INITIAL STATEMENT OF REASONS
for
PROPOSALS TO AMEND REGULATIONS WITHIN SUBCHAPTER 3, ARTICLE 6, AND SUBCHAPTER 4 OF CHAPTER 8, TITLE 8, CALIFORNIA CODE OF REGULATIONS, SECTIONS 16404 THROUGH 16439.

The Director of the Department of Industrial Relations ("Director") proposes to adopt and amend regulations governing (1) certified payroll records, and (2) the approval and operation of Labor Compliance Programs by state and local agencies involved with public works construction contracts. The existing regulations are found in Subchapter 3, Article 6 and Subchapter 4 of Chapter 8, commencing with Section 16400, of Title 8 of the California Code of Regulations. The proposed amendments will add new regulations and change several existing regulations.

GENERAL INFORMATION

The laws regulating public works projects require among other things that contractors and subcontractors pay employees not less than the general prevailing wage rates as determined under the Labor Code. These laws are enforced by the State Labor Commissioner and by state and local agencies operating their own labor compliance programs. A number of state laws adopted in the past seven years require local agencies and school districts to establish and enforce a labor compliance program as a condition for obtaining certain construction bond funds or for exercising specified contractual authority. Most notably, Labor Code sections 1771.7 and 1771.8 require labor compliance programs for public works projects funded by the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004 or the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002. Several hundred new labor compliance programs sought and obtained approval as a result of these laws, including numerous private third party entities that were approved to operate labor compliance programs under contract with public agencies.

In 2004, the Labor Compliance Program Regulations were amended to address these new statutory requirements and other changes in the laws governing prevailing wage enforcement. Those amendments included specific rules governing third party programs. However, as was noted in the Final Statement of Reasons for the 2004 amendments, certain proposals from that rulemaking were withdrawn in order to allow for more study and discussion with interested persons. The withdrawn proposals focused on monitoring and enforcement responsibilities and rules governing the withholding of contract payments.

This rulemaking now puts forth revised proposals covering those subjects and other matters suggested both by the regulated public and the Department's own regulatory experience. Statistics derived from annual reports show that the programs created since the 2002 legislation have been expensive and inefficient in accomplishing their principal task of enforcing prevailing wage laws. These proposals are intended to bring greater clarity and specificity to existing monitoring and enforcement standards in response to concerns expressed by program administrators, interest groups, legislators, and other agencies that a lack of specificity and measurable perform-

ance standards has led both to confusion and lax enforcement by labor compliance programs.

PROPOSED AMENDMENTS

The Director proposes to adopt and amend sections within Subchapter 3, Article 6, and Subchapter 4 of Chapter 8, Title 8 of the California Code of Regulations. These proposals add sections 16404, 16430, and 16435.5 and amend several other sections within Subchapter 4 (sections 16421 – 16439). The following statements apply to all of the proposed amendments unless otherwise indicated.

- The Director of Industrial Relations relied in part on the following two items to help inform his thinking on these proposals: (1) Legislative Analyst's Office Analysis of the 2007-08 Budget Bill, Capital Outlay Chapter (February 21, 2007) -- section addressing labor compliance programs; and (2) opinion letter from the Fair Political Practices Commission (FPPC) obtained during 2003-4 rulemaking concerning conflict of interest provisions of the Political Reform Act as they pertain to contract consultants to local government.

- In accordance with Government Code section 11346.45, which directs state agencies to involve affected parties in public discussions regarding proposed regulations, the Director circulated draft proposals among representatives of construction trades contractors and labor organizations, labor compliance monitors, labor compliance programs, school districts, trainers, and other governmental agencies with a particular interest in labor compliance programs. Written comments received from the following persons and entities also helped inform the Director's thinking on these proposals: Association of Labor Compliance Professionals, Los Angeles Unified School District, Coalition for Adequate School Housing, CalLCP.com, Contractor Compliance & Monitoring, Inc., Diane Ravnik, State Building and Construction Trades Council, Department of Transportation (Caltrans), Department of Finance, San Diego County Office of Education, The Solis Group, Yuba City Unified School District Labor Compliance Program, Construction Employers Association, and North Valley Labor Compliance.

- The Department consulted legal authorities (case law, statutes, and regulations) to ensure that these proposals meet applicable legal standards.

