

TITLE 8. DEPARTMENT OF INDUSTRIAL RELATIONS

NOTICE OF PROPOSED RULEMAKING

The Acting Director of the Department of Industrial Relations (“Director”) proposes to adopt new regulations setting forth procedures and requirements for registering as a public works contractor pursuant to Labor Code section 1725.5. These proposals include procedures for appealing a determination to deny registration or to revoke a previously-approved registration. The Director proposes to adopt these regulations as a new Article 7 (commencing with section 16410) of subchapter 3, of chapter 8, of division 1 of title 8 of the California Code of Regulations.

PUBLIC HEARING, WRITTEN COMMENT PERIOD, AGENCY CONTACTS

Public Hearing:

A public hearing will be held on the proposals as follows:

April 2, 2019 at 10:00 a.m.
Ronald Reagan State Building
First Floor Auditorium, South Tower
300 South Spring Street
Los Angeles, California

At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed action described in the Informative Digest. The Director requests but does not require persons who make oral comments to submit a written copy of their testimony.

Written Comment Period:

Any person or authorized representative may submit written comments relevant to the proposed regulatory action to the contact person listed below. The written comment period closes on **April 2, 2019, at 5:00 p.m.**, and the Director will only consider comments received by that deadline. Written comments may be submitted in person at the hearing *or* by letter, facsimile, or e-mail as follows:

DIR, Office of Special Counsel
1515 Clay Street, 17th Floor
Oakland, California 94612
Facsimile: (510) 622-3265
E-mail: PWCRregulations@dir.ca.gov

Agency Contacts:

Inquiries concerning the proposed regulations may be directed to:

Primary Contact:

John Cumming, Special Counsel
Office of the Director
Department of Industrial Relations
455 Golden Gate Avenue, Suite 9516
San Francisco, California 94102
(415) 486-2038

Back-up Contact:

Isaac S. Nicholson
Department of Industrial Relations
Office of the Director, Legal Unit
1515 Clay Street, Suite 701
Oakland, California 94612
(510) 286-1216

AUTHORITY AND REFERENCE

Authority: Labor Code Sections 54, 55, 1742(b), and 1773.5.

Reference: Section 1094.5, Code of Civil Procedure; and Sections 1725.5, 1742, 1771.1, 1771.3, 1771.4, and 1777.1, Labor Code.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Overview:

Chapter 1 of Part 7 of Division 1 of the Labor Code (commencing with Section 1720) regulates employment on public works projects, including the duty of contractors and subcontractors to pay their workers not less than the general prevailing wage rates as determined by the Director. California has regulated employment on public works since the 19th century and first adopted prevailing wage requirements in 1931. Since that time, the laws governing public works have been modified and refined many times to ensure proper monitoring and enforcement of prevailing wage and related requirements.

In 2014, the legislature adopted SB 854 (Stats. 2014, Chap. 28), which, among other things, established a new requirement for contractors and subcontractors to be registered with the Department of Industrial Relations in order to qualify to bid or work on a public works project. A new Labor Code Section 1725.5 set forth the qualifications and fees for registering, and new Sections 1771.1 and 1771.4 set forth related monitoring, notice, and enforcement requirements. In 2017, the legislature adopted SB 96 (Stats. 2017, Chap. 28), which, among other things, amended these laws to increase the annual registration fee, provide a limited exception to the registration requirement for small projects, and authorize the Labor Commissioner to assess penalties against contractors and awarding bodies who use unregistered contractors or subcontractors in violation of the statutory requirements.

Upon the adoption of SB 854 in 2014, the Department of Industrial Relations established an online public works contractor registration system (located at <http://www.dir.ca.gov/Public-Works/Contractor-Registration.html>) administered by the Labor Commissioner's Office. The online system asks for basic contact and licensing information and requires the registrant to certify to meeting each of the eligibility criteria in paragraph (2) of subdivision (a) of Labor Code

Section 1725.5. The system also enables the registrant to calculate and pay the required fee, including any penalty that may be due as a result of a delayed renewal or having worked on a public work without first being registered. The number of active registrations as of June 1, 2018 was over 30,000.

