

INITIAL STATEMENT OF REASONS
FOR
PROPOSED AMENDMENTS TO REGULATIONS GOVERNING
EMPLOYMENT OF APPRENTICES ON PUBLIC WORKS

The California Apprenticeship Council (“Council”) proposes to amend sections 202, 205, 227, 228, 229 and 230.1 of Title 8 of the California Code of Regulations in order to clarify and make more specific the requirements for employing registered apprentices on public works. The Council also proposes to repeal sections 231 through 232.7 of Title 8, which governed complaints, determinations, and appeals on public works apprenticeship violations until rendered obsolete by 2012 and 2014 amendments to Labor Code Section 1777.7.

BACKGROUND AND SUMMARY

The Council and the Division of Apprenticeship Standards (“DAS”) oversee and regulate apprenticeship programs in the State of California. The Council’s responsibilities include adopting regulatory standards governing the approval and operation of building and construction industry trades and firefighter programs, consistent with statutory requirements. The DAS’s responsibilities include approving and auditing programs, in accordance with standards adopted by the Council, to give workers skills and training needed to obtain well-paying jobs and provide employers with a highly skilled and experienced workforce.

This rulemaking focuses on the employment of apprentices on public works, which is governed by requirements and procedures set forth in Labor Code Sections 1777.5, 1777.6, and 1777.7. The Council’s regulatory authority with respect to these requirements is set forth in subdivision (g) of Section 1777.7, as follows. “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.” In other words, the Council establishes the rules on how to interpret and comply with statutory requirements.

Hearing Regulations: Historically, the DAS enforced the statutory and regulatory requirements governing the employment of apprentices on public works through a penalty assessment and appeals process prescribed in prior versions of Section 1777.7. However, a 2012 amendment to that section (Stat. 2012, ch. 46, § 96 (SB 1038)) shifted these enforcement responsibilities from DAS to the Office of the Labor Commissioner, also known as the Division of Labor Standards Enforcement (“DLSE”), which historically had authority to enforce all other public works requirements in the Labor Code. The same amendment eliminated the separate appeal process for DAS determinations in Section 1777.7, and required instead that determinations and appeals follow the same procedures prescribed for civil wage and penalty assessments and appeals (for prevailing wage violations) in Labor Code Section 1742. In 2014, Section 1777.7 was rewritten

to more closely resemble the prevailing wage enforcement and appeal procedures, including a requirement for DLSE to issue a civil wage and penalty assessment in accordance with Labor Code Section 1741, when determining and assessing penalties for public works apprenticeship violations. (Stat. 2014, ch. 297 § 3 (AB 2744).)

These statutory amendments to Labor Code Section 1777.7 made the Council's regulations on hearings, and appeals from DAS determinations obsolete. Accordingly, the Council proposes to repeal those regulations at sections 232 through 234.2 of title 8. Most of these regulations are wholly superseded by the statutory amendments, making the repeal of those regulations "changes without regulatory effect" as defined in 1 Cal. Code Reg. section 100(a)(6). In addition, while repeal of 8 Cal. Code Reg. section 231, is not compelled by the legislative changes, the Council believes that section is unnecessary and redundant to other statutory and regulatory provisions. Finally, other regulations need to be amended in order to cross-reference the prevailing wage hearing regulations at 8 Cal. Code Reg. section 17201 et seq. rather than the obsolete hearing regulations being repealed through this rulemaking.

Definitions and Notice Requirements: Labor Code Section 1777.5 encourages contractors and subcontractors to employ registered apprentices on public works projects, including by authorizing payment of apprentice wage rates in lieu of the substantially higher journey level prevailing wages. To qualify for the lower wage rates, apprentices must be registered with DAS, training under DAS-approved apprenticeship standards (i.e. with a DAS/CAC-approved program), and at specified minimum ratio of apprentices to journeyworker. Apprentices may only be employed at the work of the craft or trade to which they are registered.

A contractor who employs workers in an "apprenticeable craft or trade" can have apprentices dispatched to a public works project by applying "to any apprentice program in the craft or trade that can provide apprentices to the site" or by obtaining them from an approved program that already covers the contractor's work. The statute defines "apprenticeable craft or trade" as "a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council." (§ 1777.5(d).)