- No reasonable alternatives were identified by the Director of Industrial Relations, nor have any reasonable alternatives been identified and brought to the attention of the Director as of the time these amendments were proposed.

- None of the proposals mandates the use of specific technologies or equipment.

- These proposals directly impact only those state and local agencies that choose to operate a labor compliance program, including those that do so in order to obtain certain bond funding for public works construction projects or exercise contracting authority that requires having a labor compliance program.

- The Director believes that these proposals impose no mandates, costs, or savings that are different or distinct from what the Legislature has required by statute.

- The general purpose of these amendments is to clarify and provide more specific guidance through set standards concerning the proper operation of labor compliance programs. The proposals would also establish more uniform and consistent reporting procedures to improve the Department's and public's ability to monitor performance.

The purpose of proposed new *section 16404* is to expressly authorize the electronic maintenance and submission of certified payroll records, subject to specified requirements to insure these records meet the same standards for content, legibility, reliability, and disclosure that govern paper forms. The reason and necessity for the new section is to clarify the availability and facilitate the use of modern technology for prevailing wage law enforcement.

The purposes of the proposed amendments to *section 16421* are to (1) establish a specific required frequency for the furnishing of certified payroll records and clarify language concerning the use of DIR forms [subpart (a)(3)]; (2) provide a specific statement of the overall policies that governing proper enforcement by labor compliance programs [proposed subpart (e)]; (3) specify that contractors cannot use a labor compliance program's failure to comply with the regulations as an excuse or defense for not paying the prevailing wage [proposed subpart (f)]; and (4) include the legal duty to provide workers with itemized wage stubs as a topic to be covered in pre-job conferences for public works contractors [Appendix A, proposed item (14)]. The reason and necessity for items (1), (2), and (4) is to address recurring performance and enforcement problems based on failure to collect certified payroll records on a timely basis, failure to understand and distinguish a labor compliance program's state law enforcement role from a public agency's other objectives on a public work construction project, and the failure to enforce a fundamental requirement applicable to all private employments that provides precise information about how a worker's paycheck was calculated. The reason and necessity for item (3) is to clarify that a labor compliance program's performance obligations are separate and distinct from a contractor's obligation to pay prevailing wages, and the program's failures may not be used to defeat a worker's right to obtain proper wages.

The purposes of the proposed amendments to *section 16422* are to (1) change the title to clarify that it pertains to labor compliance programs rather than just awarding bodies; (2) delete the terms "initial" and "final" as modifiers of "approval" to conform to proposed changes in other regulations; (3) limit the notice requirement in subpart (e) to "in house" labor compliance programs operated by an awarding body; and (4) add three specific duties to be imposed on third party programs upon revocation. The reason and necessity for the first three items is to clarify language and applicability, including for purposes of consistency with other proposed amendments. The reason and necessity for the fourth item is to establish a means for ensuring that the revocation of a third party program does not compromise the rights of awarding bodies or workers on public works projects where that program was performing monitoring and enforcement.

The purposes of the proposed amendments to *section 16423* are to (1) change the title to more accurately reflect the breadth of current statutes requiring labor compliance programs and

include an updated list of such statutes in a separate Appendix; (2) clarify when an awarding body must have an approval for its own labor compliance program; (3) limit the duty to communicate required notices to just the Director but require that the Director have notice before an awarding certifies to another entity that it has contracted with an approved program; (4) clarify that that the Director confers formal approval on sponsoring entities as labor compliance programs rather than on methodologies; and (5) clarify that multiple approvals are *not* needed for different types of projects that require a labor compliance program. The reason and necessity for the amendments is to clear up ongoing confusion over when approvals are required by statute and what an approved program is. The prior notice requirement in item (3) addresses a recurring problem discovered through State Allocations Board audits of school districts that had certified their compliance with the labor compliance program requirements of Labor Code section 1771.7 in order to obtain bond funds but in fact had neither established nor contracted with an approved labor compliance program. Requiring advance notifications should forestall erroneous certifications which otherwise can result in an obligation to repay millions in construction bond funds.

The purposes of the proposed amendments to *section 16424* are to eliminate the word "initial" as a modifier of "approval" and make another minor grammatical change. The reason and necessity for deleting "initial" is to conform to proposed changes in other sections.

