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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

BLI 16-2021
CHAPTER 839
BUREAU OF LABOR AND INDUSTRIES

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ARCHIVES DIVISION
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& LEGISLATIVE COUNSEL

FILING CAPTION: Amendments to Definitions and Procedures for Establishing Prevailing Wage Rates

EFFECTIVE DATE: 10/12/2021 THROUGH 04/09/2022

AGENCY APPROVED DATE: 10/11/2021

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NEED FOR THE RULE(S):

Oregon's Prevailing Wage Rate (PWR) Law (ORS 279C.800-279C.870) is enforced by the Bureau of Labor and Industries' Wage and Hour Division and requires that the Labor Commissioner determine the "prevailing rate of wage" for workers on Public Works projects across the state by locality and trade or occupation. The law also required information derived from an independent wage survey be utilized to determine the prevailing wage rates. In the 2021 Legislative Session, the Legislature passed Senate Bill (SB) 493 which was signed by the Governor and is effective January 1, 2022. SB 493 amends state PWR law (ORS 279C.815) as follows: The prevailing rate of wage for each locality is the wage in the collective bargaining agreement that covers that occupation; If more than one collective bargaining agreement covers that occupation, the highest rate of wage among the collective bargaining agreements will prevail; If a collective bargaining agreement does not exist for a trade or occupation, the rate of wage may be determined by conducting an "independent wage survey." These temporary rules address the immediate, short-term needs for implementing this new legislation and establishing the prevailing wage rates.

JUSTIFICATION OF TEMPORARY FILING:

These rules allow the agency to collect and gather information necessary to publish the prevailing wage rate on public works projects for each occupation in each locality. Failure to immediately adopt these rules will adversely impact workers, contractors and public agencies who rely on the agency to establish the prevailing wage rate on a semi-annual basis. Promulgating temporary rules will provide the necessary clarification for the agency to establish the prevailing wage rates for each occupation in each locality by January 1, 2022, while the agency collects feedback and information from stakeholders that will inform the permanent rules.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Senate Bill 493.

NOTE: Additional PDF filed with this filing not included in this document. Please contact Bureau of Labor and Industries for a copy of this document.

RULES:

839-025-0004, 839-025-0009

AMEND: 839-025-0004

RULE TITLE: Definitions Generally

RULE SUMMARY: This temporary rule amendment relates to the newly enacted legislation, SB 493, and defines "collective bargaining agreement," "highest rate of wage," and "labor organization" for the purposes of establishing the state prevailing wage rate.

RULE TEXT:

As used in OAR chapter 839, division 25, unless the context requires otherwise:

(1) "Apprentice" means:

(a) A person who is individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Office of Apprenticeship (OA), or with any state apprenticeship agency recognized by OA, and who is employed by a registered training agent pursuant to ORS 660.010(10) and is working pursuant to the standards of the apprentice's apprenticeship program; or

(b) A person in probationary employment as an apprentice in such an apprenticeship program, but who is not individually registered in the program, but who has been certified by the OA or a state apprenticeship agency to be eligible for probationary employment as an apprentice, and who is employed by a registered training agent pursuant to ORS 660.010 (10) and is working pursuant to the standards of the apprentice's apprenticeship program.

(2) "The Basic Hourly Rate of Pay" or "Hourly Rate" means the rate of hourly wage, excluding fringe benefits, paid to the worker.

(3) "Bureau" means the Bureau of Labor and Industries.

(4) "Collective bargaining agreement in effect" means a collective bargaining agreement which is recognized as being binding on all parties by the National Labor Relations Board; which is enforceable within the geographic area in which the public improvement is located; and, the terms of which extend to workers who are working on the public improvement project.

(5) "Commissioner" means the Commissioner of the Bureau of Labor and Industries, or designee.

(6) "Construction" means the initial construction of buildings and other structures, or additions thereto, and of highways and roads. "Construction" does not include the transportation of material or supplies to or from the public works project by employees of a construction contractor or construction subcontractor.

(7) "Division" means the Wage and Hour Division of the Bureau of Labor and Industries.

(8) "Employ" includes to suffer or permit to work.

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

(a) The rate of contribution irrevocably made on a "regular basis" and "not less often than quarterly," as those terms are defined in OAR 839-025-0043, by a contractor or subcontractor to a trustee or to a third person pursuant to a plan, fund or program; and

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state or local law to provide any of such benefits. Other bona fide fringe benefits do not include reimbursement to workers for meals, lodging or other travel expenses, nor contributions to industry advancement funds (CIAF for example).

(10)(a) "Funds of a public agency" includes any funds of a public agency that are directly or indirectly used, as described below.

(A) "Directly used funds of a public agency" means revenue, money, or that which can be valued in money collected for a public agency or derived from a public agency's immediate custody and control, and, except as provided in ORS 279C.810(1)(a)(H) and (J) and subsection (b) of this section, includes but is not limited to any money loaned by a public agency, including the loan of proceeds from the sale of conduit or pass-through revenue bonds for the specific purpose of financing a project, and public property or other assets used as payment for all or part of a project.