The purpose of these proposals is to standardize and make more specific the registration process as well as to provide specific requirements and procedures for suspending penalties or refunding fees, for denying registration or revoking a previously-approved registration, and for hearing and deciding appeals from a determination to deny or revoke a registration. These proposals have been designed to be consistent with the online registration system that has been in use since July of 2014 and to afford basic due process rights to persons who are aggrieved by any determination to deny or revoke a registration.

Proposed Regulations

The Director proposes to adopt nine new regulatory sections (16410 through 16418) covering the public works contractor registration process, registration requirements, and notice and appeal rights. Proposed section 16410 sets forth basic registration requirements. Subsection (a) sets forth the requirement to register online. Subsection (b) specifies that registration is for all or part of a fiscal year. Subsection (c) specifies that registration is required for each separately licensed business entity or name that will engage in public work. Subsection (d) specifies that the registration requirement applies to any person employed as an independent contractor on public work. Subsection (e) provides for each registrant to be assigned a unique registration number. Subsection (f) makes these same requirements generally applicable to registration renewals.

Proposed section 16411 addresses information required at the time of registration. Subsection (a) specifies that the registration must include the applicant's legal and business name or names, the legal and physical address, the type of business entity, and the principal owners or others with authority to act for business. Subsection (b) requires the Contractors State License Board (CSLB) license number if applicable or other applicable licensing information. Subsection (c) authorizes the Labor Commissioner to accept a registrant's certification of compliance with certain requirements in Labor Code Section 1725.5(a)(2). Subsection (d) authorizes the Labor Commissioner to request independent proof of compliance with the Section 1725.5(a)(2) criteria or to consult other records to verify compliance.

Proposed section 16412 address registration fees. Subsection (a) sets forth a fee schedule in accordance with the fees and penalties specified in Labor Code Section 1725.5. Subsection (b) specifies that the fees may be modified annually as provided in Labor Code Section 1771.3. Subsection (c) authorizes the Director to suspend or delay application of certain penalties for good cause. Subsection (d) specifies when the required fee is deemed received for purposes of registration. Subsection (e) gives the Labor Commissioner discretion to refund penalty assessments in individual cases under specified circumstances. Subsection (f) gives the Labor Commissioner discretion in individual cases to cancel a duplicate registration under specified circumstances and refund the fees paid for that registration.

Proposed section 16413 covers the denial of registration. Subsection (a) specifies that registrations that are incomplete or submitted without a fee shall be denied without prejudice to

submitting a later application with complete information and the required fee. Subsection (b) specifies that a registration shall be denied based upon not meeting the statutory requirements or not paying the required fees, including applicable penalties. Subsection (c) provides 30 days within which to appeal either a notice of denial received at the conclusion of the online registration process or any written notice of denial provided subsequently to the applicant. Subsection (d) requires the appeal to be in writing, transmitted in accordance with section 16415, and to include information identifying the determination being appealed and the grounds for appeal. Subsection (e) requires a hearing on the appeal to be set within 30 days and authorizes the hearing to be conducted by telephone or other electronic means with the applicant's consent. Subsection (f) authorizes the Labor Commissioner to reconsider and for good cause to rescind the denial of registration to an otherwise qualified applicant up until 48 hours before the scheduled hearing.