The purposes of the proposed amendments to *section 16425 are* to (1) eliminate the term "initial" as a modifier of the term "approval" to conform to other proposed changes; (2) improve the understandability of the introductory language concerning factors considered in an application for approval; (3) increase the Director's time to grant or deny approval from 30 to 60 days; (4) eliminate the prescribed automatic expiration of initial approvals; (5) expressly authorize the Director to grant interim or temporary approval, subject to reasonable conditions for removing the interim or temporary designation, with conforming changes on program lists; and (6) specify that awarding bodies that intend to contract out their own labor compliance programs services to other awarding bodies must seek and obtain approval as third party programs under section 16426. The reason and necessity for these amendments is to clarify approval requirements; to give the Director adequate time to fully and fairly evaluate applications; to revise and eliminate extension language in anticipation of eliminating the two-step initial and final approval process which is currently on hiatus; to expressly state the Director's authority to place conditions or limitations on approval status as warranted in individual circumstances; and to clarify when awarding body labor compliance programs must seek approval as third party programs (which requires additional information to address staffing capacity and potential conflicts of interest).

The purposes of the proposed amendments to *section 16426* are to: (1) delete the word "initial" as a modifier of the term "approval" to conform to other proposed changes; (2) improve the understandability of the introductory language concerning factors considered in an application for approval; (3) increase the Director's deadline to grant or deny approval from 30 to 60 days; (4) eliminate the automatic prescribed expiration of initial approvals; (5) require applicants to list individuals who will be subject to Political Reform Act requirements and identify where those persons will be filing FPPC disclosure forms; and (5) expressly authorize the Director to grant interim or temporary approval, subject to reasonable conditions for removing the interim or temporary designation, with conforming changes on program lists. The reason and necessity for

the amendments is to clarify approval requirements; to give the Director adequate time to fully and fairly evaluate applications; to revise and eliminate extension language in anticipation of eliminating the two-step initial and final approval process which is currently on hiatus; to require specific information about how the program intends to comply with FPPC requirements in light of widespread misunderstanding about the applicability of those requirements; and to expressly state the Director's authority to place conditions or limitations on approval status as warranted in individual situations.

The purpose of the proposed amendments to *section 16427* is to eliminate the existing two-step approval process, in which programs are granted "initial" approval for eleven months and then reevaluated and granted "final" approval, and replace it with a single "approval" conferred on all programs and another optional status of "extended authority" for which a program may apply after three years of operation. The reason and necessity for the amendments is to bring the approval system more in line with current practice and reality. The original regulatory system was adopted in 1992, with the expectation that awarding bodies would adopt labor compliance programs to handle all prevailing wage responsibilities on an indefinite basis, and that the limited period of "initial" approval would serve as a probationary period, after which programs would be reevaluated for "final" approval. Following more recent legislation requiring labor compliance programs for specific public works projects, the number of programs has grown dramatically (from about a dozen to over 400), but many operate only on a limited basis or for finite periods of time. Due in part to staffing limitations, the Director has accepted no new applications for final approval since 2003, and instead has been extending initial approvals en masse for six months at a time. The current benefits of "final approval" are automatic approval of forfeitures if not determined by the Labor Commissioner within 20 days and the possibility of agreeing to different procedures for securing approvals of forfeitures or submitting reports. These benefits can be conferred upon programs with "extended authority" while dispensing with the need for most other programs to seek approval a second time.

The purposes of the proposed amendments to *section 16428* are to: (1) expressly state that approval may be revoked for non-compliance with governing statutes, regulations, or specific conditions of approval; (2) expressly authorize the Labor Commissioner to conduct prevailing wage law enforcement investigations and to serve as prosecutor in revocation proceedings; and (3) specify that the revocation provisions may not be read as affecting temporary or interim approval or as restricting the Director's authority to impose conditions or restrictions in lieu of revocation. The reason and necessity for these amendments is to clarify and eliminate confusion over the existence of these authorities by setting them forth in express terms.

The purpose, reason, and necessity of the proposed amendments to *section 16429* is to delete the words "initial or final" to conform to proposed changes in other regulations that would eliminate the two-step approval process for most programs.

