

State of California
Department of Industrial Relations

OFFICE OF THE LABOR COMMISSIONER



PUBLIC WORKS MANUAL

California Labor Commissioner Julie A. Su

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455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
Tel: (415) 703-4810 Fax: (415) 703-4807

MAILING ADDRESS:
P. O. Box 420603
San Francisco, CA 94142-0603

**Julie A. Su**

*California Labor Commissioner
Office of the Labor Commissioner*

May 2018

It is with great pride that the Office of the Labor Commissioner releases this updated Public Works Manual. This Manual has been revised to reflect the most recent changes in prevailing wage laws, including:

- Enhanced penalties for violations of Public Works Contractor Registration requirements, including penalties on awarding agencies who use unregistered contractors and the power of the Labor Commissioner to issue a stop order (SB 96); and
- Additional streamlining of investigative tools and processes to effectively combat prevailing wage theft while educating the public and law-abiding contractors to create a more level playing field and promote economic justice for the middle-class.

This Manual is designed to be used by the Labor Commissioner's Office to ensure consistent, timely, and accurate enforcement of the law statewide and is also intended as an educational tool for our public works stakeholder community.

My gratitude and acknowledgement for their hard work and tremendous expertise go to the following staff, who have brought this updated Manual to fruition: Acting Assistant Chief Susan Nakagama and the Legal Unit's Tom Fredericks, Bill Snyder, Luong Chau, and Lance Grucela.

I hope you find this useful.

A handwritten signature in black ink that reads 'Julie A. Su'.

Julie A. Su
State Labor Commissioner

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1. **Introduction**

1.1

This Public Works Manual is designed as a training tool for the Division of Labor Standards Enforcement (“Labor Commissioner Office”) staff to better understand the Labor Commissioner’s functions in carrying out its responsibilities to conduct investigations and undertake enforcement actions under the Public Works Chapter of the California Labor Code (LC § 1720-1861). Those statutory provisions are collectively referred to in the Manual as the prevailing wage laws. The Manual relies in part on judicial and administrative decisions whenever case-specific resolutions of legal issues are available. It is not intended as a comprehensive summary of existing law or duly promulgated regulations, or a pronouncement of the Labor Commissioner’s enforcement policies, with regard to prevailing wage compliance. Rather, the purpose of the Manual is to familiarize staff assigned to prevailing wage enforcement with processes and historical issues which have arisen, and may continue to arise, as investigations are conducted and enforcement actions are initiated, and administratively reviewed, under the statutory scheme. To the extent the Manual’s text might be viewed as purporting to establish rules of general application, but fails to present interpretations as a restatement or summary of existing laws, regulations or judicial and administrative decisions, it is invalid and should not be relied upon for that purpose. The Manual’s text, standing alone, is therefore not binding on the enforcement activities of the Labor Commissioner, or the Department of Industrial Relations (“DIR”), in subsequent proceedings or litigation, or on the courts when reviewing DIR proceedings under the prevailing wage laws.

2. **Who Does the Law Protect?**

2.1 **"Workers", Defined:**

Except for public works projects of one-thousand dollars (\$1,000) or less, Labor Code § 1771 requires that "all workers employed on public works" be paid at not less than the "general prevailing rate of per diem wages." Labor Code § 1772 provides that workers employed "by contractors or subcontractors in the execution of any contract for public work" are deemed to be so employed. Labor Code § 1723 defines a worker as including "a laborer, worker, or mechanic." A standard dictionary definition of a "worker" is a "person engaged in a particular field or activity." (Random House Dictionary of the English Language) The issue presented in the prevailing wage context is the inclusiveness of the term "workers." In *Lusardi Construction Co. v. Aubry* (1992) 1 Cal. 4th 976, 987, the California Supreme Court interpreted section 1771 and found that "By its express terms, this statutory requirement is not limited to those workers whose employers have contractually agreed to pay the prevailing wage; it applies to all workers employed on public works." This interpretation is consistent with the U.S. Department of Labor's position (41 U.S. Op. Atty. Gen. 488) that any individual who personally performs skilled or unskilled labor in construction work is protected under the Davis-Bacon Act (40 U.S.C. § 276(a), the federal prevailing wage law) even though he or she is not an "employee." These authorities support the position that protected workers under Labor Code § 1771 include not only employees, but also extends to other workers performing work covered by the prevailing wage laws.

2.2 **Statutory References To Workers "Employed" On Public Works, Explained:**

Labor Code §§ 1771 and 1772 refer, respectively, to workers "employed" by contractors or subcontractors "in the execution of any contract for public work" or "employed" on public works. Courts long ago recognized that "employed" may

mean several things including, for example, a person whose services are “utilized” in furtherance of the business of another, notwithstanding the technical absence of an employer-employee relationship, or a person “engaged in” a task for another under contract, or orders to do it. (*Johnston v. Farmers Mutual Exchange of Calhoun, Inc.*, 218 F. 2d 588 (5th Cir. 1955); *United States v. Morris* (1840) 39 U.S. 463, 475.) These authorities, likewise, support the position that prevailing wage requirements are not limited to employees of a contractor or subcontractor. Moreover, public works contractors may not avoid the prevailing wage requirement by “contracting out” all or a portion of the work performed to subcontractors. In *O. G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3^d 434, 463, the Court explained that the prevailing wage laws apply to “all” workers employed on public projects, and that the legislation cannot be “frustrated” because of the subcontracting of work required to be done under the terms of the prime contract.

2.3 **Title or Status of Worker Irrelevant.**

A worker’s title or status with the employer is not determinative of an individual’s coverage by the prevailing wage laws. What is determinative is whether the duties performed by the individual on a public works project constitute covered work. An individual who performs skilled or unskilled labor on a public works project is entitled to be paid the applicable prevailing wage rate for the time the work is performed, regardless of whether the individual holds a particular status such as partner, owner, owner-operator, independent contractor or sole proprietor, or holds a particular title with the employer such as president, vice-president, superintendent or foreman. For example, a “working” foreman or a “working” superintendant – one who performs labor on the project in connection with supervisory responsibilities – is entitled to compensation at not less than the prevailing rate for the type of work performed. Of course, if the person holding

the status or titles as listed above does not actually perform covered work on a project, his or her presence alone does not trigger the prevailing wage requirement.

2.4 **“Public Works” Defined:**

Labor Code §§ 1720-1720.6 contain within their provisions all of the basic facts and conditions which must be present for a work of improvement to fall within the statutory definition of “public works.” If those facts and conditions do not exist, the statutory enforcement mechanism available to the Labor Commissioner under Labor Code § 1741 cannot be used to recover unpaid wages or penalties authorized by the prevailing wage laws. It is therefore necessary for staff to determine at the earliest possible stage of assignment to an investigation whether the required facts and conditions appear to be present. The four separate statutory sections identify four somewhat different scenarios which comprise the public works model:

2.4.1

Labor Code § 1720(a) defines public works as construction and other enumerated construction-related tasks (including “maintenance,” see LC § 1771) done under contract and paid for in whole, or in part, with public funds. Maintenance is defined at 8 CCR § 16000.

2.4.2

Labor Code § 1720.2 extends the public works definition to include construction work done under private contract if (1) the construction contract is between private persons, and (2) the property subject to the construction is privately owned, but more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision thereof, and either (1) the lease was entered into prior to the construction contract, or (2) the lease was entered into

before completion of the construction if the work was performed according to plans or criteria furnished by the state.

2.4.3

Labor Code § 1720.3 extends the public works definition to the hauling of refuse from a public works site to an outside disposal location. The Director has opined in a web-posted Public Works Coverage Determination (see Section 2.7 of this Manual) that “refuse” is defined as “the worthless or useless part of something,” and that if, for example, dirt excavated from trenches dug for a public works contract is being put to a useful purpose, such as the covering of garbage at a landfill, it would not be considered “refuse” under those circumstances. (Public Works Case No. 2001-005 (Trash/Debris Removal from Railroad Rights-of-Way and Facilities, Blue and Green Lines).)

2.4.4

Labor Code § 1720.6 extends the public works definition to private contracts to include construction, alteration, demolition, installation, or repair work done under private contract if (1) the work is performed in connection with the construction or maintenance of renewable energy generating capacity or energy efficiency improvements, and (2) is performed on the property of the state or a political subdivision thereof, and either (1) 50 percent of the energy generated is purchased by the state or political subdivision thereof, or (2) the efficiency improvements are primarily intended to reduce energy costs that would otherwise be incurred by the state or political subdivision.

2.5

“Public Funds” Defined:

Labor Code § 1720(b) defines at some length what the statutory language “paid for in whole or in part out of public funds” means. The six examples of public funds are listed specifically at Labor Code § 1720(b), subdivisions (1)-(6), and are

not limited to the payment of money (subd. (b)(1)) by the state or a political subdivision directly to a public works contractor. The five other categories include work performed (subd. (b)(2)) by the state or political subdivision; transfer of an asset (subd. (b)(3)) for less than fair market price; fees or costs reduced, waived, or forgiven (subd. (b)(4)) by the state or political subdivision; money loaned (subd. (b)(5)) by the state or political subdivision to be repaid on a contingent basis; and credits applied (subd. (b)(6)) by the state or political subdivision against repayment obligations.

2.5.1

Public funds include state, local and/or federal monies. (8 CCR § 16000.)

2.5.2

Federally Funded or Assisted Projects.

State prevailing wage rates when higher are required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort. The state prevailing wage laws cannot be applied to a project, however, which is under the complete control of the federal government. (8 CCR § 16001(b); *Southern Cal. Labor Management Committee v. Aubry* (1997) 54 Cal.App.4th 873, 886.)

2.6

Director's Authority To Determine Coverage.

The California Code of Regulations authorizes the Director of the Department of Industrial Relations to determine coverage under the prevailing wage laws regarding either (1) a specific project or (2) type of work to be performed. (8 Cal. Code of Regs § 16001(a) (1).) The Director's authority to determine coverage of projects under the prevailing wage laws is quasi-legislative, and a final determination on any appeal is subject to judicial review pursuant to California Code of Civil Procedure section 1085. (8 Cal. Code Regs § 16002.5(c).) The Director's determination in any specific inquiry brought forth under the DIR's

regulatory coverage process (8 CCR §§ 16001-16002.5) is subject to judicial review. The Labor Commissioner is not required to file with the Director a request to determine coverage under the regulatory process before proceeding with its investigations, although it is not precluded from doing so. Under circumstances where the Labor Commissioner issues a Civil Wage and Penalty Assessment (“CWPA”) before any coverage determination dealing with that same project has been requested, any affected contractor or subcontractor may timely request a review hearing to contest a CWPA under Labor Code § 1742, and a claim that either the project or the type of work performed was not subject to the prevailing wage laws may be raised in the administrative review proceedings. (See Sections 4.7 – 4.9 for specifics on CWPAs.)

2.7

Posted Public Works Coverage Determinations.

The DIR posts on the DIR website, letters and decisions on administrative appeal issued by the Director in response to requests to determine coverage under the prevailing wage laws made pursuant to 8 CCR § 16000(a). The determinations are indexed by date and project, as compiled by DIR staff. The Director’s Office of Policy, Research, and Legislation (“OPRL”) maintains this portion of the website, and the determinations can be accessed by clicking on the topic Public works coverage determinations, which is listed on the OPRL homepage. The rates may also be accessed from the public works page on the Labor Commissioner’s website. Investigators typically review any applicable determinations as a research tool and for general guidance when confronted with factual situations which may raise issues of whether a particular project or type of work is subject to, or excluded from, coverage under the Labor Code.

2.7.1 **Coverage Determinations are Project-Specific.**

Beginning in 2001, the Director designated certain coverage determinations as “precedential” under Government Code § 11425.60. Pursuant to § 11425.60, only those coverage determinations designated by the Director as precedential could be specifically relied upon by the DIR in making future coverage determinations. In 2007, as a result of case law developments, the Director decided to no longer rely upon § 11425.60 and ceased designating any public works coverage determinations as precedential. Thereafter, the coverage determinations are considered by the DIR to be advice letters directed to specific individuals or entities about whether a specific project or type of work is public work subject to prevailing wage requirements. According to the DIR, the coverage determination letters present the Director’s interpretation of statutes, regulations and court decisions on public works and prevailing wage coverage issues, and provide advice current only as of the date each letter is issued. See Department of Industrial Relations’ Important Notice to Awarding Bodies and Interested Parties Regarding The Department’s Decision to Discontinue Use of Precedent Determinations at [http://www.dir.ca.gov/OPRL/Notices/09-04-2007\(pwcd\).pdf](http://www.dir.ca.gov/OPRL/Notices/09-04-2007(pwcd).pdf).

2.8 **Exclusions From Prevailing Wage Requirements.**

At least five specially defined categories of work are excluded from prevailing wage requirements, either under the Labor Code itself, or duly promulgated regulations.