Proposed section 16414 covers revocation of a previously-approved registration. Subsection (a) specifies three grounds for revoking registration: (1) no longer meeting the requirements of Labor Code Section 1725.5; (2) not meeting the requirements of Section 1725.5 at the time of the most recent registration or renewal or making a false certification; and (3) knowingly or negligently subcontracting with an unregistered subcontractor in violation of the registration laws in the preceding 12 months. Subsection (b) requires the Labor Commissioner to send by email or regular mail a written notice of revocation that specifies the grounds for revocation and identifies or describes the evidence that supports the determination. This subsection also requires the Labor Commissioner to send copies of the notice to the awarding body and to the contractor or subcontractor who engaged the subject contractor or subcontractor. Subsection (c) provides for revocation to become effective at the end of the tenth day following issuance of the notice, unless the notice has been appealed prior to that deadline. Subsection (d) sets forth the right to appeal the notice and requires the appeal to identify the notice being appealed and grounds for appeal. This subsection also provides 30 days in which to appeal, while further specifying that an appeal prior to the 10-day deadline in subsection (c) will stay the revocation until after the appeal is heard and decided. Subsection (d) requires an appeal hearing to be set within 30 days, with priority given to appeals filed within 10 days of the notice, and authorizes the hearing to be conducted by conference call or other electronic means with the appealing party's consent.

Proposed section 16415 covers the transmission of an appeal. Subsection (a) requires the appeal to be sent by email or first class mail to the Director's Lead Hearing Officer, with a copy sent simultaneously to the Labor Commissioner. Subsection (b) specifies the addresses to use for email transmission, and subsection (c) specifies the addresses to use when transmitting by first class mail. Subsection (d) requires the appellant or appellant's representative to include contract information and the preferred means for being reached for purposes of scheduling a hearing.

Proposed section 16416 covers the hearing and the decision on the appeal. Subsection (a) requires an impartial hearing officer to be appointed in accordance with section 17204 of the Director's Prevailing Wage Hearing Regulations (sections 17201 and following of title 8). Subsection (b) requires a hearing notice to be sent to the appellant or representative and the Labor Commissioner at least ten days prior to the hearing, and it also authorizes the hearing officer to first schedule a telephone prehearing conference to facilitate scheduling and other procedural matters. Subsection (c) makes sections 17240, 17241(b) and (c), 17242 through 17249, and 17252 of the Director's Prevailing Wage Hearing Regulations applicable to the hearing of these appeals. Sub-

section (d) requires the hearing officer to issue a written decision within five days after the hearing on a revocation that has been stayed and within ten days after the hearing on any other kind of denial or revocation. This subsection also specifies that a decision upholding the denial or revocation of registration shall specify the duration of any disqualification to register. Subsection (e) specifies that the hearing officer's decision shall be the final decision of the Director and subject to appeal only by petitioning for a writ of administrative mandate in the superior court within 45 days. This subsection also specifies that the procedures in sections 17262(d) and 17263 of the Director's Prevailing Wage Hearing Regulations shall apply to such cases.

Proposed section 16417 provides that an order of debarment made by the Labor Commissioner pursuant to Labor Code Section 1777.1 shall result in an automatic denial or revocation of registration and not be subject to notice or appeal rights other than the ones specified in Section 1777.1 and the corresponding regulations in title 8 governing debarments

Proposed section 16418 specifies that the rights, requirements, and procedures specified in this set of regulations do not apply to stop orders or penalty assessments that the Labor Commissioner may issue pursuant to Labor Code Section 1771.1.

Anticipated Benefits:

These proposals will clarify existing registration requirements and will create regularized, ascertainable, and enforceable standards for procedures currently handled on an ad hoc basis. They also provide a cheap and efficient administrative appeals process that protects the due process interests of contractors and subcontractors who are denied registration or whose previously-approved registrations are revoked.

Comparable Statutes and Regulations:

Federal law requires the payment of prevailing wages and adherence to other minimum employment standards for work performed on federal public works projects through the Davis-Bacon Act, 40 U.S.C. section 3141 - 3148, the Contract Work Hours and Safety Standards Act, 40 U.S.C. sections 3701 - 3708, and related statutes that incorporate these requirements into specific federal programs. (See 29 C.F.R. § 5.1 for a list of 60 such laws.) A majority of states have little Davis-Bacon laws, and some local entities, including the City and County of San Francisco, have their own prevailing wage ordinances. However, these laws all have distinct requirements in terms of the types of work covered, how prevailing wages are determined, and how prevailing wage requirements are enforced.

