

## **Proposed Revision of the CAC Regulations concerning Public Works enforcement (2017)**

(Proposed on behalf of the California Labor Commissioner by Thomas R. Fredericks, Esq.)

The current CAC regulations that deal with investigation and enforcement of contractor compliance with apprenticeship standards were adopted by the CAC prior to the statutory transfer of authority from the Chief of the Division of Apprenticeship Standards to the Labor Commissioner in June of 2012, and prior to the follow-up statutory implementation of that transfer in 2015. Most of these suggested revisions simply modify the CAC regulations to conform with the 2015 statutory amendments. The remaining two suggested revisions would amend the regulations to (1) reflect the interpretation unanimously adopted by the CAC in its October 30, 2014 Resolution on Employment of Apprentices on Public Works (attached) and (2) enhance the current regulatory obligation of contractors to timely furnish public works contract award information to applicable apprenticeship programs (DAS Form 140) and to timely request dispatch of apprentices (DAS Form 142). Finally, two suggested revisions (to Regulations 205 and 230.1) are proposed to implement the CAC's

**CAC Regulation 205 entitled "Definitions"** would be **amended** to revise subdivision (c) and add subdivisions (o) and (p) to read as follows:

(c) An "Apprenticeable Occupation" is one which requires independent judgment and the application of manual, mechanical, technical, or professional skills and is best learned through an organized system of on-the-job training together with related and supplemental instruction. Each "Apprenticeable Occupation" is defined by the specific work processes contained in the approved apprenticeship standards under which apprentices are training.

(o) "Work Process" is a specific skill or task, stated in a program's apprenticeship standards, in which the apprentice will receive supervised work experience and training on the job.

(p) "Registered Apprentice" means a person who is training under and in accordance with apprenticeship standards that have been approved by the Chief DAS, and who is party to an apprentice agreement that has been accepted by the Division of Apprenticeship Standards.

**Why this change is needed:** Labor Code sections 1777.5 and 1777.7 were amended in 2012 and 2015. The amendments transferred enforcement authority to the Labor Commissioner for violations by public works contractors of their statutory apprenticeship obligations. These violations are now enforced by the issuance of civil wage and penalty assessments under Labor Code section 1741, and such assessments can be reviewed under Labor Code section 1742.

Labor Code section 1777.5, subdivision (d) provides that "apprenticeable craft or trade" means "apprenticeable occupation" as defined by the California Apprenticeship Council. However, the current definition of "apprenticeable occupation" in the CAC's regulations is too vague for purposes of enforcement. In enforcing Labor Code sections 1777.5 and 1777.7, the Labor Commissioner must be able to make clear showings to DIR Hearing Officers of 1) the distinction

between public-works contractors' journey-level workers and apprentices, and 2) the specific wage rates that public-works contractors are obligated to pay to apprentices. These changes will assist the Hearing Officers in deciding whether public-works contractors have paid the required wages or owe additional amounts.

**CAC Regulation 227 entitled "Scope and Application"** would be **amended** to read, in its entirety, as follows: "These regulations shall govern the interpretation of Labor Code Section 1777.5, and shall also govern the substantive requirements of Labor Code Section 1777.7 applicable to contractors or subcontractors when an affected contractor or subcontractor has obtained review of a civil wage and penalty assessment issued by the Labor Commissioner which includes a determination of penalties assessed under subdivisions (a) and (b) of Labor Code Section 1777.7."

**Why this change is needed:** Amended Labor Code section 1777.7(g) now includes the requirement that the "interpretation of Section 1777.5 and the substantive requirements of this section applicable to contractors or subcontractors shall be in accordance with the regulations of the California Apprenticeship Council." The proposed revision of Regulation 227 mirrors the new statutory language.

**CAC Regulation 228 entitled "Definitions"** would be **amended** as follows: **Delete** subdivision (g),

Why this change is needed: Current Rule 228 lists several definitions of terms found in Article 10 of the CAC regulations, The definition of "WORKER" which appears in subdivision (g) currently reads as follows: "(g) WORKER means any journeyman as defined in Section 205(a) of Title 8 performing work of an apprenticeable occupation on a public works job, except a licensee who is a sole proprietor." This definition differs materially from the definition of that same term found in Labor Code section 1723, and from the definition of "Workers deemed employed upon public works" found in Labor Code section 1772. Specifically, Rule 228(g) **does not include** in its definition of "worker" any **apprentices** employed on public works; **limits** the definition of workers to "any journeyman . . . performing work of an apprenticeable occupation on a public works job;" and **excludes** from the definition "a licensee who is a sole proprietor." These distinctions are not only inconsistent with the definitions found in sections 1723 and 1772, but are also incompatible with the obligations of the Labor Commissioner to enforce the Public Works Chapter of the Labor Code on behalf of **all** workers, **including apprentices** and **including** workers who may also be licensees or sole proprietors. It is well established that the status or title of a particular worker (such as "licensee" or "sole proprietor") is **not** determinative of an individual's coverage by the prevailing wage laws. Because the definition conflicts with statutory provisions, a court could well declare it invalid.