2.8.1 **Volunteers.**

Labor Code § 1720.4 provides that the prevailing wage laws do not apply to work performed by a “volunteer.” “Volunteer” is defined as “an individual who performs work for civic, charitable, or humanitarian reasons, for a public agency or

corporation qualified under Section 501(c)(3) of the Internal Revenue Code as a tax-exempt organization, without promise, expectation, or receipt of any compensation for work performed.” (Labor Code § 1720.4(a)(1).) The exclusion does not apply to work performed by anyone other than those persons specifically falling within the definition. Pressure or coercion, direct or implied, from an employer, or any form of compensation for work performed results in the loss of volunteer status. (Labor Code § 1720.4(a)(1)(A) and (B).) Additionally, a volunteer may not be employed for compensation at any time in the construction, alteration, demolition, installation, repair, or maintenance work performed on the same project. (Labor Code § 1720.4(a)(1)(C).) However, an individual may receive reasonable meals, lodging, transportation, and incidental expenses or nominal nonmonetary awards without losing volunteer status if, in the entire context of the situation, those benefits and payments are not a substitute form of compensation for work performed. (Labor Code § 1720.4(a)(1)(B).)

2.8.2 **Public Agency’s Own Forces.**

Labor Code § 1771 expressly provides that the prevailing wage requirement is “not applicable to work carried out by a public agency with its own forces.” (See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794.) The California Attorney General has opined that the public agency exclusion for its own forces applied to actual “employees” of a county, and there is no published judicial decision which extends the exclusion to non-employees. (35 Op.Atty.Gen. 1.) As with all specific exemptions from a minimum wage law, exclusionary language must be narrowly construed.

2.8.3 **Janitorial Services.**

The definition of “maintenance” found at 8 CCR § 16000 requires payment of wages at the prevailing rate and includes a variety of specific examples of work

related to the “preservation, protection and keeping of publicly owned or publicly operated” facilities. The prevailing wage requirement does not apply, however, to “[j]anitorial services of a routine, recurring or usual nature.” (8 CCR § 16000.) This exception to the prevailing wage requirements applies to routine and recurring janitorial services, such as washing, vacuuming, litter removal, etc. at a public facility. The exclusion does not apply to non-routine clean-up which, for example, might occur during, or at the conclusion of, a public works construction project.

2.8.4 **Guards.**

The “maintenance” definition also excludes from the prevailing wage requirements “[p]rotection of the sort provided by guards, watchmen, or other security forces.” (8 CCR § 16000.)

2.8.5 **Landscape Maintenance Work At ‘Sheltered Workshops.’**

The “maintenance” definition also excludes this particular and unique type of work from the prevailing wage requirements. “Sheltered workshop” is defined as a nonprofit organization, licensed by the Labor Commissioner, employing mentally and/or physically disabled workers. (8 CCR § 16000.)

2.9 **Chartered Cities.**

Under Article XI, Section 5 of the California Constitution, a “chartered city” may exempt those of its public works projects which are completely within the realm of the chartered city’s “municipal affairs” from the requirements of the prevailing wage laws. (*City of Pasadena v. Charleville* (1932) 215 Cal. 384.) Cities in California are classified as “general law cities” (organized under the general laws of the state) or “chartered cities” (organized under a charter). (Govt. Code §§ 34100, 34101, 34102.) There are approximately 120 California cities organized

under a charter. The courts have identified three factors in evaluating whether a particular public works project is a “municipal affair” of a chartered city, or a matter of statewide concern. If the project would be viewed as a statewide concern, the prevailing wage requirements will apply. (*So. Cal. Roads Co. v. McGuire* (1934) 2 Cal.2d 115.) The factors to be considered are: (1) the extent, if any, of extra-municipal control over the project; (2) the source and control of the funds used to finance the project; and (3) the nature and purpose of the project. (Public Works Case No. 2006-016.) It should also be noted that the California Supreme Court has held that consideration of these judicially created factors for determining whether a project is a matter of statewide concern for prevailing wage purposes cannot be ignored merely because the Legislature expresses its own view in legislative enactments that prevailing wages constitute a matter of statewide concern. (*State Building and Construction Trades v. City of Vista* (2012) 54 Cal. 4th 574.) Although application of the factors in any particular investigation is fact driven, and interpretation of the judicially created factors has historically been the source of much litigation, the Labor Commissioner will typically review prior coverage decisions of the Director dealing with the topic in reaching a conclusion whether the exemption applies or not. A straightforward example of when the exemption was properly claimed is found on the OPRL website in Public Works Case No. 2006-016 (New Public Library, City of Lindsay.)

2.10

University Affairs.

This limited exemption from the prevailing wage laws is applicable only to public works of improvement awarded by the Regents of the University of California. In some respects similar to the chartered city exemption for municipal affairs (see Section 2.9 of this Manual), Article IX, section 9 of the California Constitution grants the Regents powers of government as to its internal “university affairs” and not involving statewide concern. (*San Francisco Labor Council v. Regents of*

University of California (1980) 26 Cal.3d. 785.) The exemption was not recognized in the case of *DLSE v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114), where the court concluded that the protection afforded private sector employees working on the University's public construction projects was a "matter of statewide concern." The decision reached in *Regents v. Aubry* (1996) 42 Cal.App.4th 579, however, specifically allowed the exemption when the University contracted with private companies to build subsidized married student and faculty/staff housing on university-owned land, holding that such a project was part of the University's core educational function, rather than a statewide concern. In instances in which the limited exemption is claimed to exist, the Labor Commissioner will make a determination based upon application of the case law to the specific facts in the matter. If the University's bid documents or contract for the work requires the payment of prevailing wage, the Labor Commissioner will conclude that the exemption does not exist and enforce the prevailing wage requirements.

3. **What Must Public Works Contractors Do To Comply With the Law?**

Contractors and subcontractors which bid on and are awarded public works projects must comply with three general obligations which are enforced by the Public Works Unit of the Labor Commissioner's Office. The three categories of obligations are set forth in detail below.

3.1 **Contractors' Obligations To Maintain and Furnish Records:**

Labor Code § 1776(a) requires each public works contractor and subcontractor to keep accurate payroll records, including the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual wages paid to each worker. The "work classification" refers to the craft classification (or type of work performed) as fixed by the

Director and specified by title on the prevailing wage determinations published and maintained by the OPRL. (Labor Code § 1773 and 8 CCR § 16203.) Payroll records which do not identify the Director's specified title (e.g., records which only identify a worker by status, such as "journeyman" or "apprentice" or "partner," and do not refer to the Director's published classification, such as "Laborer Group 1" or "Carpenter") are inadequate. Payroll records shall be on forms provided by the Labor Commissioner or in a manner containing the same information as the forms provided by the Labor Commissioner. This form (DIR Form A-1-131) is available on the Labor Commissioner's website in the Public Works/prevaling wage section. The payroll records may consist of printouts that are maintained as computer records so long as the printouts contain the same information as the forms. The required certification language is also on the Labor Commissioner's website.

3.1.1 **Payroll Records Must be Certified:**

Labor Code § 1776(b) requires that payroll records, as defined above, shall be "certified," that is, verified by written declaration made under penalty of perjury, that the information contained in the records is true and correct. (8 CCR § 16000.) The certification language is found on the back of the form furnished by the Labor Commissioner. Payroll records furnished to Labor Commissioner which are not certified are inadequate.

3.1.2 **Statement of "Employer Payments".**

The prevailing wage laws permit contractors employing workers on public works to pay a certain portion of the "Total Hourly Rate" reflected on the applicable prevailing wage determination published by the Director, either in cash to workers, or as contributions to specified plans or entities as "Employer Payments" Labor Code § 1773.1(b) and (c), as defined at 8 CCR § 16000 The Labor

Commissioner developed a form (see website for Form PW 26) to simplify both the preparation by contractors of the required information and the Labor Commissioner's review of that information. (See Section 4.2.5, following).

3.1.3 **Payroll Records, Defined:**

California regulations define Payroll Records to mean “[a]ll time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.” (8 CCR § 16000.) The Labor Commissioner may request a contractor to produce any such payroll records to assist the Labor Commissioner in determining whether the contractor paid its workers all wages due.

3.1.4 **Itemized Statements.**

Labor Code § 226, although not part of the prevailing wage laws, requires all employers to regularly furnish each of his or her employees with an accurate itemized statement, in writing, including up to nine separate categories of information. Labor Code § 226 itemized statements fall within the broad definition of “payroll records,” and must be made available for inspection by the Labor Commissioner upon request. (NOTE: Employers who fail to keep or furnish itemized statements to their employees are subject to civil and criminal penalties in accordance with the provisions found at Labor Code §§ 226-226.6. Penalties available under those sections are not enforced by the issuance of a Civil Wage and Penalty Assessment, but through a citation procedure set forth in detail at sections 226.4-226.5. Investigators who encounter violations of section 226 should proceed in accordance with those sections, which are entirely distinct from

the remedies available under the Public Works Chapter, which is the subject of this Manual.)

3.1.5 **Requests For Certified Payroll Records (“CPRs”).**

Labor Code § 1776(b)(2) requires contractors and subcontractors to make a certified copy of all payroll records as enumerated in Labor Code § 1776(a) available for inspection or furnished to the Labor Commissioner, upon the Labor Commissioner’s written request, to be provided within ten days of the contractor’s receipt of that request. Failure to timely “file” (furnish) the requested records subjects the contractor, or affected subcontractor, to monetary penalties. (Labor Code § 1776(d) and (h).) The Labor Commissioner developed a form letter entitled “Request For Certified Payroll Records” (Form PW 9) which constitutes the statutorily required written request and sets forth the penalties for noncompliance. The form letter typically requests CPRs for all workers employed by a named contractor or subcontractor for the entire duration of work performed on the project identified. Blank copies of DIR Form A-1-131 and Form PW 26 are enclosed with the form letter. The request should be mailed (first class and certified mail, return receipt requested) and/or sent electronically (facsimile or e-mail). Satisfactory evidence (certified mail receipt, facsimile confirmation, or e-mail receipt) reflecting the date of receipt by the contractor will be needed to calculate monetary penalties assessed for noncompliance.

3.1.6 **Contractors' Obligation To Electronically Submit Certified Payroll Records (“eCPRs”).**

Labor Code Section 1771.4 was added to the Public Works Chapter by the Legislature as part of the Public Works Reforms contained in SB854 which became effective on June 20, 2014. Labor Code Section 1771.4(a)(3) requires each contractor and subcontractor to furnish “the records specified in Section 1776 directly to the Labor Commissioner.” This obligation exists independently of

any written request from the Labor Commissioner. Rather, the legislation requires that the records shall be furnished at least “monthly or more frequently if specified in the contract with the awarding body” (Section 1771.4(a)(3)(A)), and in “a format prescribed by the Labor Commissioner” (Section 1771.4(3)(B)). The format prescribed by the Labor Commissioner is found on the Labor Commissioner’s website, and specifies that contractors and subcontractors must electronically submit certain payroll information by following the specific on-line instructions. The legislation was designed to enhance the Labor Commissioner’s ability to evaluate compliance with prevailing wage requirements. (Section 1771.4(a)(3)(4).) The Labor Commissioner is now able to monitor (on an ongoing basis and without the need for a written request for payroll records or a formal investigation) whether contractors and subcontractors at least appear to be in compliance with the prevailing wage laws, based solely upon the eCPRs submitted. Electronic submission of Certified Payroll Records (“eCPRs”) was also designed to complement the on-line registration of public works contractors now required by SB854’s Public Works Reforms. The on-line submission of eCPRs also enables contractors and subcontractors to provide this short format of payroll information with keystrokes, rather than preparing and delivering written documents. It is extremely important for contractors and subcontractors to understand that submission of certain payroll information electronically is a requirement separate and distinct from the obligation already found in Labor Code Section 1776(d) “to file a certified copy of the records with the entity that requested the records enumerated in subdivision (a) [of Section 1776] within 10 days after receipt of a written request” for such records. So there can be no confusion, all contractors must comply with both requirements. Thus, a contractor that has electronically furnished eCPRs is not excused from timely furnishing to the Labor Commissioner “a certified copy of all payroll records” within 10 days after receipt of such a written request.

Conversely, a contractor that provides payroll records in response to a written request from the Labor Commissioner is not excused from continuing to furnish eCPRs on an ongoing basis. There are at least two reasons why this is so. First, eCPRs do not contain, and were neither intended nor designed to contain, all of the payroll information and records which may be required for a contractor to comply with written requests by the Labor Commissioner for payroll records made pursuant to Labor Code Section 1776(d). According to the provisions of the California Code of Regulations (specifically, 8 CCR 16401(b)), “the format for reporting of payroll records requested pursuant to Labor Code Section 1776” is a form identified in the regulation as the "Public Works Payroll Reporting Form" (Form A-1-131) which is available at any of the Labor Commissioner’s Offices throughout the state. Additionally, the Labor Commissioner includes Form A-1-131 in all written requests for certified payroll records. The regulation also provides: “Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776.” As noted above, the prescribed format for eCPRs does not include all of this information. The information not available in eCPRs but which is required in Form A-1-131 submissions includes: work classifications, gross amounts earned each week, itemized deductions or contributions for federal taxes, state taxes, state disability insurance, vacation or holiday pay, health and welfare benefits, pension, union dues, if any, travel and subsistence, and savings.

