period of three years. ----- ***In the Matter of Loren Malcom, 6 BOLI 1, 7-8 (1986).***

□ When a corporate respondent intentionally failed to pay the prevailing wage rate to workers on two public works projects and the corporation's two owners and officers were responsible for the failure to pay the prevailing wage rate, the corporation and both owner/officers were placed on the commissioner's list of contractors ineligible for public contracts for a period of three years. ----- ***In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 159 (1986).***

## 17.0 LIQUIDATED DAMAGES

□ Civil penalties, liquidated damages, and debarment are distinct forms of sanctions the agency may impose for violations of prevailing wage rate laws. ----- ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 71 (1998).***

□ A respondent who failed to pay the prevailing wage rate on a public works contract was ordered to pay back pay and liquidated damages to his workers. ----- ***In the Matter of Intermountain Plastics, 7 BOLI 142, 160 (1988).***

## 18.0 AFFIRMATIVE DEFENSES

### 18.1 --- Equitable Estoppel (see also Ch. III, sec. 86.0)

□ Respondent alleged that the agency was estopped from commencing its action seeking civil penalties and placement of respondent on the commissioner's list of ineligible by virtue of the agency's prior actions and respondent's detrimental reliance on them. The forum held that the doctrine of equitable estoppel does not apply to the agency when it is enforcing a mandatory requirement of the law, and denied respondent's motion on the basis that the agency was seeking to enforce mandatory requirements of the law and equitable estoppel was not available to respondent as a defense as a matter of law. ----- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 252, 247-53 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ The doctrine of equitable estoppel does not apply to the agency when it is enforcing a mandatory requirement of the law. ----- ***In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 162 (1999).*** See also ***In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 73 (1998).***

□ The doctrine of equitable estoppel cannot prevent the agency from imposing a discretionary civil penalty as

part of its enforcement of mandatory requirements of the law. ---- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 73 (1998).*

□ Respondents have the burden of proving estoppel by a preponderance of the evidence. ---- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 74 (1998).*

□ To constitute estoppel, there must be a false representation, it must be made with knowledge of the facts, the other party must have been ignorant of the truth, the representation must have been made with the intention that it should be acted on by the other party, and the other party must have been induced to act on it. ---- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 74 (1998).*

### 18.2 --- Ignorance of the Law

□ Respondent's branch manager's ignorance of the legal requirement to post the prevailing wage rate because respondent failed to apprise him of that requirement did not provide a defense for respondent. --- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 84 (2007).*

Appeal pending.

□ Employers cannot avoid their legal responsibilities by their or their employees' selective ignorance or inattention. ---- *In the Matter of Emmert Industrial Corp., 26 BOLI 284, 290 (2005).*

□ All employers are charged with the knowledge of wage and hour laws governing their activities as employers. ---- *In the Matter of Southern Oregon Flagger, Inc., 18 BOLI 138, 166 (1999).* See also *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 78, 79 (1998).*

□ Respondent asserted that his failure to pay the prevailing wage rate was not intentional because he had never previously performed public works projects in Oregon. The commissioner rejected respondent's defense on the basis that respondent, like all employers, was charged with knowing the wage and hour laws governing its activities as an employer and noted that the forum has never given any weight to a defense of lack of experience with prevailing wage practices in Oregon. ---- *In the Matter of Haskell Tallent, 13 BOLI 273, 279 (1994).*

□ The commissioner rejected respondent's defense to a charge that he intentionally failed to pay the prevailing wage rate because he was ignorant of his responsibility to pay the prevailing wage rate, noting that all employers are charged with knowledge of wage and hour laws governing their activities as employers, the law imposes a duty upon employers to know the wages that are due to their employees, and employers cannot escape their responsibilities under the law by selective ignorance or inattention. ---- *In the Matter of Sealing Technology, Inc., 11 BOLI 241, 252 (1993).*

□ When a corporate president signed four public works contracts, but claimed he was ignorant of the requirement to pay the prevailing wage rate, the commissioner held that a person is presumed to be

familiar with the contents of any document that bears his signature, and the contents of the contracts should have put the president on notice of the prevailing wage rate requirements. ---- *In the Matter of Sealing Technology, Inc., 11 BOLI 241, 251-52 (1993).*

□ A contractor testified he believed that the value of providing a housing opportunity in a rehabilitated recreational vehicle park would be enough, when added to the hourly wage, to equal the prevailing wage rate, including fringe benefits. The forum rejected that defense to the charge of intentional failure to pay the prevailing wage rate in part because an employer has a duty to know the wages due to an employee and ignorance of the law as to what qualifies as a fringe benefit is not an excuse. ---- *In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 158 (1986).*

### 18.3 --- Other

□ The forum rejected respondent's exception that it was entitled, as a matter of law, to rely on its own interpretation of *former* ORS 279.350(4) – which was that as a subcontractor, it was not required to post, despite the decision of the Oregon Court of Appeals' opinion to the contrary, until its appellate rights were exhausted. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 87 (2007).*

Appeal pending.