(B) "Indirectly used funds of a public agency" means, except as provided in subsection (b) of this section, that a public agency ultimately bears the cost of all or part of the project, even if a public agency is not paying for the project directly or completing payment at the time it occurs or shortly thereafter. A public agency does not indirectly use funds of a public agency when it elects not to collect land rent that is due. Examples of when an agency "ultimately bears the cost" of all or part of a project include but are not limited to:

(i) Amortizing the costs of construction over the life of a lease and paying these costs with funds of a public agency during the course of the lease;

(ii) A public agency subsidizing the costs of construction that would normally be borne by the contractor;

(iii) Using insurance proceeds that belong to a public agency to pay for construction. Insurance proceeds represent "money collected for the custody and control of a public agency" and therefore are funds of a public agency, whether the contractor obtains payment directly from the insurance company or the public agency; or

(iv) Using or creating a private entity as a conduit for funding a project when the private entity is in fact an alter ego of the public agency.

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

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

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

(C) Tax credits or tax abatements;

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

(E) The difference between:

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

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

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

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

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

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

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

(11) "Highest rate of wage among collective bargaining agreements" is the highest rate of wage when combining the hourly rate plus the fringe benefits.

(12) "Housing" has the meaning given that term in ORS 456.055.

(13) "Labor organization" means any organization certified as such by the National Labor Relations Board.

(14) "Major renovation" means the remodeling or alteration of buildings and other structures within the framework of an existing building or structure and the alteration of existing highways and roads, the contract price of which exceeds

\$50,000.

(15) "Nonprofit organization," as used in section (9)(b)(A) of this rule, means an organization or group of organizations described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.

(16) "Normal business hours" means the hours during which the office of the contractor or subcontractor is normally open for business. In the absence of evidence to the contrary, the Division will consider the hours between 8:00 a.m. and 5:00 p.m., excluding the hours between 12:00 noon and 1:00 p.m., on weekdays as normal business hours.

(17) "Overtime" means all hours worked:

(a) On Saturdays;

(b) On the following legal holidays:

(A) Each Sunday;

(B) New Year's Day on January 1;

(C) Memorial Day on the last Monday in May;

(D) Independence Day on July 4;

(E) Labor Day on the first Monday in September;

(F) Thanksgiving Day on the fourth Thursday in November;

(G) Christmas Day on December 25.

(c) Over 40 hours in a week; and either

(d) Over eight (8) hours in a day; or

(e) Over 10 hours in a day provided:

(A) The employer has established a work schedule of four consecutive days (Monday through Thursday or Tuesday through Friday) pursuant to OAR 839-025-0034; and

(B) The employer operates in accordance with this established work schedule.

(18) "Overtime rate" means the basic hourly rate of pay multiplied by one and one-half.

(19) "Overtime wages" means the overtime hours worked multiplied by the overtime rate.

(20) "Person" includes a public or private corporation, a partnership, a sole proprietorship, a limited liability company, a government or governmental instrumentality.

(21) "Prevailing wage rate claim" means a claim for wages filed by a worker with the Division.

(22) "Public agency" means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any instrumentality thereof organized and existing under law or charter.

(23)(a) "Public work," "public works" or "public works project" includes but is not limited to:

(A) Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;

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

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

(D) A device, structure, or mechanism, or a combination of devices, structures, or mechanisms that:

(i) Uses solar radiation as a source for generating heat, cooling, or electrical energy; and

(ii) Is constructed or installed, with or without using funds of a public agency, on land, premises, structures, or buildings that a public agency owns, regardless of the total project cost; or

(E) A project for the construction, reconstruction, major renovation or painting of a road, highway, building, structure, or improvement of any type that occurs, with or without using funds of a public agency, on real property that a public university listed in ORS 352.002 owns.

(F) Pursuant to ORS 352.138(4)(b), a project resulting from an agreement under the terms of which a private entity constructs, reconstructs, renovates or paints an improvement of any type that occurs, with or without using funds of a

public agency, on real property owned by a public university listed in ORS 352.002 or by a nonprofit organization or other entity that a public university listed in ORS 352.002 owns or controls exclusively.

(b) "Public works" does not include:

(A) Reconstructing or renovating privately owned property that a public agency leases; or

(B) A private nonprofit entity's renovation of publicly owned real property that is more than 75 years old if:

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

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

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

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

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

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

(27)(a) "Residential construction project" means a public works project for the construction, reconstruction, major renovation or painting of a single family house or apartment building of not more than four (4) stories in height and all incidental items such as site work, parking areas, utilities, streets and sidewalks pursuant to the U.S. Department of Labor's "All Agency Memorandum No. 130" -- "Application Of The Standard of Comparison 'Projects Of a Character Similar' Under the Davis-Bacon and Related Acts" dated March 17, 1978, and "All Agency Memorandum No. 131" "Clarification of All Agency Memorandum No. 130" dated July 14, 1978. (See Appendix 6.)

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

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

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

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

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

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

(30) "Staff resources of a public agency" means employees of the public agency who may manage, supervise or oversee a project or employees of the public agency used to design or inspect one or more components of a project, but not persons with whom a public agency contracts to perform such services.