3.1.7 **Responses To Inspection Requests.**

While the Labor Commissioner is authorized to inspect a certified copy of CPRs at all reasonable hours, at the principal office of the contractor or subcontractor (Labor Code § 1776(b)(2)), investigators typically do not request inspection. Rather, copies of CPRs are routinely requested to be furnished instead.

3.1.8 **Responses To Requests For Copies.**

The deadline for contractors or subcontractors to furnish the requested copies of CPRs is within ten days after receipt of a written request. (Labor Code § 1776(d).) The statutory language does not specify “calendar” or “working” days, however, 8 CCR § 16000 defines “days” as calendar days unless otherwise specified. Labor Code § 1776(c) permits contractors to use copies of payroll records or printouts of payroll data, so long as the documents furnished contain the same information as the forms provided by the Labor Commissioner, and the records are certified in the manner specified at 8 CCR § 16000. If the documentation furnished does not meet both of these requirements, the contractor or affected subcontractor is subject to monetary penalties under Labor Code § 1776(h). Computation Example: The first penalty day is the calendar date after the ten day response period has expired. The last penalty day is the calendar date upon which the tardy CPRs are received by the Labor Commissioner. The assessment is calculated by multiplying the total number of penalty days times the number of workers listed on the tardy CPRs, times \$100.00. If no CPRs are produced, the last penalty day is the date a Civil Wage and Penalty Assessment assessing penalties under Labor Code § 1776 is served, and the number of workers is estimated based upon the best evidence available. In the event a contractor fails to timely comply with a request for CPRs, including any follow-up request for additional underlying payroll records listed in the definition of “payroll records” found at 8 CCR 16000 (i.e., “All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project”), the penalty will continue beyond the date of

service of the CWPA and “until strict compliance is effectuated.” (See, Labor Code section 1776(h).)

3.1.9 **Costs, Limited Reimbursement To Contractors and Public Agencies.**

The Labor Commissioner has no statutory or regulatory obligation either to pay contractors or affected subcontractors for requested copies of CPRs as a precondition to compliance with a Labor Commissioner-initiated request for CPRs, or to reimburse contractors for any expenses incurred. Recovery of costs for preparing or furnishing CPRs are only available to contractors (or public entities) under 8 CCR § 16402, a regulation which applies only if the request for CPRs was made by the “public” pursuant to Labor Code § 1776(b)(3). That statutory subdivision, when read in conjunction with that regulation, sets forth with specificity the timing and amounts of costs for reproduction of CPRs available to contractors and public entities (including the Labor Commissioner).

3.1.10 **CPR Privacy Concerns.**

Labor Code § 1776(e) mandates special handling of CPRs obtained by the Labor Commissioner and two other public entities -- awarding bodies and the Division of Apprenticeship Standards (“DAS”) – who are also statutorily authorized to request CPRs from public works contractors. Before making CPRs available for inspection as copies, and furnished upon request to the public or any other public agency pursuant to Labor Code § 1776(b)(3), CPRs obtained by staff must be “marked or obliterated to avoid disclosure” of workers’ names, addresses and social security numbers. That same obligation is set forth at 8 CCR § 16403.

3.1.11 **Two Exceptions:**

The first exception applies to copies of CPRs furnished to a “joint labor-management committee” established pursuant to the Federal Labor Management

Cooperation Act of 1978 (29 U.S.C. § 175(a)). The redaction of personal information from copies of CPRs provided to those specially authorized joint labor-management committees is limited to the workers' social security numbers only. The workers' addresses are not to be obliterated. (Labor Code § 1776(e).) The second exception applies to agencies that are included in the Joint Enforcement Strike Force on the Underground Economy established pursuant to California Unemployment Insurance Code section 329, and other law enforcement agencies investigating violations of law. These particular agencies are entitled to be provided with copies of certified payroll records without any redaction of names, addresses, and social security numbers. However, any copies of such records received by these law enforcement agencies made available for inspection or furnished to the public by these agencies must be redacted to prevent disclosure of an individual's name, address, and social security number. (Labor Code § 1776(f)(1).)

3.1.12 **Full Social Security Numbers Required.**

Labor Code § 226(a), which sets forth certain record keeping requirements for employers, limits an employer's obligation to provide only the last four digits of employees' social security numbers. Labor Code § 1776(a) has not been so amended and requires the inclusion of the full social security number. For enforcement purposes, however, it should not be considered as a violation of Labor Code § 1776 warranting the issuance of a CWPA if a contractor makes available for inspection, or furnishes upon request, the full social security number for all affected employees on a separate written report, signed under penalty of perjury, to the entities identified in 1776(b)(2) within the time limits specified in Labor Code 1776. These entities include a representative of the body awarding the contract, the Labor Commissioner, and the Division of Apprenticeship Standards (DAS).

3.1.13 **Retention of Payroll Records by Public Works Contractors.**

There is no provision in the prevailing wage laws which specifies a records retention period for CPRs or all of the types of “payroll records” as defined and listed at 8 CCR § 16000. The limitations period for legally recognized wage underpayment remedies available against public works contractors, however, vary depending upon the remedy available. Accordingly, contractors should retain CPRs for the duration of any applicable limitations period. Contractors must also separately comply with any record keeping requirements set forth in the Labor Code and applicable Industrial Welfare Commissioner wage order.

3.2 **Contractors’ Obligations To Pay Prevailing Wage Rates:**

Not less than the specified prevailing rates of per diem wages must be paid to all workers employed in the execution of public works contracts. (Labor Code § 1774.) Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work. (Labor Code § 1772.) Note: rates are also accessible through the Labor Commissioner’s Public Works website.

3.2.1 **“Prevailing Rate of Per Diem Wages,” Defined:**

Labor Code § 1773.1 specifies the components which comprise the rates published by the Director, and are available on the DIR website as “General Prevailing Wage Determinations.” The specific rates applicable for each craft, classification, or type of work, and for each geographic locality throughout the state, can be located on the DIR website.

3.2.2 **Director's Authority to Determine Prevailing Wage Rates.**

Labor Code § 1773 requires any body awarding a contract for public work to obtain from the Director the prevailing rates for all hours worked, including holiday and overtime rates, and provides to the Director the general methodology for making such determinations. Labor Code § 1773.9 further expands that methodology, and Labor Code § 1773.4 provides the regulated public with a process by which to request review of the Director's wage determinations. The Director is authorized by Labor Code § 1773.5 to establish rules and regulations to implement the prevailing wage laws, and the Director has done so at length with respect to the setting and publishing of the rates applicable on public works projects. 8 CCR §§ 16000-16304 The Director has the sole responsibility for establishing the prevailing wage rates for all classifications of workers.

3.2.3 **Issue Date / Effective Date.**

The issue date listed on each prevailing wage determination refers to the date the OPRL placed copies of the Director's new determinations in the mail to awarding bodies and other interested persons. (8 CCR § 16000.) The more important date, however, is the effective date, which is not listed on the determination. The effective date is the first date upon which the wage rates set forth in the determinations apply to work performed on a project. The effective date is ten days after the issue date. (8 CCR § 16000.) Because rates are generally issued by OPRL twice a year (February 22nd and August 22nd), those rates go into effect ten days thereafter (March 3rd in leap years and March 4th in non-leap years, and September 1st, respectively).

3.2.4 **Effective Date / Bid Advertisement Date.**

The Bid Advertisement Date (or Date of Notice or Call for Bids) is defined at 8 CCR § 16000. This is the date an awarding body published the "first notice

inviting bids” in a newspaper (or otherwise legally promulgated notice) of a prospective public works project which results in a contract being awarded. For the Labor Commissioner’s enforcement purposes, if the effective date of a determination is on or after the bid advertisement date but before the listed expiration date, the rates listed on that particular determination constitute the prevailing wage rates for work performed under that public works contract. Consistent with the Department’s enforcement policy, if an awarding body does not advertise the public works project for bid, other benchmark events, including the first written memorialization of the agreement concerning the public works elements of project or the contract governing the award of public funds will be utilized instead. (See e.g., Baldwin Park Market Place, City of Baldwin Park, Public Works Case No. 2003-028, October 16, 2003.)

3.2.5 **Expiration Date / Double Asterisk / Predetermined Increases.**

Each prevailing wage determination also includes a specified expiration date. This is defined as the date upon which the determination is “subject to change.” (8 CCR § 16000.) If there are “predetermined” changes (generally, increases to the wage rate), the expiration date will be followed by a double (**) asterisk. The new prevailing wage rate goes into effect on the day following the expiration date listed in the determination. Predetermined increases are published and available on the OPRL homepage, and specify the date upon which the increase(s) must be paid to workers. The predetermined increase web posting informs the investigator and public of applicable future predetermined increases to the rates listed in the original wage determination for work performed on that project.

3.2.6 **Expiration Date / Single Asterisk.**

If there are no “predetermined” changes, the expiration date on each prevailing wage determination will be followed by a single (*) asterisk. Single asterisk

expiration dates mean the rates listed on that particular wage determination apply for the entire duration of the project, no matter how long work under the original public works contract continues.

3.2.7 **Overtime.**

The worker must be paid the applicable overtime rate set forth in the wage determination. This includes the requirement that any overtime performed under the public works contract must be compensated at the overtime rate required by the prevailing wage determination in effect on that project for the craft.

3.2.7.1 **Worker Performing Work During The Same Workday In Two Or More Different Classifications With Different Rates Of Pay.**

In the situation where a worker performs work during the same workday in two or more different classifications with different rates of pay, the worker must be paid the overtime rate *in effect* for the type of work he or she is performing during those overtime hours. The same requirement applies to a worker performing work on two or more public works projects during the same workday. All hours must be counted for overtime purposes, and the worker must be paid the applicable overtime rate *in effect* for the type of work performed for all overtime hours worked in the workday. *Example:* If a worker is performing work in the Inside Wireman's classification for four (4) hours and then performs work in the Painter's classification for six (6) hours, the worker would be entitled to no less than the total of four (4) hours of pay at the Inside Wireman's straight time rate of pay, four (4) hours of pay at the Painter's straight time rate of pay, and two (2) hours of pay at the Painter's overtime rate of pay for the two (2) hours worked in excess of eight (8) hours per day. As in all circumstances on public works projects where the worker is paid at two or more different rates of pay during the same workday, the employer is responsible for maintaining records showing that

the worker was paid the appropriate rate of pay for all hours worked in each classification.

3.2.7.2 **Worker Performing Work On Public and Private Projects During the Same Workday With Different Rates of Pay.**

In the situation where a worker is paid two rates during the course of a workday and one of those rates is based upon work on a public works project and the other rate is based upon work performed on a private works project during that same workday, the regular rate for calculating the overtime rate for work performed on the public works project is based on the higher of either the weighted average or the prevailing wage rate in effect at the time that the work is performed, *which is often dependent upon when that public work was performed.*

Example: If a worker is employed in a workday for four (4) hours on a private construction job at \$15.00 per hour and then, after completing the work on the private project, is employed during the same workday for eight (8) hours on a public work project at \$30.00, the worker would be entitled to \$15 per hour for the four (4) hours worked on the private project, \$30 per hour for the first four (4) hours worked on the public works project, and the applicable overtime rate (e.g. \$45 per hour) set forth in the prevailing wage determination for the final four (4) hours worked on the public works project. This is the case because the worker cannot be paid less than the applicable prevailing wage straight time or overtime rate for work performed on a public works project and since all hours worked are counted for overtime purposes, four of the worker's hours worked on the public works project were worked in excess of eight (8) hours during the workday. Conversely, if the same worker performs four (4) hours of work on a public works project and then, later in the same workday, the worker performs eight (8) hours of work on a private construction project, the worker would be entitled to \$30 per hour for the first four (4) hours worked on the public works project, \$15 per hour for the first four (4) hours worked on the private project, and the weighted

average of the two rates for the final four (4) hours worked on the private works project. Investigators should refer to the Labor Commissioner's 2002 Enforcement Policies and Interpretations Manual, sections 49.2.5- 49.2.6.1, for a detailed explanation of how to establish the regular rate of pay for calculating overtime under the weighted average method. Applying that methodology here, and assuming the worker only worked one twelve (12) hour day during that workweek, the weighted average calculation results in a regular rate of \$20 per hour (4 hours x \$30 per hour (\$120) + 8 hours x \$15 per hour (\$120) = \$240, divided by 12 total hours worked during that workweek = \$20 per hour) and the correct overtime rate for the worker would be \$30 per hour (1.5 x the regular rate of \$20).

3.3

Contractors' Obligations To Comply With Apprenticeship Standards.

Labor Code § 1777.5 identifies the obligations of contractors (including subcontractors) to employ apprentices on public works projects. The requirements to employ apprentices do not apply to "contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor when the contracts of general contractors or those specialty contractors involves less than thirty-thousand dollars (\$30,000)." Labor Code § 1777.5(o.) Contractors who "knowingly violate" any of these requirements are subject to monetary penalties (up to \$300.00 for each full calendar day of noncompliance) under Labor Code § 1777.7, and may also be "debarred," i.e., denied the right to bid on or be awarded a contract for public works, or perform work as a subcontractor on a public works project, for up to a period of three years. The appropriate remedy in each case will be based upon a consideration of five circumstances listed in the statute. Effective June 27, 2012, the Legislature amended section 1777.7 to transfer enforcement of these

apprenticeship obligations from the Chief of the Division of Apprenticeship Standards (DAS) to the Labor Commissioner.