Subdivision (e) of Section 1777.5 requires contractors to send public works contract award information to apprenticeship programs that can supply apprentices to the work site. Notice requirements and time limits are spelled out in greater detail in 8 Cal. Code Reg. section 230. The following section 230.1, sets forth, among other things, requirements and time frames for requesting a program to dispatch apprentices to a job site.¹ A large number of penalty

¹ Contractors typically use the DAS Form 140 to comply with section 230, and the DAS Form 142 to comply with section 230.1, and the form numbers sometimes serve as a shorthand designation for the required notification procedures.

assessments under Labor Code Section 1777.7 arise from violations of these requirements, which have the effect of depriving apprentices of training opportunities on public works.

This rulemaking seeks to address specific issues that have come to light over the last several years, that make these requirements difficult to enforce and are attributable to a lack of clear or specific regulatory standards. The statutory definition of “apprenticeable craft or trade” offers no guidance on what craft or trade an apprentice belongs to when performing a particular type of work and what wage must be paid to that apprentice on a public works project. As consequence, the Council, on October 30, 2014, adopted a [Resolution on Employment of Apprentices on Public Works](#), which interpreted Section 1777.5 as requiring that the work process in which the apprentice is engaged be part of the apprenticeship program’s approved training standards, in order to qualify for the lower apprentice wage rate.² The Council now proposes to do by adopting regulatory definitions of “apprenticeable occupation,” “work process” and “registered apprentice,” as well as more specific standards on the use of apprentices. In addition, the Council proposes to delete a definition of “worker” in 8 Cal. Code Reg. section 228 that is both unnecessary and potentially in conflict with the broader understanding of that term in prevailing wage law.

DLSE has also run into difficulty enforcing the contract award information requirements in 8 Cal. Code Reg. section 230 and the request for dispatch of apprentice requirements in section 230.1, due to the lack of instructions in section 230 on how that notice must be transmitted, and the absence of any standards in either regulation concerning what constitutes proof that the required notice or request was actually sent to the intended recipient. These proposals address those concerns by establishing clear service and record retention requirements for both items, and by giving the contractor or subcontractor the burden of showing the required item was sent.

Conforming amendments: One section that the Council proposes to amend, 205, is the subject of a separate Council rulemaking to implement application, reporting, and evaluation requirements adopted in SB 56 and AB 235. The proposed amendments from that rulemaking included here for informational purposes and to avoid the possibility of the Council adopting inconsistent versions of these sections at the conclusion of this rulemaking.

SPECIFIC PURPOSE AND BASIS OF PROPOSED ACTIONS

² A worker who does not meet the prescribed standards for receiving apprentice wages must be paid the journey level prevailing wage, regardless of qualifications or experience, consistent with the public works law’s overall objectives of protecting and benefiting workers on public works project and in turn providing the public with the skills and efficiency of well-paid workers. (*Lusardi Construction v. Aubry*, 1 Cal.4th 976 at 987 (1992).

Section 202. Investigations, Holding of Hearings, and Determinations.

The Council proposes to correct the cross-reference in subsection (c) of this section so that it will refer to the prevailing wage hearing regulations that govern public works enforcement cases and from which procedures may be borrowed for other kinds of complaint hearings, in lieu of the obsolete hearing regulations that are being repealed as part of this rulemaking.

Section 205. Definitions.

The Council is adding a sentence to the definition of “apprenticeable occupation” in subsection (c) of this section, for the purpose of expressly tying this definition to work processes contained in the approved apprenticeship standards under which apprentices are training. The Council is also adding two new subsections (p) and (q) to provide regulatory definitions for the terms “work process” and “registered apprentice.” All three terms are used in the Council’s proposed restatement of substantive requirements in section 227(c) (below) to clarify and delimit how apprentices may be employed on public works projects. Specifically, in order to comply with the Labor Code’s public works apprenticeship requirements and qualify for payment of apprentice wages on public works, the registered apprentices must be “training under apprenticeship standards that include the specific work processes that will be performed by the contractors’ journey-level employees,” and contractors may only assign those apprentices to “work that is included in the apprenticeship standards under which [they] are training.” (Council 10/30/14 Resolution on Employment of Apprentices on Public Works.)

The underlying purpose of these regulatory definitions and the restatement of substantive requirements in section 227(c) is to ensure that the work performed by apprentices on public works is a genuine part of their training program leading to journey-level status, and conversely that apprentices will not be used as a source of cheap labor for work processes that are not part of their structured and approved training program. Labor Code Section 1777.7(g) authorizes the Council to adopt interpretive standards by regulation, and a regulation is needed to require and enforce the Council’s interpretation rather alternative interpretations to which the statute might be susceptible in determining work processes that can be performed by apprentices.