The purpose of the new proposed *section 16430* is to require awarding bodies to take cognizance of and comply with requirements of the Political Reform Act as they pertain to labor compliance program personnel. The reason and necessity for this proposal is to address widespread misunderstanding and noncompliance with these requirements, including and especially

the failure of awarding bodies to require contract senior level compliance officers to file FPPC conflict of interest disclosure forms. In subpart (b), the Director is proposing, but has not yet implemented, the possibility of providing an alternative filing location for these forms so that compliance officers in private programs can file in one place rather than with every local agency or district for which they provide services.

The purpose of the proposed amendments to *section 16431* is to clarify and make more specific what is required to be reported in annual reports. Although the current requirements call for descriptions and summaries, many programs provide one-word answers for each of the enumerated items, making the reports essentially meaningless. The principal difference between the two proposed options is that Option A encourages programs to use suggested report forms on the Department's web site (as many now do), while Option B would make the use of those forms mandatory unless a program has final approval or extended authority and the Director has agreed to a different reporting format. The reason and necessity for the proposals is stated in new proposed subpart (c), which is to provide information "in sufficient detail to afford a basis for evaluating the scope and level of enforcement activity of the Labor Compliance Program." The need for better and more consistent data has been impressed upon the Department by inquiries from other agencies and branches of government as well as by the Department's own experience. A specific reason and necessity for having mandatory forms is to assure that all necessary information is uniformly reported, facilitating understanding and consistent evaluation of all reports.

The purpose of the proposed amendments to *section 16432* is to set forth specific minimum standards governing the monitoring of payroll records, investigations of complaints and potential violations, and audits to determine the extent of violations. Option A was developed in the context of the existing regulatory framework, while Option B restates these requirements in greater detail in a manner that more closely reflects the Labor Commissioner's terminology and approach to investigations and audits. Option B would require more frequent reviews of payroll records (applying the minimum monthly review requirement found in Labor Code section 1771.7 (c) to all labor compliance programs), and would require weekly site visits. The purpose of the last subpart in both options is to (1) provide contractors with notice and an opportunity to respond if appropriate before requesting the Labor Commissioner to approve a forfeiture, and (2) specify the circumstances under which a labor compliance program may resolve a prevailing wage violation without first requesting approval from the Labor Commissioner.

The reason and necessity for most of the proposed amendments to *section 16432* is to (1) provide minimum standards so that programs do not devote bond money to unnecessary activities; and (2) address the lack of meaningful enforcement reflected in annual reports by outlining the specific techniques that are necessary for effective enforcement of the prevailing wage laws. Some programs seem to believe that their principal duty is to verify the use of the correct rates for reported work (which can be accomplished with software) without considering whether the work is classified or reported properly, although the Department's own experience shows that most significant violations arise out of improper classification of workers or misreporting of hours worked and wages paid. Some programs are also invisible to workers or indistinguishable from construction managers or other job-site personnel, which results in prevailing wage complaints continuing to come in to the Labor Commissioner despite the existence of a labor compli-

ance program. On-site visit and interviewing requirements are needed to make program personnel visible and accessible to workers and also to perform certain kinds of monitoring, including ensuring that required notices are posted and that the work being performed matches what the contactor is reporting. The reason and necessity for a new subpart regarding notice to contractors and settlement authority is to clarify the appropriateness of giving contractors notice to allow for early resolution of violations where appropriate, and also to clarify the widely ignored need to request the Labor Commissioner's approval when assessing wages and penalties, while allowing for settlement of certain kinds of cases without seeking the Labor Commissioner's approval, provided the labor compliance program documents its action.