3.3.1 **Three Overall Categories Of Apprenticeship Violations.**

All public works contractors must: (1) Timely submit contract award information to an authorized apprenticeship program both before commencing work on the project and after work has been concluded. (See, LC § 1777.5(e) and 8 CCR 230); (2) Employ DAS-registered apprentices, including compliance with minimum and maximum ratios of work hours performed by apprentices to journeymen. (See, LC § 1777.5(d) and (g), and (h)-(l), LC § 3077 and 8 CCR 230.1(a) and (c)); (3) Make training fund contributions to the California Apprenticeship Council (“CAC”) in specified amounts. (See, LC § 1777.5(m)(1) and 8 CCR 230.2.) The statutory references and/or the regulations cited are extremely detailed and explain with particularity: (1) The procedures contractors must follow to properly submit contract award information (what, when, and where) and to request dispatch of apprentices to the project (when and from whom); (2) The calculation of minimum and maximum ratios for determining the number of hours apprentices are to be employed before the end of the contract or subcontract; (3) Optional payment of training fund contributions to approved apprenticeship programs rather than to the CAC; (4) Compliance with the “journeyman on duty” rule (when required); (5) Specified exceptions to any of these requirements. The cited regulations were written and adopted by the CAC. The Labor Commissioner enforces apprenticeship standards when apprenticeship violations are the specific subject of new complaints and will include apprenticeship compliance during the course of investigations arising from complaints alleging other violations of the prevailing wage laws, such as wage underpayments to workers.

3.3.1.1 **Failure To Submit Contract Award Information / Violations.**

Labor Code section 1777.5(e) requires every contractor on a public works project “to submit contract award information” to an applicable DAS-approved apprenticeship program that can supply apprentices in a particular apprenticeable occupation to the public works site. The CAC regulation found at 8 CCR 230(a) explains and supplements that requirement. DAS Form 140 was created to allow contractors to fill-in-the-blanks on that form to provide all information required by either the statute or the regulation. Specifically, DAS Form 140 seeks the following: (1) The contractor's name, address, telephone number, and state license number; (2) Full name and address of the public work awarding body; (3) The exact location of the public work; (4) Date of the contract award; (5) Expected start date of the work; (6) Estimated journeymen hours; (7) Number of apprentices to be employed; and (8) Approximate dates apprentices will be employed. The form itself is available to the public on the DAS website, along with an interactive list of contact information for all of the approved apprenticeship programs in defined geographical areas throughout the state. Read together the statutory and regulatory provisions suggest three different deadlines to provide the DAS Form 140 information. The statutory deadline is “prior to commencing work” on the project, but the CAC regulation alternatively requires providing the information “to the applicable apprenticeship committee within ten days of execution” of the prime contract (or subcontract), “but in no event later than the first day” the contractor has workers employed upon the public work. For the Labor Commissioner’s enforcement purposes the deadline for submission of DAS Form 140 information by each contractor (for each applicable craft) is the first day a journeyman in that craft works on the project for that contractor. Because neither the provisions of Labor Code 1777.5(e) nor the language in the

CAC regulation specify any particular method of submission, the Labor Commissioner relies upon the definition of acceptable “service” of documents found in the Director's regulations under Labor Code section 1742 (which by law apply to the review of the Labor Commissioner's penalty assessments for apprenticeship violations) as controlling. Under the Director's regulation found at 8 CCR 17210(b), DAS Form 140 information is deemed submitted to an approved apprenticeship program “at the time of personal delivery or mailing, or at the time of transmission by facsimile or other electronic means.” It is the responsibility of the contractor to provide satisfactory evidence to the Labor Commissioner that DAS Form 140 information has been timely submitted / transmitted by one of these methods. It should be noted that while contractors using electronic means (fax or e-mail) to transmit a completed DAS Form 140 to an apprenticeship program will likely have easy access to documentary proof of the date of electronic transmission, no similarly reliable evidence may be available to contractors to establish the date of submission when first class mail is the only method used. In that situation, the date of mailing may be established by additional documents (such as a certified mail receipt, or a receipt for delivery of certified mail which reflects the date of mailing, or a proof of service by first class mail which accompanied the DAS Form 140) which would constitute reliable evidence that the DAS Form 140 was in fact mailed on or before the deadline. The obligation to submit DAS Form 140 information is not identical for all contractors. The CAC regulation found at 8 CCR 230(a) explains that contractors who have been approved to train apprentices “in the area of the site of the public works project” in a particular apprenticeable craft need only submit DAS Form 140 information to those programs. Contractors who are not already approved by an apprenticeship program sponsor in the area must provide DAS Form 140 information to all of the applicable apprenticeship programs whose geographic area of operation “includes the area of the public works project.”

3.3.1.2 **Failure to Submit Contract Award Information / Penalties.**

Penalties for violations of DAS Form 140 requirements are assessed in accordance with Labor Code section 1777.7(a)(1) for “each full calendar day of noncompliance.” The first penalty day for failing to submit / transmit DAS Form 140 information for each apprenticeable craft is the calendar day after the deadline date has passed. A contractor's certified payroll records, if accurate, generally provide the most easily available evidence to establish the first penalty day. Thus, if a contractor first employed a journeyman carpenter on May 1, 2015, the first penalty day for failing to submit / transmit DAS Form 140 information would be May 2, 2015. The penalty continues to be assessed for each full calendar day thereafter until the calendar date upon which the DAS Form 140 is actually submitted / transmitted. If the DAS form 140 information is never submitted / transmitted, the penalty continues to be assessed for each calendar day thereafter until and including the last calendar date the contractor performed any work in any apprenticeable craft on the project. Investigators should include in their Penalty Review form a simple explanation of their calculation of the penalty days being assessed for DAS Form 140 violations, showing the first penalty date, the last penalty date, and the total number of penalty days. Two examples, again using May 1, 2015, as the date our contractor first employed a journeyman carpenter on the project:

Example 1: Failure to timely submit / transmit contract award information for craft of carpenter on or before May 1, 2015. First penalty day = 5/2/15; Last penalty day (based on the calendar date before submission, assuming

here that 6/3/15 is the date of submission) = 6/2/15. Total number of penalty days is 32.

Example 2: Failure to ever submit / transmit contract award information for the craft of carpenter; First penalty day = 5/2/15; Last penalty day (based on the last date the same contractor performed any work in any apprenticeable craft on the project, assuming here that 7/7/15 is the last date of work) = 7/7/15. Total number of penalty days is 67.

3.3.1.3 **Minimum Ratio Violations.**

Understanding the minimum ratio requirement (“one hour of apprentice work for every five hours of journeyman work”) and the mathematical calculation of penalties when violations occur lends itself to a step-by-step approach: (1) To determine whether a violation has occurred, the investigator must first count the *total number of journeyman hours* worked in a particular craft by a specific contractor “before the end of the contract or, in the case of a subcontractor, before the end of the subcontract.” (See, subdivision (h) of § 1777.5.) *Assume* the contractor in question has submitted certified payroll records (“CPRs”) which reflect that *journeyman carpenters* worked a total of *750 straight-time hours* over the course of the contract. (Note that hours worked by journeymen in excess of 8 per day or 40 per week are *excluded* from this calculation, also pursuant to subdivision (h) of § 1777.5.) (2) Calculate 20% of 750 journeyman hours to determine the minimum number of apprentice hours required before the end of the contract. ($750 \times 0.20 = 150$ *minimum apprentice hours*.) (3) *Assume* that this contractor’s CPRs only reflect a total of *40 apprentice hours worked* in the carpenter craft during the contract. That number is *less apprentice hours than the minimum required* under the statutory formula. *Violation* of the minimum ratio requirement has therefore been established. (4) The investigator must now

determine the penalty. The Legislature did *not* base the penalty upon the number of hours a contractor may have fallen short in providing apprentices with work on the project. Rather, § 1777.7(a)(1) provides that contractors who knowingly violate *any* of the apprenticeship standards found in § 1777.5 “shall forfeit as a civil penalty” an amount not exceeding \$100 “for each full calendar day of noncompliance.” (Note that the maximum increases to \$300 *per day* when two or more violations occur within a three-year period. *Assume* that our contractor does not have a prior violation.) Because subdivision (h) of § 1777.5 informs us that *compliance with* the minimum ratio requirement applies during “any day or portion of a day when any journeyman is employed at the jobsite,” *noncompliance with* the ratio should be also measured against that *same* total number of calendar days. (Note that it is therefore *irrelevant* for penalty purposes whether the contractor’s apprentices and journeymen were employed in accordance with the ratio on *any single day*. This is so because our statute mandates that compliance with the ratio is not to be determined at the end of *each day*, but only by “the end of the contract.”) *Assume* the CPRs in our example reflect that the total count of calendar days during which one or more journeyman carpenters were employed by this contractor was 50. (5) The contractor is therefore subject to a *maximum penalty of \$5000* (\$100 x 50 days of noncompliance = \$5000) for failing to employ apprentice carpenters in accordance with the minimum ratio required by § 1777.5.

3.3.1.4 **Affirmative Defense to Minimum Ratio Violations.**

A contractor which fails to accumulate a sufficient number of apprentice hours before the end of the contract or subcontract may raise an affirmative defense to avoid minimum ratio penalties under the CAC regulation found at 8 CCR 230.1(a). The regulation explains that contractors not already employing sufficient apprentices to comply with the minimum one-to-five ratio “must request

dispatch of required apprentices" from DAS-approved apprenticeship committees providing training in the applicable craft or trade in the geographic area of the public work. That regulation served as the template for DAS Form 142, use of which enables contractors to be excused from the minimum ratio obligation even if the minimum ratio of apprentice hours is not actually achieved before the end of the contract or subcontract. To do so, it is the contractor's burden to establish that all of the regulation's request-to-dispatch requirements have been satisfied. The requirements may be summarized as follows: (1) Did the contractor request dispatch from each apprenticeship committee in the geographic area of the site of the public work? (2) Has the contractor provided the Labor Commissioner with a copy of each written request, with proof that it was sent by first class mail, facsimile or e-mail? (3) Did the request give the committee written notice of at least 72 hours (excluding Saturdays, Sundays and holidays) before the date on which one or more apprentices were required? (4) Was the request made in enough time to meet the above-stated ratio? (5) Did the contractor actually employ each of the apprentices dispatched? Failure of the contractor to establish that each of these requirements has been satisfied will be insufficient to establish an affirmative defense to a minimum ratio violation.

3.3.2 **Apprenticeship Violations Which Also Result In Prevailing Wage Underpayments.**

The Labor Commissioner's enforcement of the obligation of all contractors and subcontractors to pay not less than the specified prevailing rates of per diem wages may include situations where underpayments resulted from certain violations of the apprenticeship standards identified in Section 3.3.1 above. The first three apprenticeship-related examples of wage underpayments, as explained below in Sections 3.3.2.1 (Unregistered Apprentices), 3.3.2.2 (Nonpayment Of Training Fund Contributions) and 3.3.2.3 (Maximum Ratio Violations), have all been historically addressed by the Labor Commissioner as prevailing wage

violations when discovered during the course of our prevailing wage investigations. The last example, explained below in Section 3.3.2.4 (Journeyman On Duty Violations), involves a discrete obligation applicable only to those public works contractors who have elected to employ and train apprentices under the rules and regulations of the CAC. Previously, it had been a policy decision that the Labor Commissioner would refer complaints alleging violations of this "journeyman on duty" rule (8 CCR 230.1(c)) to DAS for investigation. Because the Labor Commissioner has now replaced DAS as the state agency responsible for enforcing contractor violations of apprenticeship standards, violations of this and other duly adopted CAC regulations which may result in prevailing wage underpayments will also be enforced under LC § 1741, and therefore subject to penalties authorized by LC §§ 1775 and 1813.

3.3.2.1 **Unregistered Apprentices.**

Labor Code section 1777.5(b) and (c) authorize contractors to pay certain workers at "the prevailing rate of per diem wages for apprentices." If a prevailing rate for apprentices is included in the Director's published wage determinations for a particular craft or trade, it is always less than the journeymen rate. The lower apprentice rates serve as a monetary incentive for contractors to satisfy the required minimum ratio of apprentice hours to journeymen hours before the end of the contract. To be paid at the lower apprentice rates, a worker must be "registered" (i.e., be party to a written apprenticeship agreement confirming that the worker is "in training under apprenticeship standards that have been approved by the Chief" of the DAS). A worker's eligibility to be paid at an apprenticeship rate may be verified by referring to the online data base maintained on the DAS website for each particular craft or trade. However, investigators generally require the contractor to provide a copy of the worker's written apprenticeship agreement to establish eligibility. Regardless of the

perceived level of skills (or lack thereof) that a worker in a particular craft or trade may actually possess, he or she must be enrolled in a DAS-approved apprenticeship training program at the time the work was performed. If not, hours worked in that craft or trade must be paid at the higher journeymen rate.