As part of this rulemaking, the Council is including other revisions to this section that have been proposed in the Council’s separate rulemaking to implement SB 56 and parts of AB 235. These revisions include updating the term “journeyman” to “journeyworker” in subsection (a) and recognizing variations of these terms that may appear in other regulations but are intended to have the same meaning. The Council is correcting citation errors in subsections (i) and (m). Finally, the Council has proposed a new definition of “acceptable electronic format” (proposed new subsection (o)) so that apprenticeship programs in the building and construction trades industry will know how to comply with Labor Code Section 3075.7’s requirement to report specified data “in an electronic format acceptable to the [DAS].”

Section 227. Scope and Application.

The Council’s proposed restatement of this section is drawn from and intended to implement Labor Code Section 1777.7 (g), which states that the interpretation of the substantive statutory requirements for employment of apprentices on public works “shall be in accordance with the regulations of the California Apprenticeship Council.” The Council notes, however, that procedural requirements are now governed by the prevailing wage assessment and appeals statutes and corresponding hearing rules, as specified in Labor Code Section 1777.7(c).

Section 228. Definitions [for purposes of public works apprenticeship regulations].

The Council proposes to delete the definition of “worker” in this section because it is different from and more limited than the statutory definition of “worker” in Labor Code Section 1723 that governs the Labor Code’s public works requirements as a whole.³ The definition in subsection (g) of this regulation does not apprentices and it excludes licensed sole proprietors who are considered “workers” under Labor Code Section 1723 when performing work that is subject to prevailing wages. (*See* Labor Code Section 1774.) This regulatory definition does not appear to serve any distinct purpose, and it should be eliminated in order to avoid any confusion with the statutory definition.

Section 229. Service, Notice, and Computation of Time.

The Council proposes to make minor edits to the existing text of subsections (a) through (c) to clarify their meaning and applicability. A new subsection (d) is proposed to set forth specific service, record retention, and burden of proof requirements that will apply both to contract award notices under section 230 and requests for dispatch of apprentices under section 230.1. Section 230 currently provides no information on how the required notice must be transmitted to the applicable apprenticeship program, and neither section requires copies of the notices to be retained and who has the burden to prove the notice was sent as required. Not surprisingly, these omissions are often the focal point of litigation over whether the requirements were violated -- Was the notice sent? How was it sent, when, and by whom? Where was it sent? Was it received and by whom? – with conflicting memories and testimony providing no clear answers and often frustrating DLSE’s efforts to enforce the requirements. The proposed service requirements are drawn from the existing language of section 230.1(a) and provide clear instructions on how to serve the notices. The proposed record retention requirements are designed to provide the necessary “paper trail” to show what was sent, as well as when, where, by whom, and to whom, bringing an end to testimonial disputes over unavailable documentation. The burdens of retaining these records, providing copies to the Labor Commissioner (*i.e.* DLSE) on request, and proving the required notices were sent are placed on the contractor, consistent

³ Labor Code Section 1723 states in full, “‘Worker’ includes laborer, worker, or mechanic.”

with their existing legal obligations to provide the notifications and their control over when and how that happens.

Finally, the Council also proposes to add a new subsection (c) in order to clarify that requests for review of a civil wage and penalty assessment are governed by the prevailing wage hearing regulations at 8 Cal. Code Reg. § 17201 et seq. rather than this section.

Section 230.1. Employment of Apprentices on Public Works.

The Council is proposing to restate and elaborate on the substantive requirements for employing apprentices in subsection (c). The purpose of this restatement, which is drawn from the Council's 10/30/14 Resolution on the Employment of Apprentices on Public Works, is to set forth in express language that when apprentices are employer and paid apprentice rates on public works, they must be training under apprenticeship standards that include the specific work processes being performed by the contractors' journey-level employees, and the apprentices only be assigned to work included in the apprenticeship standards under which they are training. The underlying purpose is ensure that the work performed by apprentices on public works is a genuine part of their training program leading to journey-level status, and conversely that apprentices will not be used as a source of cheap labor for work processes that are not part of their structured and approved training program. Labor Code Section 1777.7(g) authorizes the Council to adopt interpretive standards by regulation, and a regulation is needed to require and enforce the Council's interpretation rather alternative interpretations to which the statute might be susceptible in determining work processes that can be performed by apprentices.

Sections 231. Complaints.