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

(32) "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Office of Apprenticeship (OA), as meeting its standards for on-the-job training programs, and which has been so certified by that office, and who is employed by a registered training agent pursuant to ORS 660.010(10) and is working pursuant to the standards of the trainee's program.

(33) "Training agent" means an employer that is registered with a local joint committee and the Apprenticeship and Training Division of the Bureau of Labor and Industries.

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

(35) "Wages" or "Prevailing Wages" means the basic hourly rate of pay and fringe benefits as defined in sections (2) and (9) of this rule.

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

STATUTORY/OTHER AUTHORITY: ORS 651.060(4), ORS 279C.808, ORS 651.060(4), ORS 279C.808

STATUTES/OTHER IMPLEMENTED: ORS 279C.800-.870, ORS 279C.800-.870

ADOPT: 839-025-0009

RULE TITLE: Procedure for Establishing Prevailing Wage Rates

RULE SUMMARY: This rule clarifies the procedure for establishing prevailing wage rates.

RULE TEXT:

(1)The Labor Commissioner shall establish prevailing wage rates by:

(a) Adopting the basic hourly rate of pay and fringe benefits established by a Labor organization through a collective bargaining agreement in effect for that locality and occupation.

(b) When there are two or more collective bargaining agreements in effect for that locality and occupation, the Labor Commissioner shall use the highest rate of wage among collective bargaining agreements.

(c) In instances when the procedure established in (a) or (b) of this subsection is not feasible, employing other methods deemed appropriate by the agency may be used, including but not limited to:

(i) An independent wage survey conducted by the agency;

(ii) The use of wage and hour data from other state agencies, including the Oregon Employment Department and/or Department of Revenue;

(iii)The use of data from surveys performed by the United States Department of Labor, Wage and Hour Division; or

(iv) The use of an existing validated survey that includes wage and hour data reported to the agency.

(d)For purposes of establishing the prevailing wage rates, the basic hourly rate of pay, fringe benefits and any hourly premium pay established by a Labor organization through a collective bargaining agreement in effect for a trade or occupation in a locality may cover all or a portion of that locality.

(2) Collective bargaining agreements and union wage information must be received no more than 45 days prior to the next scheduled rate publication. If this information is not received by the agency within this time frame, the Labor Commissioner will use the rates included in the most recent complete submission.

(3) Appeals must be submitted in writing to the agency and describe all relevant details for consideration.

STATUTORY/OTHER AUTHORITY: ORS 279C.815, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS379C.800-870

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TEMPORARY ADMINISTRATIVE ORDER
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BLI 23-2021

CHAPTER 839

BUREAU OF LABOR AND INDUSTRIES

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FILING CAPTION: Corrected deadline for submission of prevailing wage rate information.

EFFECTIVE DATE: 11/04/2021 THROUGH 04/09/2022

AGENCY APPROVED DATE: 11/04/2021

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NEED FOR THE RULE(S):

Clarified the deadline to submit prevailing wage rate information is no less than 45 days prior to the next rate publication.

JUSTIFICATION OF TEMPORARY FILING:

The consequences from failing to adopt this rule is that the agency would have no articulated procedure for accepting rate information in response to the statutory changes enacted from SB 493.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

ADOPT: 839-025-0009

SUSPEND: Temporary 839-025-0009 from BLI 16-2021

RULE TITLE: Procedure for Establishing Prevailing Wage Rates

RULE SUMMARY: Corrected deadline for submission of collective bargaining agreement and union wage information.

RULE TEXT:

(1) The Labor Commissioner shall establish prevailing wage rates by:

(a) Adopting the basic hourly rate of pay and fringe benefits established by a Labor organization through a collective bargaining agreement in effect for that locality and occupation.

(b) When there are two or more collective bargaining agreements in effect for that locality and occupation, the Labor Commissioner shall use the highest rate of wage among collective bargaining agreements.

(c) In instances when the procedure established in (a) or (b) of this subsection is not feasible, employing other methods deemed appropriate by the agency may be used, including but not limited to:

(A) An independent wage survey conducted by the agency;

(B) The use of wage and hour data from other state agencies, including the Oregon Employment Department and/or Department of Revenue;

(C) The use of data from surveys performed by the United States Department of Labor, Wage and Hour Division; or

(D) The use of an existing validated survey that includes wage and hour data reported to the agency.

(d) For purposes of establishing the prevailing wage rates, the basic hourly rate of pay, fringe benefits and any hourly premium pay established by a Labor organization through a collective bargaining agreement in effect for a trade or occupation in a locality may cover all or a portion of that locality.

(2) Collective bargaining agreements and union wage information must be received no less than 45 days prior to the next scheduled rate publication. If this information is not received by the agency within this time frame, the Labor Commissioner will use the rates included in the most recent complete submission.

(3) Appeals must be submitted in writing to the agency and describe all relevant details for consideration.

STATUTORY/OTHER AUTHORITY: ORS 279C.815, ORS 651.060(4)

STATUTES/OTHER IMPLEMENTED: ORS379C.800-870