□ The forum rejected respondent's defense that a press release issued by the commissioner stated "Gardner noted that while the appeal [of a court decision concerning the application of the state's prevailing wage rate law] is pending, the [Circuit Court] judge's decision is not binding on the agency's interpretation in that case or in any other cases." The forum's reason was that the commissioner's press release was an incorrect statement of the law and respondent did not articulate how this statement provided a legal defense, if any, to respondent that would make the statement relevant to this case. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 87 (2007).*

Appeal pending.

□ Respondent's affirmative defense that the agency's action was barred by the statute of limitations was rejected because respondent did not cite an applicable statute of limitations at hearing and the forum was unaware of any statute of limitations that applied. ---- *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 86 (2007).*

Appeal pending.

□ To prevail on the defense of laches, a respondent must prove three elements: (1) there was an unreasonable delay by the agency; (2) the agency had full knowledge of facts that would have allowed it to avoid the unreasonable delay; and (3) that the unreasonable delay resulted in such prejudice to respondent that it would be inequitable to afford the relief sought by the agency. The mere passage of time is not sufficient to invoke the equitable doctrine of laches; respondent must prove that it suffered actual prejudice attributable to the passage of time. Respondent did not prove any of these elements and the forum rejected its

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defense of laches. ---- *In the Matter of Labor Ready Northwest, Inc.*, 28 BOLI 47, 86 (2007).

Appeal pending.

□ Respondent's subsequent payment of back wages may be considered as a mitigating factor, but is not a defense to respondent's failure to pay the prevailing wage rate. ---- *In the Matter of Labor Ready Northwest, Inc.*, 27 BOLI 83, 136-37 (2005).

Affirmed, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), rev den 342 Or 473, 155 P3d 51 (2007).

□ Respondent's belief that ORS 279.359(2) did not apply to him was not a defense to the agency's charge that respondent knew or should have known of the violation. ---- *In the Matter of Storm King Construction*, 27 BOLI 46, 54 (2005).

□ When there was no evidence of terms or conduct on the part of the agency that would clearly indicate an intention to renounce the agency's authority to assess civil penalties or place respondent on the commissioner's list of ineligible, the forum rejected respondent's defense of waiver. ---- *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 252, 295 (2001).

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ Waiver is the intentional relinquishment of a known right. It must be plainly and unequivocally manifested, either in terms or by such conduct as clearly indicates an intention to renounce a known privilege or power. In general, the question of whether a waiver has occurred is resolved by examining the particular circumstances of each case. Waiver may be either explicit or implicit, that is, implied from a party's conduct. ---- *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 252, 293 (2001).

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ The forum declined to adopt respondent's theory of "waiver by estoppel," holding that "waiver by estoppel" refers to estoppel and not waiver. ---- *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 252, 293 (2001).

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ The forum rejected respondent's argument that it could not have determined from BOLI's applicable prevailing wage rate book that its workers should have been classified as tenders to plasterers. ---- *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 245, 284-85 (2001).

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280

(2004).

□ In a wage survey case, the forum did not accept as mitigation respondent's claim that one principal was ignorant of the other's failure to timely complete and return the 2000 wage survey and that therefore the civil penalty should be abated, stating that the forum had never given any weight to the fact that a respondent's internal affairs were in disarray and that employers cannot avoid their legal responsibilities by selective ignorance or inattention. ---- *In the Matter of The Landscape Company of Portland, LLC*, 22 BOLI 69, 76 (2001).

□ Respondent argued that the requirement that respondent complete and return the commissioner's 1998 and 1999 wage surveys was invalid because it placed respondent in the position of being "self-incriminating" if it completed and returned the wage surveys. The forum interpreted this as a constitutional argument, which an authorized representative is not authorized to make. Even if respondent had properly raised the argument through counsel, the forum would have rejected it because the privilege against self-incrimination is only applicable in criminal proceedings. - ---- *In the Matter of Schneider Equipment, Inc.*, 21 BOLI 60, 74 (2000).