This section sets for standards and procedures for complaints leading up to DAS determinations and enforcement of public works apprenticeship violations. The Council believes these standards and procedures are obsolete following amendments to Labor Code Section 1777.7 that transferred enforcement authority to DLSE and required use of the enforcement and appeal procedures in Labor Code Sections 1741 and 1742. Accordingly, the Council proposes to repeal this regulation.

Sections 232 through 232.70. Determinations, Appeals, and Hearings on Public Works Apprenticeship Violations.

These regulations implement an enforcement and appeals process that was formerly prescribed by Labor Code Section 1777.7, but then supplanted by 2012 and 2014 amendments to Section 1777.7 that require use of the enforcement and appeals procedures in Labor Code Sections 1741

and 1742 instead. In other words, these regulations effectively have been repealed by statute, and the Council proposes to remove them from Title 8.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES RELIED ON

No technical, theoretical, or empirical studies were relied upon in drafting these proposals.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

These proposals do not require contractors, the state, or anyone else to use special technologies or equipment.

ECONOMIC IMPACT ASSESSMENT

These proposals will have three distinct sets of impacts. First, the repeal of obsolete appeal and hearing regulations will have a minor but positive effect on parties to enforcement cases and their representatives, particularly anyone new to this regulatory scheme who may be confused by the continued presence of these obsolete items. One of the objectives of the 2012 amendments to Labor Code Section 1777.7, was to eliminate a separate set of appeal procedures for public works apprenticeship violations that was almost an exact duplicate of the procedures prescribed for prevailing wages under Labor Code Section 1742. This rulemaking will now bring that objective to its final fulfillment by repealing the corresponding set of nearly four dozen regulations, and leaving parties and practitioners with only one set of rules to learn and follow. The Council believes the monetary cost impacts associated with these repeals are negligible.

The second set of impacts derives from the proposed restatement of substantive requirements for employing registered apprentices on public works. The use of apprentices promotes public policy and benefits apprentices by providing meaningful training opportunities that lead to better paying jobs and provide society with a highly skilled and trained workforce. A contractor who provides these training opportunities in the specified manner also derives a benefit in terms of being able to pay lower wage rates to registered apprentices. Conversely, apprentices who are not registered or not employed in the required manner must be paid substantially higher journey-level prevailing wages for whatever type of work they perform on a public works project, regardless of their individual skill levels, experience, or quality of work.

These proposals close a loophole where the contractor and its journey-level workers were performing work that they were qualified to do in what is considered an “apprenticeable craft or trade,” but its registered apprentices, obtained from a CAC/DAS-approved program, were used for work processes that were not part of their approving training program. However, compliance with the CAC’s interpretation, as embodied in these proposals, could have these potential impacts. (1) A contractor using qualified journey-level workers would need to pay higher

journey level wages to apprentices engaged in work processes that were not part of their approved training program and might be liable for penalty assessments for violating apprenticeship requirements; (2) alternatively, the contractor might request apprentices to be dispatched from an approved program that does provide training in the required work process; (3) a different specialty contractor that is affiliated with an apprenticeship program that provides the requisite training could be obtained for the work; or (4) the program supplying apprentices to the contractor could seek to amend its training standards to include the work process in question.

This is a particularized problem that only occurs in a limited number of settings. For a contractor described above, the most likely and least costly option would be the third one of entering into a subcontract with a specialty trades contractor (which, according to DIR public works project registration records, it does on some projects). That would increase the potential cost for apprentices on the project by about 28%, which is the average difference between higher paid apprentice wages and lower paid apprentice wages in the Bay Area (according to DIR's published general prevailing apprentice wage rates). For a major public works general contractor, i.e. one with public works revenue of \$200 million per year, that performs projects with overlapping trade components, such as pipefitter, operating engineer, carpenter, electrician, etc., could result in an annual cost increase of up to \$212,000, assuming the contractor is making the maximum use of apprentices on those projects (one of every five hours), and in all instances using laborer apprentices rather than pipefitter, operating engineer, carpenter or electrician apprentices. The further assumptions going into this calculation are that approximately 25% of the company's gross revenue (\$50 million) is for profit and overhead, with the other 75% (\$150 million) devoted to direct construction costs; that 70% of direct construction costs (\$105,000,000) would pay for labor; that the Contractor would self-perform 30% of the labor (\$31,500,000); and that 20% of the labor would be for pipefitters (\approx \$6,300,000 that could vary according to relative costs of other trades). While 20% of the hours could be devoted to apprentices, they would only represent 12% of the cost (\$756,000), since the average of apprentice rates is only about 55% of journeylevel rates. Applying the projected cost increase of 28% to this overall labor cost results in a cost impact of approximately \$212,000. As the same time, this cost impact may be offset by increased productivity, and hence a lower number of hours, for apprentices being trained and supervised in the specific work processes they are asked to perform.