**CAC Regulation 229 entitled "Service Notice and Computation of Time"** would be *deleted* in its entirety.

**Why this change is needed:** Amended Labor Code section 1777.7(c)(1) now provides that the Labor Commissioner "shall issue a civil wage and penalty assessment in accordance with the provisions of Section 1741, upon determination of penalties assessed under subdivisions (a) and (b)" of Section 1777.5, which lists a contractor's apprenticeship obligations. Amended Section 1777.7(c)(1) also provides that administrative review of such a civil wage and penalty assessment is only available to the affected contractor upon request "in accordance with the provisions of Section 1742." The regulations which "govern" Labor Code section 1742 review hearings were adopted by the Director of Industrial Relations in 2001 and are found at 8 CCR 17201 - 17270. Those regulations already specifically address the subjects of service, notice and computation of time. Those regulations therefore **replace** CAC Rule 229.

**CAC Regulation 230 entitled "Notification of Contract Award Information"** would be *amended* to include a **new** subdivision (b) which would read as follows:

"(b) Effective January 1, 2018, all contract award information otherwise in accordance with the provisions of subdivision (a) above will be subject to the following additional requirement. The notification of contract award information shall be sent by first class and certified mail, return receipt requested, or facsimile or e-mail. If mailed, the contractor or subcontractor shall retain a copy of all such notifications, including copies of U.S. Postal Service receipts as proof of mailing. If transmitted electronically by facsimile, the contractor or subcontractor shall retain a copy of all such notifications including an electronic copy of confirmation that the facsimile was received by the recipient, and date received. If transmitted by e-mail, the contractor or subcontractor shall retain a copy of all such e-mail transmissions, and bearing the date of the e-mail transmissions. Upon written request from the Labor Commissioner, the contractor or subcontractor shall provide a copy of all such notifications of contract award information to the Labor Commissioner. Consistent with the provisions of Labor Code section 1742(b), the contractor or subcontractor shall have the burden of proving that the notification of contract award information was timely submitted in accordance with this regulation in any review hearing held under Labor Code section 1742(b)."

**Why this change is needed:** This is the first of the two suggested revisions being proposed to enhance the current regulatory obligations of contractors. This modification is not required by the recent amendments to Labor Code sections 1777.5 and 1777.7, but addresses an evidentiary issue that arises when contractors claim that the notice of contract award information required to be submitted in accordance with current Rule 230 was in fact submitted, but without providing reliable documentation of that claim. Currently, Rule 230 does not specify that contractors must retain and provide copies of the notices actually furnished to apprenticeship committees. The enhancements proposed will serve to avoid the need for Hearing Officers to rely solely upon testimonial evidence when the issue of whether

proper and timely written notification was made. Because current Rule 230 **already** requires that notices of contract award information "shall be in writing," enhancing that rule to also require that copies of such notices be retained by contractors and furnished to the Labor Commissioner upon written request cannot be viewed as overly burdensome. The addition of the requirement that notices of contract award information which the contractor chooses to mail (rather than transmit electronically) must be sent by first class and certified mail is similar to the requirements currently imposed by statute (Labor Code section 1741(a)) and DIR regulation (8 CCR 17220(a)) on the Labor Commissioner when mailing civil wage and penalty assessments to contractors. The requirement to maintain copies of U.S. Postal Service return receipts as proof of mailing is drawn from current CAC Rule 231(g). Finally, there would be no additional mailing costs (first class and certified mail, return receipt requested) for contractors who may choose to use electronic transmission by facsimile or e-mail.

**CAC Regulation 230.1 entitled "Employment of Apprentices on Public Works"** would be **amended** to revise subdivision (c) and add a **new** subdivision (e). Revised subdivision (c) would read as follows:

"(c) Apprentices employed pursuant to Labor Code section 1777.5 shall be registered apprentices who are training under apprenticeship standards that include the specific work processes that the contractor will perform on the project. Contractors must assign apprentices only work that is included in the apprenticeship standards under which the apprentices are training. Apprentices on public works cannot be assigned work other than that which is stated in the work processes of the apprenticeship standards under which the apprentices are training. Where an employer employs apprentices under the rules and regulations of the California Apprenticeship Council, as set forth in Labor Code Section 1777.5(c)(2), apprentices employed on public works must at all times work with or under the direct supervision of journeyman/ men. The on-the-job training shall be in accordance with the apprenticeship standards and apprenticeship agreement under which the apprentice is training, provided that a contractor shall not be subject to any financial or administrative obligations to a trust fund or employee benefit plan unless the contractor has so agreed."