□ Respondent argued that civil penalties could not be assessed because there was no specific statutory cite in the wage surveys authorizing the assessment of civil penalties in any amount for respondent's failure to complete and return BOLI's 1998 and 1999 wage surveys. The forum held that respondent was clearly placed on notice of the law by the unequivocal language on both wage survey forms that completion and submission of the wage surveys is required by Oregon law, and a specific statutory cite of the type described by respondent is not required by the law. ---- *In the Matter of Schneider Equipment, Inc.*, 21 BOLI 60, 74 (2000).

□ Respondent argued that it should not be required to complete and return the 1998 and 1999 wage surveys because of a "lack of custody or control" by the agency, as manifested by the agency's contract with the Employment Department to gather this information. The forum rejected this defense because ORS 279.359(4) specifically authorizes the commissioner to enter into contracts with "public or private parties" such as the Employment Department to conduct wage surveys. ---- *In the Matter of Schneider Equipment, Inc.*, 21 BOLI 60, 74-75 (2000).

□ Respondent argued that the commissioner's prescribed timelines for completing BOLI's 1998 and 1999 wage surveys were unreasonable, given that respondent and other contractors were required to complete them in a short period of time during peak construction season. In 1998, that prescribed timeline was "two weeks"; in 1999 it was twenty-seven days. The 1998 survey was due at the end of September 1998; the 1999 survey was due on September 15, 1999. The forum concluded that the commissioner exercised his discretion within the range of discretion delegated to him by law, that the commissioner's action followed the procedures prescribed by statute, and that the substance of the commissioner's action was reasonable.

---- *In the Matter of Schneider Equipment, Inc., 21 BOLI 60, 74-75 (2000).*

□ Respondent's argument that it did not violate ORS 279.350(1) because the commissioner's classification of the workers as boilermakers was faulty in that it was based on union jurisdictional agreements, rather than on a field survey of industry practices, was inapplicable. ---- *In the Matter of Northwest Permastore Systems, Inc., 20 BOLI 37, 55 (2000).*

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

□ Respondent did not meet its burden of proving, as an affirmative defense, that the commissioner's classification of standpipe erection workers as boilermakers was incorrect. ---- *In the Matter of Northwest Permastore, 18 BOLI 1, 17-18 (1999), reconsidered 20 BOLI 37 (2000).*

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

□ Respondent's affirmative defense that, whatever the union jurisdictional practice may be, the actual industry practice in Oregon is to pay laborers' wages to standpipe erection workers was not an available defense as a matter of law. ---- *In the Matter of Northwest Permastore, 18 BOLI 1, 18 (1999), reconsidered 20 BOLI 37 (2000).*

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

□ When respondent asserted the affirmative defense that the commissioner had acted inconsistently with an established prior agency practice by proposing that civil penalties be assessed against respondent, but did not identify any prior agency practice that would have permitted it to pay laborers' wages to its standpipe erection workers, the forum held that respondent could not prevail on this theory. ---- *In the Matter of Northwest Permastore, 18 BOLI 1, 18 (1999), reconsidered 20 BOLI 37 (2000).*

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

□ A subcontractor that has intentionally failed to pay or post prevailing wage rates "shall be ineligible" for up to three years to receive any public works contract or subcontract. It is no defense that, after an agency investigation, the subcontractor paid the back wages owed. ---- *In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 75 (1998).*

□ The prime contractor's payment of the differential between the prevailing wage rates and the lower wage rates paid by the respondent subcontractor to his 12 employees did not negate the subcontractor's violation of ORS 279.350(1). ---- *In the Matter of Haskell Tallent, 13 BOLI 273, 279-80 (1994).*

□ A contractor's late payment of the prevailing wage rate to his workers after the "errors were pointed out" did not make his violation of ORS 279.350 unintentional. ---- *In the Matter of Loren Malcom, 6 BOLI 1, 11 (1986).*

□ When a contractor testified that he knew of the requirement to pay the prevailing wage rate, his "feeling"

that he was in compliance with the law did not constitute an "unintentional miscalculation" that excused his failure to pay the prevailing wage rate. ---- *In the Matter of Loren Malcom, 6 BOLI 1, 11 (1986).*