The purposes of the proposed amendments to s*ection 16434* are to clarify the role of public works coverage determinations in providing guidance for enforcement decisions, to elaborate upon and clarify specific enforcement duties with respect to apprentices employed on public works, and to require enforcement records to be maintained that will enable the Department to evaluate the program's enforcement activities and will also be available in the event of related legal action. The purposes for additional and more specific proposals in Option B are to (1) provide a specific procedure for handling complaints based on the practice of the Labor Commissioner; (2) require enforcement records to be maintained for each public work project on which the program has enforcement responsibilities, with a suggested reporting format (Appendix D); and (3) specify that the Labor Commissioner may provide, sponsor, or endorse training for labor compliance programs with specified components. The reason and necessity for all of the amendments is to add clarity and specificity on matters for which programs and other interested persons have complained there currently is a lack of guidance (or inaccurate guidance with respect to public works coverage determinations). The reason and necessity for addressing apprenticeship responsibilities is to clarify what issues remain within the prevailing wage enforcement responsibilities of a labor compliance program as distinct from the enforcement responsibilities of the Division of Apprenticeship Standards. The reason and necessity for a rule requiring the maintenance of enforcement records is so a program can demonstrate, and the Department can evaluate, compliance with the duty to enforce the prevailing wage law in a manner consistent with the practice of the Labor Commissioner (subpart (a)), and to preserve pertinent records for so long as they may be relevant to a wage claim within any applicable statute of limitation. The reason and necessity for a complaint procedure is that no written standards presently exist, and many programs do not recognize a responsibility to respond to complaints, which results in those complaints being redirected to the Department, other agencies, and the Legislature. The reason and necessity for the proposal on training is to provide assurance to programs and the public that training will be made available and will address specified subjects, thus enabling program personnel to acquire and maintain necessary levels of expertise.

The purposes of the amendments to s*ection 16435* are to (1) remove and separate withholding for wage underpayments into a separate regulation to avoid confusion between the two different authorities for contract withholding and the differing requirements for each; (2) make grammatical changes to add clarity to existing language; (3) specify that withholding due to delinquent or inadequate payroll records does not require the Labor Commissioner's approval and place limits on the amount of contract payments that should be withheld due to delinquent or inadequate payroll records; (5) require that the contractor and subcontractor, if applicable, get

written notice, with prescribed contents, when contract payments are withheld for this reason; (6) specify that withholding for this reason must cease when the proper records are supplied; and (7) specify that any assessment of penalties under Labor Code Section 1776(g) for inadequate or delinquent records does require the Labor Commissioner's approval. The reason and necessity for the amendments are to address areas of ongoing confusion over program responsibilities, as well as to address potentially excessive and disruptive use of withholding authority that may be disproportionate to the violation and may place undue financial hardship on contractors while leaving them with no practical means of recourse.

The purposes of the new s*ection 16435.5* are to (1) remove and separate withholding for wage underpayments into a separate regulation to avoid confusion between the two different authorities for contract withholding and the differing requirements for each; and (2) specify that withholdings due to wage underpayments and other violations do require the Labor Commissioner's. The reason and necessity for the amendments are to address ongoing confusion over the two different authorities for contract withholding and clarify that there must be Labor Commissioner approval for contract withholding due to prevailing wage underpayments and penalties.

The purposes of the amendments to s*ection 16436* are to (1) restate the definition of "forfeitures;" (2) delete an unnecessary enumeration of statutory violations that cause wage underpayments; (3) allow for automatic Labor Commissioner approval of small forfeitures (less than $1,000); and (4) specify that all other forfeitures require the Labor Commissioner's approval as specified in section 16437. The reason and necessity for the amendments are to address confusion over what constitutes a forfeiture requiring the Labor Commissioner's approval and to reduce the bureaucratic load of requesting and approving small forfeitures.

The purposes of the amendments to s*ection 16437* are to: (1) include with a request for approval of forfeiture the amount of funds being held in retention, which may be relevant to statute of limitations issues, an audit summary or audit enumerating amounts of wages and penalties due, and revised information regarding the program's approval status; (2) make non-substantive grammatical corrections to subpart (d); and (3) make revisions in subpart (a)(9) and subpart (e) to conform with other proposals to change from "initial" and "final" approvals to "approval" and extended authority. The reason and necessity for the amendments are to provide additional information that is required for the Labor Commissioner to approve, and the program to be able to enforce, a prevailing wage violation, and to provide other clarifying and conforming changes in the regulatory language.

The purpose of the amendments to s*ection 16439* is to specify and clarify that the labor compliance program has full authority to settle the wage and penalty assessment and any resulting enforcement proceeding once a forfeiture has been approved by the Labor Commissioner, unless the Labor Commissioner has intervened into the enforcement proceeding. The reason and necessity for the amendments is to address ongoing confusion over whether programs are required to return to the Labor Commissioner for permission or approval before settling a case for less than the approved amount of the forfeiture.