The Council does not believe the actual impacts would be this high for contractors facing comparable scenarios, i.e. who obtain apprentices from a program that is affiliated with journeylevel workers on the project but does not provide training in a specific work process the apprentices will perform. Far more commonplace and costly for public works contractors is paying the full journeylevel prevailing wage to all workers, including trainees (cost option No. 1 above) because they do not have a relationship or supervision and training structure in place to accept registered apprentices from an approved program.

The third set of impacts derive from the addition of service and record retention requirements and a burden of proof standard for DAS Form 140 notices of contract award information under section 230 and DAS Form 142 requests for dispatch of apprentices under section 230.1. These requirements impact all registered public work contractors who work in apprenticeable crafts or trades. Of the up to 30,000 or more public works contractors who may be registered with the Department of Industrial Relations pursuant to Labor Code Section 1725.5 in a given year, the Council estimates that approximately 98% may be engaged in apprenticeable crafts or trades on contracts of \$30,000 or more (*see* Labor Code § 1777.5(o), setting this threshold for enforcing public works apprenticeship requirements). It is important to note, however, that these contractors are already subject to the notification and request requirements in regulatory sections 230 and 230.1, and these proposals merely require contractors to maintain a record of what they have done. Public works construction involves a myriad of notice and recordkeeping requirements, and the vast majority of responsible contractors already follow the better practice of monitoring and keeping track of their own compliance – which in this case means retaining copies of two forms, the DAS Form 140 and DAS Form 142, and accompanying proof of service documents. These proposals are directed at the outliers, estimated at no more than 1-2% who fail to track compliance or who falsely allege compliance but claim a mailed notice was never received or falsely reported missing. The cost to the contractors of retaining copies of two additional items is negligible in light of the volume of paperwork, including certified payroll records, that must already be retained and tracked for prevailing wage compliance. However, the discipline of retaining such records will save the cost of being assessed for violations.

The proposed record retention requirements and burden of proof standards should also result in cost savings for DLSE and the state by taking away the ability of parties to make arguments over whether, when, or how a notice was sent or not sent. DLSE receives between 1500 and 2000 public works apprenticeship complaints annually. This type of complaint over a dispatch violation in which no records were kept, is a very minor subset of no more than about 10 complaints per year, but is more difficult to prove or contest without records. Eliminating that problem would save DLSE approximately \$17,000 annually, based on the average investigator handling 60 new complaints a year and the median cost of a DLSE investigator being \$100,000 per year -- saving about \$50,000 over the course of the current and next two fiscal years. Moreover, once a contractor is assessed penalties for one of these notice violations or learns of someone else assessed penalties for these violations (at the rate of \$100 per calendar day or \$300 per day for repeat violations under Labor Code Section 1777.7(a)(1)), that contractor likely would take needed steps to improve compliance and avoid repeat violations.

These proposals will have a corresponding benefit to contractors and the state in clarifying requirements for the employment of apprentices on public works and reducing appeals and litigation of enforcement cases involving the issues addressed in these proposals. In the context of the full range of Labor Code requirements and contractor compliance issues on public works,

these are minor items that will have no measurable impact in terms of the number of contractors performing public works or the volume of public works being performed. In light of and based on this overall assessment, the Council has determined that these regulatory proposals will not create a significant number of new jobs or businesses, eliminate a significant number of existing jobs or businesses, or significantly expand business in California. The proposals also are not expected to have an adverse impact on small business.

CONSIDERATION OF ALTERNATIVES

The Council undertook an extensive years-long process to develop and refine these proposals. While the repeal of appeal and hearing rules rendered obsolete by statutory amendments to Labor Code Section 1777.7 are “changes without regulatory effect” (1 Cal. Code Reg. § 100(a)(6)), other proposed amendments involved policy choices. The Council believes it has made choices that best promote the public policies underlying the requirements for employing apprentices on public works and that will reduce unnecessary litigation over whether required notices have been sent. The Council is not aware of alternatives to these proposals that either would be equally effective but less costly for affected parties or more effective without increasing costs. The Council invites the public to provide comments and suggestions regarding alternatives at the scheduled public hearing on these proposals or during the written comment period.