California's Public Works Contractor Registration program is a state-specific program that was modeled in part on similar programs that existed in the states of New Jersey and New Mexico. These proposed regulations are based on California's statutes and comparable due process procedures governing prevailing wage enforcement appeals (at sections 17201 and following of title 8) that have been in use for over 15 years. These proposed regulations are not inconsistent or incompatible with any other existing state regulations (or any pending proposals of which the Director is aware).

DISCLOSURES REGARDING THE PROPOSED ACTION

The Director has made the following initial determinations with respect to these proposed regulations and invites further comment on these specific impacts.

Mandates on Local Agencies or School Districts: The proposed regulations do not impose mandates on local agencies or school districts. These proposals govern only the public works contractor registration process, including notice requirements and appeal rights of contractors who are denied registration or whose previously-approved registrations are revoked.

Costs or Savings to Any State Agency: The proposed regulations will impose minor costs on the Department of Industrial Relations to implement and administer the specified notice and appeal procedures. The online registration process required by these regulations was developed in 2014 to implement the statute, and has been updated to accommodate renewals and penalties and to improve features. From the time the registration system was implemented, the Department has, on an informal basis, provided for the adjustment and refund of registration fees that were paid in error, for delayed enforcement of renewal penalties, and for incomplete applications, including applications with delayed fee payments, to be denied without prejudice and completed at a later time. The Department has not formally revoked any registrations, except in conjunction with debarments under a separate statute and regulatory process; and to date, registration violations have been addressed through the collection of statutory penalties assessed against contractors who want to continue to work on public works projects.

The Director anticipates that the Labor Commissioner will begin issuing revocation notices in a limited number of cases where contractors are found to be working in violation of registration requirements or to have lied on their applications, and where other remedies (including stop orders and penalty assessments) would not address the situation. The Director assumes most notices will be served by email at no material cost, but that 25 to 50 notices per year may be prepared and served by first class mail at an average cost of \$3.00 per mailing (three notice copies at \$1.00 each). Based on experience with other licensing programs and the fact that revocation only prevents a contractor from working on public works, and only for a limited time period, the Director anticipates only 15 to 25 appeals per year, with only 5 to 10 going to full hearing and decision, and fewer than half of these requiring first class mailing. The cost of conducting hearings is estimated at 20 hours of staff time (Labor Commissioner's office and Director's hearing officer) at a cost of \$75 per hour, totaling \$1500 per hearing, plus material costs of \$50 for printing and mailing of notices and decisions when required. These are all absorbable costs for the Department using existing staff, including hearing officers, who already perform comparable functions for prevailing wage enforcement appeals under Labor Code Section 1742. With regard to potential court appeals from a denial or revocation of registration, the proposed regulations do not create or alter any existing rights other than setting a time limit for such appeals.

No other state agency is involved in administering the requirements of these proposed regulations, and consequently they will impose no costs on any other state agency.

Reimbursable Costs Imposed on Local Agencies or School Districts: None.

Other nondiscretionary costs or savings imposed on local agencies: None.

Costs or savings in federal funding to the state: None.

Initial Determination of Economic Impact on Business Directly Affecting Business, including Ability to Compete: The Director has made an initial determination that these proposals will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. These proposals do not alter existing statutory public works contractor registration requirements, but simply clarify those requirements and extend formal due process rights and protections to ensure that the requirements are administered fairly and consistently.