3.3.2.2 **Nonpayment Of Training Fund Contributions.**

Labor Code § 1777.5(m)(1) requires contractors who employ journeymen or apprentices in any “apprenticeable craft” (the Director’s wage determinations include a symbol (#) next to the craft designation to indicate an apprenticeable craft) must contribute to the California Apprenticeship Council (“CAC”) the amount reflected as the hourly “training” rate that appears on the Director’s wage determination, for each hour worked. A contractor is also entitled to take credit for such contributions made to a DAS-approved apprenticeship program that can supply apprentices to the site of the public work. The training contribution is a distinct obligation of the contractor under Labor Code § 1777.5(m)(1) and cannot be satisfied by paying the required hourly contribution directly to the worker. The Labor Commissioner may issue a Civil Wage and Penalty Assessment against a contractor if the contractor fails to pay the required hourly training contributions to a DAS-approved apprenticeship program or the CAC.

3.3.2.3 **Maximum Ratio Violations.**

Labor Code § 1777.5(g) includes a “maximum ratio” limitation on the total number of hours of work performed by apprentices in a particular craft as measured against the total number of hours performed by journeymen in that craft under a public works contract. The applicable maximum ratio (if any) is not contained in either the Labor Code itself or duly promulgated regulations, but found only in the apprenticeship standards under which the apprenticeship program operates if the contractor agrees to be bound by those standards. If a maximum ratio violation is

suspected, the Labor Commissioner will request a copy of the standards under which the apprenticeship program operates, including the maximum ratio requirement, as well as evidence that the contractor has agreed to be bound by those standards. Any violation of a maximum ratio requirement can be measured only by determining the total hours worked by apprentices and journeymen at “the end of” the contract or the subcontract, rather than on a daily basis. (LC § 1777.5(h).) If such a violation is found, the aggregate prevailing wage underpayment is typically calculated and remedied by raising a sufficient number of the excess hours originally paid at the apprentice rate to be paid at the journeymen rate, thereby ensuring compliance with the maximum ratio.

3.3.2.4 **Journeyman On Duty Violations.**

Labor Code § 1777.5(c)(2) allows a contractor to elect to have its apprentices employed and trained in accordance with the “rules and regulations” of the CAC to satisfy its statutory obligation to employ apprentices (and to simultaneously qualify its DAS-registered apprentices as eligible to be paid at lower apprentice wage rates). Alternatively, under LC §1777.5(c)(1,) the contractor may elect to have its apprentices employed and trained in accordance with the standards of a DAS-approved apprenticeship committee. If the contractor elects to follow the CAC rules, the applicable regulation is found at 8 CCR 230.1(c), and expressly requires that apprentices so employed “must at all times work with or under the direct supervision of journeyman/men.” This is not a ratio requirement (such as the maximum ratio limitation explained above at Section 3.3.2.3) for which compliance is determined “at the end of the contract.” Rather, this is a mandatory, daily obligation that is in effect whenever a worker paid as an apprentice is working on the public works project. Thus, apprentices who are not at all times working “with or under” a journeyman (for the same classification of work in which the apprentice is being trained) must be paid not less than the journeyman rate. The lower apprentice wage rate is simply not available for the

worker in this situation because his or her employment and training under LC § 1777.5(c)(2) is by definition “not in accordance” with the CAC rules which the contractor has elected to follow. This is so even though the worker may be registered as an apprentice with the DAS. The regulation found at 8 CCR 230.1(c) is frequently referred to as the “journeyman on duty” rule. Violations are remedied by the Labor Commissioner’s issuance of a Civil Wage and Penalty Assessment. Note that the rule would not apply if a contractor elects the alternative method to employ and train apprentices set forth at LC § 1777.5(c)(1). From a practical standpoint, investigators should routinely request that contractors provide evidence of their compliance with their obligation to submit contract award information to an authorized apprenticeship program before commencing work on the project, as required by LC § 1777.5(e). A completed DAS form entitled “Public Works Contract Award Information” (DAS 140) includes the contractor’s selection of either the CAC rules or a particular apprenticeship committee’s standards under which their apprentices will be employed.

4. **The Labor Commissioner’s Prevailing Wage Enforcement Process.**

The Labor Commissioner enforces California’s prevailing wage requirements.

4.1 **Calculation of Wages Due.**

Labor Code § 1774 requires payment of not less than the “specified prevailing rates of wages” for all hours worked. The specified rates are the rates found in the Director’s wage determinations which correspond with the type of work performed by individual workers. Contractors are required to select the applicable wage determination based on the work actually performed by a worker for each hour of work on the project. Contractors also must identify one of the Director’s classifications (such as “carpenter” or “drywall finisher”) for each of the

hours worked by an individual worker. In its investigations, the Labor Commissioner will determine the difference between the total wages required to be paid and the total wages actually paid.

4.1.1 **Travel and Subsistence Requirements.**

Labor Code § 1773.1 includes within its definition of “per diem wages” both “travel” and “subsistence” payments in the Director’s determination of the applicable prevailing wages due for a particular type of work. Historically, the amounts required for either travel or subsistence are fixed daily amounts due to workers whenever the terms of a collective bargaining agreement are adopted by the Director as setting forth the prevailing wage rates in a particular locality. These fixed amounts are not specifically set forth in any of the Director’s published wage determinations, but are only noted in footnotes appearing on the wage determinations. The footnote language appears in bold on each affected determination under the heading: “TRAVEL AND/OR SUBSISTENCE PAYMENT.” The text below the footnote directs the reader to the DIR website to obtain the travel and subsistence requirements, and the fixed daily amounts if the requirements are met. There is little uniformity among the requirements found in the OPRL’s posted collective bargaining agreement (CBA) provisions, and contractors must verify the provisions in each case to determine when and under what circumstances travel and/or subsistence payments may be required. The requirements differ among classifications, but are usually based on the distance a worker must travel from a designated location to the public work jobsite. The fixed daily amount also differs among classifications. SPECIAL NOTE: Compensable travel time is distinct from travel and/or subsistence payments. Compensable travel time is included in the calculation of hours worked. Travel

and/or subsistence payments are a separate and distinct obligation of public works contractors if the conditions set forth in the CBA are adopted by the Director to apply to work on a public works project.

4.1.2 **“Scope of Work” Provisions Published by the DIR.**

The classification of work subject to a specific, Director-issued wage determination is often a primary area of dispute between Labor Commissioner and public works contractors in enforcement proceedings under the prevailing wage laws. In addition to routine factual disputes (such as workers claiming they performed certain duties while the employing contractor claims otherwise), even if the duties performed are not in dispute, the correct classification for that very type of work (and therefore the prevailing rate which applies) may be contested. The Director will make the final determination on the correct classification. (*DLSE v. Ericsson Information Services, Inc.* (1990) 221 Cal.App.3d 114.) Occasionally, the wage determination itself may include references to specific types of work subject to that determination (such as a particular “Operating Engineer” Group Number referring to a particular type of equipment). Other determinations may not include that level of specificity. When such an issue arises, the Director has typically relied on the Scope of Work provisions published by the OPRL, along with that particular wage determination. It is therefore important that investigators review those Scope of Work provisions whenever this issue arises during an investigation. It is irrelevant from the Labor Commissioner’s perspective whether a worker happens to be a member of a union whose CBA provisions are posted by OPRL with the wage determination, or whether an affected contractor is signatory to that CBA. In the prevailing wage context, the Labor Commissioner does not enforce CBA provisions which may be in effect between public works contractors and one or more labor organizations. The applicable wage rate is determined by the worker’s classification and is based on the work actually

performed. Rather, the Labor Commissioner enforces the rates set forth in the Director's wage determinations and the Scope of Work provisions may provide guidance in interpreting the determinations. Workers may be reclassified when the duties or work tasks do not accurately reflect the work being performed.

4.1.3 **Factual Disputes Concerning the Type of Work Performed.**

Factual issues of this nature are one of the primary areas of dispute arising in investigations by the Labor Commissioner. From a practical standpoint, the best approach for investigators is to obtain as much evidence as may become available. Although it is impossible to predict the weight which might be assigned to any evidence by a trier-of-fact in the event a CWPA is contested, the following sources of evidence may be available (this listing is not meant to be all-inclusive):

- (1) Worker complaints, statements (preferably, written) or questionnaires identifying the duties and equipment used by the worker;
- (2) Public works contracts and subcontracts, including specifications;
- (3) Inspection reports or logs maintained by awarding bodies, contractors or any other observers of the work performed;
- (4) Time and pay records, prepared either by workers (such as calendars) or contractors, which may include descriptions of duties.

4.1.4 **Different Classifications For the Same Worker.**

The minimum prevailing wage for hours worked in the execution of a contract for public works is based upon the specified prevailing rates "for work of a similar character" (LC §§ 1771 and 1774.) Therefore, it is possible that one worker may perform more than one type of work during the course of a project. Two

important considerations for staff encountering this situation during an investigation are: (1) The potentiality that even though two different classifications of work identified in the Director's wage determinations may sometimes provide the minimum rates required to be paid for the worker's separate duties, the higher minimum rate may apply for all of the hours worked. The U.S. Department of Labor analyzed this issue under similar provisions in the Davis-Bacon Act (40 U.S.C. § 276(a), the federal prevailing wage law) and determined that when a worker performs duties in a higher paying classification (such as a Pipefitter), the fact that some of the work performed by that same worker is similar to a type of work in a lower paying classification (such as Laborer Group 1), when that same work is performed by a Pipefitter (as a small or large part of his or her whole assigned task on any given job) it is the work of a Pipefitter, and must be compensated at the higher rate. (*In re Corley* (1978), Case No. 77-DB-114, 23 Wage and Hour Cases, 1071, 1075.) The *In re Corley* analysis is not intended to presumptively apply to all situations where a contractor's CPRs identify the same worker as performing work during the same day in two different classifications at two different rates of pay. Consistent with the language of Labor Code 1771, a contractor is generally not required to pay its workers at a rate higher than that specified in a particular wage determination for the type of work performed. The *In re Corley* rationale is applicable only where both types of work performed by the same worker are part of the work assigned to that worker in accomplishing the overall task performed under the higher-paying classification. Absent compelling evidence as to the type of work performed, any uncertainties will likely be resolved in the favor of worker testimony (and against the affected contractor whose failure to maintain the required records created the uncertainties) concerning the duties actually performed. (See, *Hernandez v. Mendoza* (1988), 199 Cal.App.3d 721.)

4.1.5 **Compensable Travel Time.**

Travel time related to a public works project constitutes “hours worked” on the project, which is payable at not less than the prevailing rate based on the worker’s classification, unless the Director’s wage determination for that classification specifically includes a lesser travel time rate. (See Director’s Decision in *In the Matter of Kern Asphalt Paving & Sealing Co., Inc.* (March 28, 2008), Case No. 04-0117-PWH. (See also *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575).)

Travel time required by an employer after a worker reports to the first place at which his or her presence is required by the employer is compensable travel time, and includes travel **to a public work site**, whether from the contractor’s yard, shop, another public work site, or a private job site. All such compensable travel time must be paid at the same prevailing wage rate required for the work actually performed by the worker **at the public works site**. No additional facts, such as whether tools or supplies are being delivered by the worker to the site, need be present.

4.1.6 **Calculation of Overtime and Saturday/Sunday/Holiday Wages.**

Labor Code § 1815 requires that work performed on public works projects in excess of 8 hours per day, or 40 hours per week, must be compensated at not less than time and one-half the basic rate of pay. Failure to pay the appropriate overtime rates subject the contractor to penalties pursuant to Labor Code § 1813. In addition to Labor Code § 1815, the Director’s wage determinations generally designate specific premium rates for straight-time hours worked on Saturday and/or Sunday and Holiday work. The DIR website identifies the particular Holidays covered by the premium rate requirements under each wage determination. Saturday, Sunday, and Holiday premium rates apply for the hours worked on each of those days as specified in the applicable determination. If more than 8 hours per day are worked on the Saturday, Sunday and Holiday or

the hours worked, including Saturday, Sunday and Holiday exceeds 40 hours for the week, then overtime rates (calculated from the premium rate) also applies and the contractor is subject to penalties pursuant to Labor Code § 1813.

4.1.6.1

Note: In some cases, the wage determination for a specific classification may specify the requirement that overtime be paid for hours worked in excess of a maximum number that is less than 8 hours per day or 40 hours per week. For instance, the general prevailing wage determination may require that overtime be paid for all hours worked in excess of seven (7) hours per day or 35 hours per week. In those circumstances, overtime must be paid in accordance with the conditions set forth in the general wage determination. (See, 8 CCR 16200(a)(3)(F), Exception 4, discussed below at 4.1.7.4.) Contractors that fail to comply with this requirement are subject to penalties under Labor Code § 1775 in addition to the amount of any wages due.

4.1.7

Exceptions to Overtime Requirements.

Overtime is to be paid as indicated in the applicable wage determination. There are four limited exceptions to the overtime requirements under 8 CCR 16200(a)(3)(F). They are:

4.1.7.1

Exception 1:

If a workweek other than Monday through Friday is a fixed business practice or is required by the awarding body, no overtime payment is required for the first eight hours on Saturday or Sunday. The “fixed business practice” portion of this exemption is construed narrowly. It will not be permitted in circumstances where the contractor cannot establish that such a practice exists on all its projects, including public and private projects.