□ When a contractor argued at hearing that his failure to pay the prevailing wage rate was a bookkeeping error, and therefore not an intentional failure to pay, the forum found that this argument, even if true, would not be successful. The forum stated that the definition of "willful" excludes "unintentional miscalculation," but found that the contractor's bookkeeping error was far from an unintentional miscalculation when the contractor was aware of his obligation to pay the prevailing wage rate, was performing other public works contracts at the time, and incorrectly entered the rate of pay for six employees on six different time cards over a period of several months. ---- *In the Matter of Loren Malcom, 6 BOLI 1, 10 (1986).*

□ When a contractor has violated ORS 279.350 by failing to pay the prevailing wage rate on a public project, the payment of fringe benefits and additional wages by the contractor after an investigation by the Wage and Hour Division of the agency is not a defense to failure to pay the prevailing wage rate. ---- *In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 155 (1986).*

□ A contractor testified he believed that the value of providing a housing opportunity in a rehabilitated recreational vehicle park would be enough, when added to the hourly wage, to equal the prevailing wage rate, including fringe benefits. The forum rejected that defense to the charge of intentional failure to pay the prevailing wage rate because an employer has a duty to know the wages due to an employee and ignorance of the law as to what qualifies as a fringe benefit is not an excuse and because there was no reasonable or objective basis for the supposed belief that providing a recreational vehicle park hook-up was worth the difference between the prevailing wage rate and what the contractor was paying in actual wages. ---- *In the Matter of P. Miller & Sons Contractors, Inc., 5 BOLI 149, 159 (1986).*

## 19.0 EXEMPTIONS

□ Projects "for which the contract price does not exceed \$25,000" and projects "regulated under the Davis-Bacon Act" are exempt from the provisions of ORS 279.348 to 279.380. There was no evidence presented showing that the subject contracts were regulated by the Davis-Bacon Act. However, both contracts involved individual contracts for less than \$25,000, a fact which would make them exempt from Oregon's prevailing wage rate laws unless they were part of a larger "project" costing more than \$25,000. ORS 279.357(1)(a). ---- *In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 153 (2001).*

## 20.0 STATUTORY INTERPRETATION

□ When statutory interpretation is required, the forum must attempt to discern the legislature's intent. To do that, the forum first examines the text and context of the statute. The text of the statutory provision itself is the starting point for interpretation and the best evidence of

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the legislature's intent. Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. --- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 281 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

See also *In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 162 (2001)*.

□ ORS 174.010 limits the forum's role in construing statutes "simply to ascertain[ing] and declar[ing] what is, in terms or in substance, contained therein, *not to insert what has been omitted, or to omit what has been inserted[.]*" ---- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 252, 282(2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ The forum rejected respondent's argument that it erred by relying on a strictly textual analysis of ORS 279.350(4), stating that if the legislative intent can be determined from the wording of the statute, no further inquiry is permissible. ---- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 252, 282 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

□ The forum rejected respondent's argument that the forum's interpretation would lead to absurd results, holding that when legislative intent is clear from an inquiry into text and context, the forum may not apply the absurd-result maxim. ---- ***In the Matter of Labor Ready Northwest, Inc., 22 BOLI 252, 282 (2001).***

Reversed in part, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004).

## 21.0 AGENCY RULE INTERPRETATION

□ Former OAR 839-016-0540(3)(a) establishes a minimum, not an upper limit, on the commissioner's authority to determine an appropriate civil penalty. ---- ***In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 116 (2007).***

Appeal pending.

See also *In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 75 (2007), appeal pending.*

□ This forum and Oregon's appellate courts have previously held that an agency may apply a policy interpretation established at a contested case hearing to matters that are the subject of the case. ---- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 152 (2001).***

□ When an agency's interpretation of its own rule is

plausible and cannot be shown to be inconsistent with the wording of the rule itself, or with any other source of law, the agency's interpretation is entitled to deference. - ---- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 152 (2001).***

□ When the agency's written interpretation of its rule drew a common sense distinction between demolition that is merely destruction of a structure and demolition that is connected with construction, reconstruction, or renovation subject to prevailing wage rate laws that cannot occur until an existing structure has been demolished, the forum found this was a plausible interpretation that was neither inconsistent with the wording of the rule or any other source of law. The forum relied on the agency's interpretation regarding when demolition work is subject to Oregon's prevailing wage rate laws in determining whether the subject contract fell within the category of "public works." ---- ***In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 152-53 (2001).***