Known Cost Impacts on Representative Private Person or Business: The private sector impact of these proposals is limited to contractors and subcontractors in construction and related trades who seek to register as public works contractors, including those denied registration or whose previously-approved registrations are revoked. The appeal procedures created by these proposals can be utilized without material cost by receiving and sending required notices electronically and by authorizing any hearing to be conducted by conference telephone call. Assuming an aggrieved party opts for first class mail, the estimated cost is \$3.00 per mailing in an estimated 10 appeals per year, or an aggregate cost of \$30.00 per year. If a contractor or subcontractor chooses to have an in-person hearing, they would also incur travel costs to a nearby location. All other costs associated with an appeal, including attorney's fees, would be incurred in any type of challenge to a Department action, and are not added costs imposed by these proposals.

Creation, Elimination, or Expansion of Jobs or Businesses, and benefits to health and welfare (results of Assessment under Government Code section 11346.3 (b)): The Director has made initial determinations that these proposals will not (1) affect the creation or elimination of jobs within the State of California; (2) affect the creation of new businesses or the elimination of existing businesses within the State of California; or (3) affect the expansion of businesses currently doing business within the State of California. As noted at page 5 above under "Anticipated Benefits," these proposals will benefit the public health and welfare in general and public works contractors in particular by clarifying existing registration requirements, creating regularized, ascertainable, and enforceable procedural standards, and providing a cheap and efficient administrative appeals process that protects the due process interests of contractors and subcontractors who are denied registration or whose previously-approved registrations are revoked.

Reporting Requirements (finding under Government Code Section 11346.3 (d)): None.

Effect on Housing Costs: None.

Effect on Small Business: The Director has made an initial determination that these proposals will not affect small business. Labor Code Section 1725.5 requires public works contractors, most of whom are small businesses, to register with the Department of Industrial Relations, and the statute prescribes certain criteria to qualify for registration. Contractors who fail to qualify, fail to pay statutorily-prescribed fees, or whose previously-approved registrations are revoked due to a violation of registration of requirements may challenge the denial or revocation. These proposals clarify registration requirements and create specific notice and appeal procedures for denials and revocations. Small businesses will incur no new or distinct burdens nor will they derive any new or distinct benefits from these proposals.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code Section 11346.5(a)(13), the Director must determine that no reasonable alternative considered by the Director or that otherwise has been identified and brought to the Director's attention that (1) would be more effective in carrying out the purpose for which the action is proposed; (2) would be as effective as the proposed action and less burdensome to affected private persons; or (3) would more cost-effective to affected private persons and equally effective in implementing the underlying statutes. The only alternatives of which the Director was aware when developing these proposals are (1) doing nothing, in which case notices and appeals and questions about program requirements would be handled on an ad hoc basis at likely greater costs to affected parties, or (2) adopt different and likely more formal and cumbersome procedures than those being proposed, also at greater cost to all concerned. The Director invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

AVAILABILITY OF INFORMATION PERTAINING TO THE PROPOSED ACTION

The Director will have this Notice, the Initial Statement of Reasons, the text of the proposals, as well as the entire rulemaking file available for inspection and copying throughout the rulemaking process at the following location:

Office of the Director of Industrial Relations
Assistant to Special Counsel
1515 Clay Street, 17th Floor, Oakland, California 94612

Website:

The principal rulemaking documents, including this notice, the Initial Statement of Reasons, and the text of the proposed regulations, may also be accessed through the Department's website at www.dir.ca.gov/Rulemaking/DIRProposed.html.

Availability of Changed or Modified Text:

After holding the hearing and considering all timely and relevant comments received, the Director may adopt the proposed regulations substantially as described in this notice. If modifications are proposed that are sufficiently related to the originally proposed text, the modified text (with changes clearly indicated) will be made available to the public and posted on the Department's website for at least 15 days before the regulations are adopted as revised. Requests for copies of any modified regulations may be sent to PWCRregulations@dir.ca.gov or to any of the contact persons or locations listed in this notice. Written comments on any proposed modifications will be accepted for 15 days after the date on which they are made available.

Availability of the Final Statement of Reasons and the Rulemaking File:

Upon completion, the Final Statement of Reasons will be available and the entire rulemaking file may be obtained from the Office of the Director at the address indicated above.