4.1.7.2 **Exception 2:**

If the collective bargaining agreement provides for Saturday and Sunday work at straight-time, no overtime payment is required for the first eight hours on Saturday or Sunday.

4.1.7.3 **Exception 3:**

If the awarding body determines that work cannot be performed during normal business hours, or work is necessary at off hours to avoid danger to life or property, no overtime is required for the first eight hours in any one calendar day, and 40 hours during any one calendar week.

4.1.7.4 **Exception 4:**

No overtime payment is required for less than 40 hours in a standard work week, or for less than eight hours in a calendar workday, unless specified in the collective bargaining agreement used as the basis for the prevailing wage determination.

4.1.8 **Restriction on Alternative Workweek Schedules:**

The California Labor Code requires that workers employed on public works in excess of eight hours per day receive compensation for all such hours at not less than the specified overtime rate. (Labor Code §§ 1810, 1811, and 1815.) The California Constitution also restricts the hours that may be worked on public works projects to eight hours a day, except in specified circumstances. (Article XIV, section 2). Notwithstanding Labor Code §§ 511, 514 and Wage Order 16, these restrictions apply to all workers performing work on public works projects,

including workers covered under collective bargaining agreements and workers covered by an alternative workweek schedule adopted under Labor Code § 511 or Wage Order 16. Accordingly, no worker may be employed on a public works project for more than eight hours a day unless the worker receives the overtime compensation specified by the applicable prevailing wage determination.

4.1.9 **Saturday Make-Up Days:**

The determinations for some crafts permit contractors to pay straight time rates for Saturday work if certain conditions are satisfied. Any such exception from the general prevailing wage requirements is construed narrowly in accordance with its express terms. Furthermore, the exception must be included in the applicable prevailing wage determination in order to apply. The Labor Commissioner will not recognize exceptions which may exist in underlying collective bargaining agreements which rates are adopted by the Director for purposes of public works unless the Director also adopts the exception and it is included in the determination.

4.2 **Credit for Employer Payments.**

California prevailing wage law requires the payment of per diem wages, which includes two components. The first component is the Basic Hourly Rate. The second component is the Employer Payments. Taken together, these two components make up the Total Hourly Rate which must be paid to each worker for any work performed on a public works project.

4.2.1 **Employer Payments Are A Credit Against The Obligation To Pay The General Prevailing Wage Rate Of Per Diem Wages.**

Contractors obligated to pay prevailing wages may take credit for amounts up to the *aggregate* total of all benefits, such as pension, health & welfare, etc., listed as prevailing in the applicable wage determination. Contractors are not limited to

the individual amounts specifically listed under the various categories of benefits specified in a wage determination in taking credit for providing Employer Payments. Rather, the contractor may take a credit for the aggregate total of permissible Employer Payments made on behalf of the affected worker. For example, the Director's statewide prevailing wage Determination (C-20-X-1-2017-1) for the Iron Worker (Ornamental, Reinforcing, Structural) classification for the craft of Iron Worker , reflects a Basic Hourly Rate of \$36.00, with permissible Employer Payments of \$9.55 per hour (Health and Welfare), \$13.32 per hour (Pension), \$4.00 per hour (Vacation/Holiday), \$2.865 per hour (Other Payments), and one mandatory employer payment of \$0.72 per hour (Training), which must be paid to the California Apprenticeship Council ("CAC") or an approved apprenticeship program. The Sum of all these components (\$66.455) is the Total Hourly Straight-Time Rate listed on the Determination. The aggregate total of permissible Employer Payments (excluding the amount required for Training) is \$29.735. The permissible Employer Payment amounts listed here typically reflect the particular hourly benefit rates found in a collective bargaining agreement which the Director determined had established the prevailing rate for this craft and classification of work in this geographic area. Absent contractual obligations which may apply to a particular contractor, the total of \$29.735 per hour may be paid by an employer in full or in part to any category of permissible Employer Payments, and the employer will be entitled to credit against the total prevailing wage obligation. Thus, an employer may choose to contribute \$20 of the aggregate total to a private medical insurance plan or a pension plan for its workers, and pay the remainder of \$9.735 directly to the workers. The employer may take credit for the medical insurance or pension payments, and all of the payments added together (\$45.735 paid to workers + \$20.00 paid to medical or pension plan + \$0.72 to CAC = \$66.455), which would reflect compliance by this employer with the prevailing wage rate obligation. (*WSB Electric, Inc. v. Curry*)

(9th Cir. 1996) 88 F.3d 788.) This credit may be taken only as to amounts which are actual payments. (8 Cal. Code of Regs. § 16200(a)(3)(I).) No credit may be taken for benefits required to be provided by other state or federal law. (Labor Code § 1773.1(c).) For instance, a contractor may not take a credit against its prevailing wage obligations for benefits such as workers' compensation, unemployment benefits, and social security and Medicare contributions.

4.2.2 **No Reduction of the Basic Hourly Rate.**

California law prohibits the use of credits for Employer Payments to reduce the obligation to pay the hourly straight time or overtime wages specified as the Basic Hourly Rate in the general prevailing wage determination. (Labor Code § 1773.1(c) and 8 Cal. Code of Regs. § 16200(a)(3)(I).) Two legislatively created exceptions to this general rule are now found at Labor Code section 1773.1(c) and section 1773.8. Both exceptions are extremely limited in scope and are only applicable to increases in employer payment contributions made pursuant to criteria set forth in a collective bargaining agreement ("CBA"), and only if the specific statutory conditions listed in the Labor Code have been met. Investigators will typically require a contractor claiming an exception under these sections to submit satisfactory evidence that the exception applies, including, but not limited to, a certified copy of the CBA upon which the exception is based, and to certify that the CBA's terms applied to the workers identified on the contractor's certified payroll records.

4.2.2.1 **Example:**

Basic Hourly Rate	\$ 25.00
Employer Payments	\$ 15.00

Employer Payments must be paid for all hours worked, including overtime hours, unless expressly provided otherwise in the general prevailing wage determination. The general prevailing wage determinations specify the applicable daily, Saturday, Sunday, and Holiday overtime payment. Although the applicable overtime rates set forth in the determination include the Employer Payments, the overtime rate (for example, time and one half) is based upon the Basic Hourly Rate only. The Employer Payment is therefore excluded from calculating the applicable overtime premium due as overtime compensation.

4.2.3.1

Example:

An employee worked 12 hours in the workday as an Iron Worker on a public works project. The Basic Hourly Rate of pay in the determination is \$32.00 plus \$22.00 in Employer Payments. The overtime rate for the first 2 daily overtime hours is \$48.00 (one and one half (1½) times the Basic Hourly Rate of \$32.00, or \$32.00 + \$16.00). The wages due for each overtime hour is \$70.00 (the overtime rate plus Employer Payments, or \$48.00 + \$22.00). The wages due per hour for all other overtime is \$86.00 (two (2) times the Basic Hourly Rate plus Employer Payments, or \$64.00 + \$22.00).

The worker would be due.

8 Hours at \$54.00 (\$32.00 + \$22.00)	\$432.00
2 Hours at \$70.00	\$140.00
2 Hours at \$86.00	\$172.00
Total Wages Due	\$744.00 ¹

¹ This example is for illustration purposes. The general prevailing wage determinations specify the applicable Total Hourly Rates that must be paid to workers for straight time, overtime, Saturday and Sunday work, and there is no need for contractors to independently determine the hourly amount to be paid.

4.2.4 **Types of Employer Payments for Which An Employer May Take a Credit Against Its Prevailing Wage Obligations.**

The types of employee benefits recognized as Employer Payments under Labor Code § 1773.1 include payments for:

- (1) Health and welfare.
- (2) Pension.
- (3) Vacation.
- (4) Travel.
- (5) Subsistence.
- (6) Apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions.
- (7) Worker protection and assistance programs or committees established under the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) to the extent that the activities of the programs or committees are directed to the monitoring and enforcement of laws related to public works.
- (8) Industry advancement and collective bargaining agreements administrative fees, provided that these payments are required under a collective bargaining agreement pertaining to the particular craft, classification, or type of work within the locality or the nearest labor market area at issue.
- (9) Other purposes similar to those specified in paragraphs (1) to (8), inclusive.

4.2.4.1 **Types Of Benefits Which Do Not Constitute Employer Payments:**

The types of benefits for which an employer may not take a credit against its prevailing wage obligations include benefits such as the use of a cell phone or company vehicle, gas reimbursement, or a Christmas bonus.

4.2.5. **“Employer Payments” Defined:**

Labor Code § 1773.1 defines Employer Payments to include all of the following:

- (1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.
- (2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.
- (3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

4.2.5.1

It is not necessary that the Employer Payment satisfy all of these three conditions in order for the credit to be valid. It is sufficient that the Employer Payment satisfies any one of the specified conditions in order to be considered an Employer Payment for which a contractor is entitled to take a credit against its prevailing wage obligation.

4.2.5.2 **Irrevocably Made to a Trustee or Third Person Pursuant to a Plan, Fund, or Program.**

Examples of these types of Employer Payments include contributions by a union signatory contractor to a labor-management affiliated pension, health & welfare, training, and vacation programs, contractor payments for health insurance premiums, contractor payments irrevocably made to a trustee or third party for pension benefits, and similar types of payments.

4.2.5.2.1 **Employer Payments made to these types of plans must be made regularly.**

A contractor may take credit for Employer Payments “if the employer regularly makes the contributions, or regularly pays the costs, for the plan, fund, or program on no less than a quarterly basis.” (Labor Code § 1773.1(d).)

4.2.5.2.2 **Employer Payments Must Be Determined Separately For Each Worker.**

Credit against the prevailing wage obligation may be taken only toward the prevailing wage requirement for each applicable worker. Employers may not take credit for an individual worker based upon an average payment or contribution made on behalf of a group of workers. For a specific example demonstrating the Labor Commissioner’s method of converting a contractor’s monthly or annual contributions to a typical benefit plan into an hourly wage equivalent to calculate the amount of credit available against the prevailing wages due to an individual worker, please refer to Section 4.2.6.4.1 of this Manual.

4.2.5.2.3 **Vesting Does Not Normally Affect Right to Credit.**

Many pension plans, particularly union-affiliated pension plans, contain “vesting” requirements which, under the plan, require that the worker complete a certain length of service before the worker has a nonforfeitable right to benefits under the plan. The existence of such vesting requirements does not affect the amount of credit an employer may take for such contributions, provided that the pension plan is a bona fide plan that meets the applicable requirements under ERISA, including the minimum vesting requirements. Under no circumstances, however, may the forfeited contributions revert to the employer.

4.2.5.3 **Employer Payments That Are Reasonably Anticipated to Benefit Workers.**

Employer Payments that are not irrevocably made to a trustee or third person pursuant to a plan, fund, or program may still be valid as a credit against the prevailing wage obligation, provided that they meet all of the conditions set forth in Labor Code § 1773.1(b)(2). Such rate of actual costs for such plan or programs can be credited against the prevailing wage only if the plan or program:

- (1) Can be reasonably anticipated to provide benefits to workers;
- (2) Is pursuant to an enforceable commitment;
- (3) Is carried out under a financially responsible plan or program; and
- (4) Has been communicated to the workers affected.

4.2.5.3.1 **Example.**

The type of Employer Payments contemplated under § 1773.1(b)(2) may include certain vacation and holiday plans for which the employee accrues the benefit during the time worked on a public works project. Such payments must meet all the conditions set forth above. In addition, the credit may be taken only as to amounts which are “actual payments.” (8 CCR § 16200(a)(3)(I).)

4.2.5.4 **Payments to the California Apprenticeship Council.**

Employer Payments for which a contractor may take a credit against its prevailing wage obligations also include payments made to the CAC pursuant to Labor Code § 1777.5(m)(1). The amount of contribution is listed on the general prevailing wage determination for those crafts which are recognized by the Director of the DIR as an apprenticeable craft. Such amounts are typically listed

in the general prevailing wage determination under the heading Training or similar type heading.

4.2.5.4.1 **Includes Payments Made to An Approved Apprenticeship Program.**

A contractor may take as a credit for payments to the CAC any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public work project. (Labor Code § 1777.5(m)(1).)

4.2.5.4.2 **Training Contributions Not Paid to the Worker.**

Although such payments constitute part of the Total Hourly Rate required to be paid by the employer, such payments are not paid to the worker. Rather, such payments are made to either the CAC or the applicable approved apprenticeship program. The contractor may add the amount of the contributions in computing his or her bid for the public works contract. (Labor Code § 1777.5(m)(1).)

4.2.5.4.3 **Exception - Non-Apprenticeable Crafts.**

For non-apprenticeable crafts, any training contributions should be paid to the worker as wages and not paid to the CAC. Some crafts are not identified on the Director's wage determinations with a symbol (#) which indicates an apprenticeable craft. If that is the case, any training contribution listed in the general prevailing wage determination should be paid to the worker, or to the applicable training program, if the contractor is contractually obligated to make such payments under its collective bargaining agreement.