New subdivision (e) would read as follows:

"(e) Effective January 1, 2018, all requests for dispatch of apprentices otherwise in accordance with the provisions of subdivision (a) above will be subject to the following additional requirement. The request for dispatch shall be sent by first class and certified mail, return receipt requested, or facsimile or e-mail. If mailed, the contractor or subcontractor shall retain a copy of all such requests, including copies of U.S. Postal Service receipts as proof of mailing. If transmitted electronically by facsimile, the contractor or subcontractor shall retain a copy of all such requests, including an electronic copy of confirmation that the facsimile was received by the recipient and date received. If transmitted by e-mail, the contractor or subcontractor shall retain a copy of all such e-mail transmissions and bearing the date of the e-mail transmissions. Upon written request from the Labor Commissioner, the contractor or subcontractor shall

provide a copy of all such requests to the Labor Commissioner. Consistent with the provisions of Labor Code section 1742(b), the contractor or subcontractor shall have the burden of proving that the request for dispatch was timely submitted in accordance with this regulation in any review hearing held under Labor Code section 1742(b)."

**Why this change is needed:** This is the second of the two suggested revisions being proposed to enhance the current regulatory obligations of contractors. The first modification reflects the guidance Resolution unanimously passed by the CAC on October 30, 2014, and is made for the same enforcement reasons as are explained above in regard to the amendments to Rule 205. The second modification is not required by the recent amendments to Labor Code sections 1777.5 and 1777.7, but addresses an enforcement issue that arises when contractors claim that the request for dispatch required to be submitted in accordance with current Rule 230.1 was in fact submitted, but without providing reliable documentation of that claim. Currently, Rule 230.1 does not specify that contractors must retain and provide copies of the requests actually furnished to apprenticeship committees. The enhancements proposed will serve to avoid the need for Hearing Officers to rely solely on testimonial evidence when the issue of whether proper and timely written requests for dispatch were made. Because current Rule 230.1(a) **already** requires that requests for dispatch "shall be in writing," enhancing the rule to also require that copies of such notices be retained by contractors and furnished to the Labor Commissioner upon written request cannot be viewed as overly burdensome. The addition of the requirement that requests for dispatch which the contractor chooses to mail (rather than transmit electronically) must be sent by first class and certified mail is similar to the requirements currently imposed by statute (Labor Code section 1741(a)) and DIR regulation (8 CCR 17220(a)) on the Labor Commissioner to mail civil wage and penalty assessments to contractors. The requirement to maintain copies of U.S. Postal Service return receipts as proof of mailing is drawn from current CAC Rule 231(g). Finally, there would be no additional mailing costs (first class and certified mail, return receipt requested) for contractors who choose to use electronic transmission.

**CAC Regulations 231, 232 and 232.01., 232.12 as currently found in Article 10, entitled "Required Apprentices On Public Works Contract," would be *deleted*.**

**Why this change is needed:** All of these current regulations deal exclusively with rules which previously governed "proceedings for review of civil penalty or debarment of contractors under Labor Code sections 1777.5 and 1777.7." (See, current Rule 232.01(a).) All of these rules have been supplanted by the Legislature's recent amendment of provisions in Labor Code sections 1777.5 and 1777.7 which **transferred authority** for enforcement of civil penalties against public works contractors to the Labor Commissioner alone, and **implemented the transfer** of those obligations to the Labor Commissioner. Additionally, **debarment** of contractors for certain violations of Sections 1777.5 now falls within the exclusive authority of the Labor Commissioner under Labor Code section 1777.1(d), effective January 1, 2015.

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## California Apprenticeship Council Resolution on Employment of Apprentices on Public Works

The apprenticeship community has requested guidance from the California Apprenticeship Council with respect to the employment and training of registered apprentices on public works projects. After careful consideration, the Council confirms that Labor Code section 1777.5 requires public works contractors to employ apprentices who are training under apprenticeship standards that include the specific work processes that will be performed by the contractors' journey-level employees, and to assign apprentices only work that is included in the apprenticeship standards under which the apprentices are training. Apprentices on public works cannot be assigned work other than that which is stated in the work processes of the apprenticeship standards under which the apprentices are training.

This resolution was affirmed at the regular California Apprenticeship Council meeting held on October 30, 2014.