4.2.6. **Annualization.**

Annualization is a principle adopted by the federal Department of Labor in enforcing the Davis-Bacon Act for crediting contributions made to fringe benefit plans based on effective rate of contributions for all hours worked during a year

by an employee on both public (Davis-Bacon) and private (non-Davis-Bacon) projects. (*Miree Construction v. Dole* (11th Cir. 1991) 930 F.2d 1536, 1539.) California law requires that the credit for employer payments must be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer. (Labor Code § 1773.1(e).)

4.2.6.1 **Exceptions:**

Annualization is required except where one or more of the following occur:

- (1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.
- (2) The higher rate of payments is required by a project labor agreement.
- (3) The payments are made to the CAC pursuant to Section 1777.5.
- (4) The director determines that annualization would not serve the purposes of this chapter.

4.2.6.2

The annualization principle requires that when converting an employer's contribution to a pension or medical plan into an hourly amount, the amount of payments must be divided by the total number of hours worked in a year on all projects, public and private, not just the number of hours worked during that year on public projects. This method of calculation, the "annualization" principle,

provides a means to permit an employer to take credit only for employer contributions paid to workers while employed on covered public works projects.

4.2.6.3 **Annualization Calculation.**

For enforcement purposes, the Labor Commissioner follows the federal enforcement guidelines. See Department of Labor Field Enforcement Handbook – 6/29/90, Section 15f11. (See <http://www.dol.gov/whd/FOH/index.htm> to review the handbook.) Under the federal enforcement guidelines, where a contractor makes annual payments in advance to cover the coming year and actual hours will not be determinable until the close of that year, the total hours worked by the workers performing work covered by California's prevailing wage laws, if any, for the preceding calendar year (or plan year) will be considered as representative of a normal work year for purposes of annualization. Similarly, where the contractor pays monthly health insurance premiums in advance on a lump sum basis, the total actual hours worked in the previous month, or in the same month in the previous year, may be used to determine (i.e. estimate) the hourly equivalent credit per employee during the current month. It is not considered a violation if the contractor uses the full year equivalent of 2,080 (40 hours x 52 weeks) hours in determining the applicable credit unless, of course, the affected employee worked more than 2,080 hours in that applicable year.

4.2.6.4 **Representative Period.**

Any representative period may be utilized in such cases, provided the period selected is reasonable. Employers using other methods to calculate the allowable credit have the burden of establishing that their method satisfies the annualization requirements set forth in Labor Code 1773.1(d).

4.2.6.4.1 **Example:**

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An employee works as a carpenter where the basic hourly rate set forth in the wage determination for Carpenter is \$30 and the total employee benefit (Employer Payment) package is \$15, excluding the training contribution. Accordingly, the total hourly rate required to be paid under California's prevailing wage laws is \$45.

Where the employer provides the carpenter with medical insurance in the amount of \$4,800 per year, the employer would divide the total annual cost of the benefit by the total hours worked by the employee for the preceding year. The employer may also use 2,080 hours, which is the equivalent of full year employment to arrive at the allowable Employer Payment credit.

For instance, where the employer uses the equivalent of full year employment, or 2,080 hours, the applicable credit is as follows:

$$(\$400 \times 12 \text{ months}) \text{ divided by } 2,080 \text{ hours} = \$2.31 \text{ per hour.}$$

If the worker in this example receives no other employee benefits which are recognized as bona fide Employer Payments under California law, then for each hour worked on a project covered by California's prevailing wage laws, the employer is entitled to take a credit of no more than \$2.31 against its obligation to pay the worker \$45 per hour, up to a maximum credit of \$4,800, which is the total amount paid for medical insurance. The difference between the \$15.00 per hour employer payment required under the applicable wage determination and the credit allowed for the provision of medical insurance must be paid to the worker as part of his or her hourly wage for work performed on the public works project.

Basic Hourly Rate	\$ 30.00
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Medical Insurance Benefit	\$ 2.31
Additional Wages Due	\$ 12.69
Total Due Per Hour	\$ 45.00

If the worker works the entire year only on projects covered by California's prevailing wage laws, or under circumstances otherwise exempt under the exceptions set forth above in Labor Code § 1773.1(e)(1)-(4), the employer would be entitled to take the full credit of \$2.31 up to a maximum of \$4,800.

Conversely, if the worker worked only 1,500 hours of the year on projects covered by California's prevailing wage laws and 580 hours of the year on other jobs which are not covered by California's prevailing wage laws or are otherwise not exempted under Labor Code § 1773.1(e)(1)-(4), the employer would be entitled to take a credit of only \$2.31 per hour towards meeting the employer's obligation to pay the prevailing wage on the California public works projects. Therefore, although an employer may have paid \$4,800 in insurance premiums for that year, the employer is entitled to take a total annual credit of only \$3,465.00 (1,500 x. \$2.31) against its prevailing wage obligation because the employer may take the credit only for those hours worked on a public works project.

4.2.6.5 **Payments To The California Apprenticeship Council Pursuant To Section 1777.5.**

As specified in Labor Code section 1773.1(e)(3), payments made to the CAC, or to an applicable approved apprenticeship program pursuant to Labor Code § 1777.5(m)(1), do not need to be annualized. For enforcement purposes, the Labor Commissioner takes the position that the exemption from the annualization requirements under section 1773.1(e)(3) is limited to the training contribution amounts set forth in the applicable general prevailing wage determination. An employer may not claim credit against a worker's per diem wages for training

contribution amounts paid in excess of the amount set forth in the applicable general prevailing wage determination unless the worker actually benefits from the payment. (See Director's Decision *In the Matter of Request for Review of DBS Painting, Inc.* (December 10, 2007), Case No. 06-0168-PWH). Credit for contribution amounts which meet this requirement must be annualized unless otherwise exempt under section 1773.1(e)(3).

4.3 **Calculation of Labor Code § 1775 Penalties.**

The Labor Code provides that the contractor and subcontractor, if any, under the contract shall forfeit not more than two hundred dollars (\$200.00) for each calendar day, or portion thereof, for each worker paid less than the required prevailing wage rate. This dual liability is most easily described as a penalty which is combined, united, and shared by both the contractor and subcontractor. The fact that a contractor may have been totally ignorant of its subcontractor's prevailing wage underpayment is not, standing alone, a defense to liability for this penalty. Moreover, and contrary to an argument sometimes raised by prime contractors, the language of the statute does not mean that the prime contractor only becomes responsible for the penalty if the subcontractor fails to pay it first. While the Labor Commissioner may only collect the total penalty once, the contractor and subcontractor equally share full responsibility for the amount assessed. The only exception is found in the "safe harbor" provisions available to prime contractors who meet the requirements of Labor Code § 1775(b), discussed in detail below in Section 4.3.1 of this Manual. In assessing the amount of the penalty, the Labor Commissioner considers two factors. The first factor is whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor. The second factor is whether the contractor or subcontractor

has a prior record of failing to meet its prevailing wage obligations. There are minimum penalties. The Labor Commissioner may assess not less than forty dollars (\$40.00), unless the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor. The Labor Commissioner may assess not less than eighty dollars (\$80.00) if the contractor or subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned. The Labor Commissioner may assess not less than one hundred twenty dollars (\$120.00) if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1. The Labor Commissioner's determination of the penalty amounts is reviewable for abuse of discretion. Any outstanding wages shall be satisfied before applying that amount to the penalties.

4.3.1.1 **Limited Prime Contractor Safe Harbor.**

Section 1775(b) provides that a prime contractor may avoid liability for section 1775 penalties when workers employed by its subcontractor were paid less than the required prevailing wage.

The prime contractor of the project is not liable for any penalties under section 1775 unless (a) the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or (b) the prime contractor fails to comply with all of the following requirements:

- (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works

project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

- (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees by periodic review of the certified payroll records of the subcontractor.
- (3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.
- (4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

Important. Even if a prime contractor avoids section 1775 penalties where the evidence presented to the Labor Commissioner satisfies the conditions of Labor Code § 1775(b)(1)-(4), a prime contractor remains jointly and severally liable for all wage underpayments occasioned by its subcontractors, and penalties and liquidated damages available under Labor Code §§ 1813 and 1742.1.

4.4 **Calculation of Labor Code § 1813 Penalties.**

The dollar amount of this penalty is fixed at \$25.00 for each worker for each calendar day during which the worker is required or permitted to work more than eight hours in any one calendar day or 40 hours in any one calendar week. Unlike Labor Code § 1775 penalties, the Labor Commissioner has no discretion to not assess or to reduce or modify the penalty amount under § 1813.

4.5 **Calculation of Unpaid Training Fund Contributions.**

Absent credit having been given to the contractor for payments made in satisfaction of this prevailing wage obligation, the Labor Commissioner will calculate the unpaid contributions based upon the hours worked in any particular classification, and reflect the amounts due under the "Training Fund" heading. NOTE: Not all payments for training funds are entitled to credit against the total prevailing wage obligation.

4.6 **Determination of Hours Worked and Amounts Paid.**

While CPRs furnished by public works contractors must reflect both hours worked and amounts paid, there may be frequent conflicts between the information provided by workers and contractors on these two components of the audit. The Labor Commissioner will consider other sources to determine the accuracy of the payroll records and to determine whether the workers were paid fully for all hours worked on the public works projects.

4.6.1 **Releases Signed By Workers As Proof Of Amounts Paid.**

California law prohibits an employer from requiring an employee to release wages due unless such wages have been paid in full. (Labor Code § 206.5.) The Labor Commissioner will generally not accept “Releases” provided by contractors, standing alone, as conclusive proof that these payments have actually been paid for hours worked on the project in question. Such releases must be supported by independent proof that the payment reflected in the release has actually been made (for example, cancelled checks), and confirmation with the worker who signed the release that payment was actually received for work performed on the project in question.

4.7 **Civil Wage and Penalty Assessments (“CWPA’s”).**

Labor Code § 1741 describes in detail the statutory process by which the Labor Commissioner enforces its claims for unpaid wages and penalties. The Labor Commissioner’s compliance with that process has been achieved by the creation and use of the form entitled “Civil Wage and Penalty Assessment” (Form PW 33) which tracks, in all respects, the statutory language. The use of this specific form by investigators is mandatory to initiate statutory enforcement actions under the prevailing wage laws.

4.7.1 **Service of the CWPA / Statute of Limitations / Tolling.**

Labor Code section 1741 provides that the CWPA shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in which the public work was performed, or not later than 18 months after acceptance of the public work, whichever occurs last. Labor Code section 1741 also provides that the period for service of assessments shall be tolled for three reasons: (1) For the period of time required by the Director of Industrial Relations to determine whether a project is a public work; (2) For the period of time that a contractor or subcontractor fails to provide in a timely manner certified

payroll records pursuant to a request from the Labor Commissioner; (3) For the period of time that an awarding body fails to timely furnish (upon written request) the Labor Commissioner with a copy of the valid notice of completion filed in the office of the county recorder, or a document evidencing the awarding body's acceptance of the public work, until the Labor Commissioner's actual receipt of those documents.

4.8 **Administrative Review of CWPAs.**

Labor Code § 1742 provides contractors served with a CWPA an opportunity to timely request administrative review of the monetary assessment. If no hearing is requested “within 60 days after service,” the CWPA becomes final (Labor Code § 1742(a)), and enables the Labor Commissioner to either obtain contract funds withheld by the awarding body or, if insufficient funds have been retained, to enter a court judgment against the contractors served, without the necessity of an administrative hearing and without filing a lawsuit. (Labor Code §§ 1742(d) and (e).) If any of the contractors served with the CWPA do timely transmit a written request for a review hearing, a hearing will be provided by the DIR before the assessment can become a final order. (Labor Code § 1742(b).) The administrative review process involves several different participants from the Labor Commissioner and DIR, and their respective roles follow.

4.8.1 **Role of DIR / OD-Legal.**

The Director, currently through the Office of the Director's Legal Unit, is responsible under Labor Code § 1742(b) to both hold an administrative review hearing in accordance with the procedures established under the Prevailing Wage Hearing Regulations found at 8 CCR §§ 17201-17270, and “issue a written decision affirming, modifying, or dismissing the assessment.” The hearing process is required to be fair and impartial, and the findings in the written decision

“must be supported by substantial evidence in the light of the whole record.” The proceedings must provide affected contractors with the protections of due process. To guarantee due process, affected contractors are specifically provided with an opportunity to obtain court review of any written decision by filing a writ under Code of Civil Procedure 1094.5. (Labor Code § 1742(c).)

4.8.2 **Prevailing Wage Hearing Regulations.**

The regulations which are in effect during the entire period after a contractor files a request for a review hearing and until those proceedings conclude, either by dismissal of the proceedings by the Hearing Officer (generally, because of settlement) or on the date which a written decision signed by the Director affirming, modifying, or dismissing the assessment becomes final, are found at 8 CCR §§ 17201-17270. Two particular regulations which have not been previously addressed in this Manual are important to investigators: (1) No direct or indirect communication regarding any issue in the review proceeding is permitted between the investigator and the Hearing Officer without notice and the opportunity for all parties to participate in the communication. (8 CCR § 17207(a).) Investigators typically ensure compliance with this rule prohibiting “ex parte” communications by avoiding any communications with the Hearing Officer, except during the formal proceedings; (2) The required method of service of a CWPA and the required contents of a CWPA are restated at 8 CCR § 1720.

4.8.3 **Settlement Meetings and Settlements.**

Labor Code § 1742.1, in addition to providing the availability of liquidated damages (an amount equal to the wages covered by the CWPA if those wages remain unpaid 60 days after service of the CWPA), requires that the Labor Commissioner afford contractors served with a CWPA an opportunity to meet to attempt to settle any dispute regarding the assessment, if such a request is made

by the contractor within 30 days following service. The CWPA form (at page 3) identifies the investigator who issued the CWPA as the person to contact to arrange a settlement meeting. The meeting may be held by phone or in person, and nothing said in the meeting is either subject to discovery, or admissible as evidence, in any administrative or civil proceeding. The investigator may handle the meeting with or without involvement by Legal, but it is always prudent to review the issues which might be discussed in the meeting with either a Senior Deputy or Legal. Either a Senior Deputy or Legal should be notified if settlement can be achieved. In the event a contractor requests that a written settlement agreement or release be signed by the Labor Commissioner, Legal must be notified and must review any such document before signing. The proposed terms of a post-CWPA settlement are to be approved by a Senior Deputy or Legal.

4.8.4 **Liquidated Damages.**

Contractors and their sureties are also subject to liquidated damages (LC § 1742.1(a)) in an amount equal to the wages, or portion thereof, that still remain unpaid for 60 days after service of a CWPA issued by the Labor Commissioner or a Notice To Withhold Contract Payments issued by a DIR-approved LCP. Liquidated damages are distributed to workers. If the assessment is overturned or modified after administrative or judicial review, liquidated damages are only available on the wages found to be due and unpaid. Additionally, the statute provides that a contractor may avoid liability for liquidated damages by depositing in escrow with the DIR the full amount of the assessment, including penalties, within 60 days following service of the CWPA or Notice. (LC § 1742.1(b).) The Labor Commissioner's CWPA form specifies that a check or money order in the full amount of the assessment is required, accompanied by a copy of the contested CWPA or Notice, and mailed to: Department of Industrial Relations, Attention Cashiering Unit, P.O. Box 420603, San Francisco, CA 94142. The DIR

will release such funds (plus any interest earned) at the conclusion of all administrative and judicial review to the persons or entities who are found to be entitled to the amounts so deposited.

4.9 **CWPAs Which Become Final / Collection From Awarding Body / Judgments.**

Labor Code § 1742(a) provides that a CWPA becomes “final” if no review hearing has been requested within 60 days after service. CWPAs that have become final may be submitted to the awarding body withholding contract funds under that CWPA to obtain the amounts due. (Labor Code § 1742(f).) If funds are not available from the awarding body, Legal may request entry of judgment in the Superior Court in any county in which the affected contractors have property or a place of business. (Labor Code § 1742(d).) Legal will decide whether to proceed with either collection from the awarding body, or by pursuing entry of a court judgment against the contractors.

4.10 **Debarment.**

Labor Code section 1777.1 authorizes the Labor Commissioner to seek an order of debarment against contractors, subcontractors and specific individuals identified in Labor Code section 1777.1(a) and (d). An order of debarment prohibits the named contractors and others named in the order from either bidding on or being awarded a contract for public work, or performing work as a subcontractor on any public works project. There are four separate bases for debarment: (1) Section 1777.1(a) - Violation of the Public Works Chapter with “intent to defraud” as that term is defined at 8 CCR 16800; (2) Section 1777.1(b) - The commission of two or more separate willful (defined at Labor Code section 1777.1(e)) violations within a three-year period; (3) Section 1777.1(c) - Failure to provide a timely response to a request to produce certified payroll records within 30 days after receipt of the specified written notice from the Labor Commissioner described in Section 1777.1(c), entitled "Notice Of Intent To

Debar"; (4) Section 1777.1(d) - Knowingly committing a serious violation of any provision of Labor Code section 1777.5. The period of debarment is from one to three years, except for debarments under Labor Code section 1777.1(d), which provides for debarment for a period of up to one year for the first violation of Labor Code section 1777.5, and for a period of up to three years for a second or subsequent serious violation of that section. The procedures the Labor Commissioner must follow in initiating a debarment proceeding and obtaining an order of debarment are set forth in regulations duly promulgated by the Labor Commissioner and found at 8 CCR 16800-16802.

4.10.1 **Debarment Investigations.**

The Labor Commissioner conducts investigations to determine if a contractor, subcontractor, or individual has committed violations of the prevailing wage laws which authorize the debarment remedy. Generally, the investigations are based upon the facts and circumstances discovered in prior investigations which resulted in the issuance and service of CWPA's. However, the Labor Commissioner may also conduct debarment investigations resulting from complaints filed by any "person" as that term is defined at 8 CCR 16800.

4.10.2 **Posting of Debarment Orders.**

In accordance with Labor Code section 1777.1(f), a list of contractors, subcontractors or other entities or individuals ordered debarred by the Labor Commissioner, the periods of debarment, and the contractor's State License Board license number, are posted on the Commissioner's Internet Web site.

4.11 **The Labor Commissioner's Jurisdiction to Enforce California's Prevailing Wage Laws is Not Exclusive.**

The Labor Commissioner does not have exclusive jurisdiction to enforce California's prevailing wage laws. The California Labor Code authorizes specified

awarding bodies to initiate and enforce a labor compliance program for public works projects, as specified, under the authority of the awarding body. (Labor Code §§ 1771.5, 1771.7, 1771.8, and 1771.9.) In addition, statutes and case law authorize other entities and individuals to enforce California's prevailing wage laws.

It should be noted that the availability of private rights of action to enforce the prevailing wage laws as specified in Sections 4.11.1, 4.11.2 and 4.11.3 below do not provide the much more favorable administrative procedures and burdens of proof which are set forth in Labor Code section 1741 - 1743, and the relevant Prevailing Wage Hearing Regulations found at 8 CCR 17221 - 17251. Thus, the likelihood of recovery in prevailing wage enforcement cases filed in state or federal courts under private rights of action should be carefully considered in comparison with the alternative approach of filing a complaint with the Labor Commissioner against contractors or subcontractors for investigation and enforcement by the Labor Commissioner on behalf of workers, as specified in Labor Code section 1741. It must also be recognized that in these private rights of action workers cannot recover liquidated damages (under Labor Code section 1742.1) otherwise available through the Labor Commissioner's enforcement. In addition, when the Labor Commissioner takes enforcement action, no portion of a workers' recovery of wages will be reduced by attorney fees or any other costs of litigation. All attorneys considering representing workers in private rights of action to seek recovery of unpaid prevailing wages are therefore encouraged to provide workers with the pros and cons of proceeding directly in court rather than simply filing a complaint with the Labor Commissioner.

4.11.1 **Action by Joint Labor-Management Committee.**

Labor Code § 1771.2 authorizes a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (29 U.S.C. 175a) to bring a civil action against an employer that fails to pay the prevailing wage to its employees. The action must be commenced not later than 18 months after the filing of a valid Notice of Completion in the office of the County Recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever last occurs.

4.11.2 **Worker's Private Right of Action.**

In a 2002 decision, the California Court of Appeal held that a union, as assignee of the worker's statutory rights, had standing to assert the employer's duty to pay prevailing wages under the California Labor Code. (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 770.) In so holding, the court concluded that the workers have private statutory rights to recover unpaid prevailing wages under Labor Code §§ 1194 and 1774 as well as waiting time penalties under Labor Code § 203. (*Id.* At 809.)

4.11.3 **Third Party Beneficiary.**

The California Court of Appeal found that a worker on a public works project may maintain a private suit against the contractor to recover unpaid prevailing wages as a third party beneficiary of the public works contract if the contract provides for the payment of prevailing wages. (*Tippett v. Terich* (1995) 37 Cal.App.4th 1517, 1531-32.)

4.12 **Industrial Welfare Commission (IWC) Wage Order 16-2001.**

Contractors employing workers on California public works projects must comply with any applicable provisions of Wage Order 16, or other applicable wage order. These obligations are in addition to any prevailing wage obligations that may apply on the public works project. These obligations include, among other things, requirements concerning record keeping, meal and rest periods, uniform and equipment, and reporting time. (See Addendum 5 for the IWC order 16.)

4.12.1 **Referral of Wage Order Violations to BOFE.**

The requirements under Wage Order 16, or any other applicable wage order that may apply to workers employed on a public works project, are not enforced by means of the administrative procedures set forth in Labor Code § 1741. However, the Public Works Unit will issue citations under other Labor Code provisions for violations it finds, such as the Labor Code 226 requirement of itemized wage statements. In appropriate circumstances, the Public Works Unit of the Labor Commissioner's Office will bring in the Bureau of Field Enforcement (BOFE) for investigation and prosecution by the Bureau of Field Enforcement. In addition, workers who believe that they may have a claim for violation of Wage Order 16, or any applicable wage order, may file an administrative claim with the Labor Commissioner under Labor Code § 98.

5. **The Labor Commissioner's Role in Prevailing Wage Enforcement by Labor Compliance Programs ("LCPs").**

Labor Code § 1771.5 first became effective in 1990 and authorized certain awarding bodies to "initiate and enforce" a labor compliance program to assist the Labor Commissioner in handling compliance with the prevailing wage laws. To qualify as a statutory LCP, applicants must obtain approval to operate as such from the Director. (LC § 1771.5(c).) The number of approved LCPs expanded

after 2003, when new Labor Code provisions (such as LC § 1771.7) and other new laws required that LCPs be utilized for prevailing wage compliance whenever certain public funds (such as statutorily specified bonds or other legislation-generated monies) are used to finance any part of a public works project. Regulations dealing with LCP activities were duly promulgated by the Director nearly 20 years ago, and have been amended several times since. The current LCP regulations are approximately 30 pages in length and are found at 8 CCR §§ 16421-16439. New amendments to the existing regulations were approved by the Office of Administrative Law and became effective January 21, 2009. Only a few of the existing regulations directly involve tasks to be performed by the Labor Commissioner in LCP matters. This Manual will not attempt to explain any of the LCP regulations which do not directly involve the Labor Commissioner's Office staff. This Manual will highlight certain LCP regulations which require the Labor Commissioner's participation in prevailing wage enforcement activities handled by LCPs.

5.1 **Forfeitures Requiring Approval by the Labor Commissioner.**

The regulation found at 8 CCR § 16436 defines the categories of "forfeitures" which LCPs are required to withhold from public works contractors who are subject to LCP prevailing wage compliance activities on projects for which an awarding body has a statutory duty to utilize an LCP. Under the LCP statutes, the LCP activities may be conducted by the awarding body's own DIR-approved LCP or by a third-party LCP, likewise approved by the Director. In either situation, the amount of the "forfeiture" must be submitted to and approved by the Labor Commissioner (or staff designated by the Labor Commissioner), if the forfeiture is more than \$1000, before the LCP can implement the statutory enforcement mechanism. That mechanism is the issuance and service of a "Notice of Withholding Contract Payments," a document which is the mirror image of the Labor Commissioner's CWPA form. The method by which the LCP seeks the

Labor Commissioner's approval of the desired forfeiture is delivery of a written "request for approval of the forfeiture" for review by staff. Forfeitures less than \$1000 are deemed approved upon service of the Labor Commissioner of copies of the Notice of Withholding, audit and a brief narrative summarizing the nature of the violation(s). (See 8 CCR § 16436.) A suggested form or format for these written requests can be found as Appendix D following § 16437. The LCP regulations specify the items which must be included with any submission. The required items are spelled out in detail at 8 CCR § 16437. Staff who typically have been assigned the responsibility of approving or denying LCP forfeiture requests has been at the Senior Deputy level or higher. The two types of forfeitures which require the Labor Commissioner's approval are: (1) Unpaid prevailing wages found by the LCP to be due under Labor Code § 1774 and (2) Penalty assessments under Labor Code §§ 1775, 1776 and 1813. (8 CCR § 16436.) Because LCPs must enforce the requirements of the prevailing wage laws "consistent with the practice of the Labor Commissioner" (8 CCR § 16434), all of the sections of this Manual which describe the Labor Commissioner's method of calculating amounts due for wages (including giving credit available to contractors for Employer Payments) and the formulas, amounts and circumstances giving rise to the listed statutory penalties apply. Staff assigned to handle LCP requests for approval of forfeitures must be familiar with all of these sections, which will not be individually referenced by the applicable Section numbers here.

5.2

Determination of Amount of Forfeiture by the Labor Commissioner.

The regulation found at 8 CCR § 16437, as noted above, lists all of the items required to be included in any LCP's request for approval of a defined "forfeiture." Those items are self-explanatory and will not be repeated here. The regulation also includes time deadlines for both the LCP's submission of a written request

for approval (not less than 30 days before final payment is due from the awarding body to the contractor, and never less than 30 days before expiration of the statute of limitations set forth in Labor Code § 1741), and the Labor Commissioner's response to the request for approval. The deadline for Labor Commissioner's response is required within 30 days of the receipt of the proposed forfeiture. For LCPs with "extended authority" from the Director to operate, approval is automatically effective 20 days after the requested forfeitures are served on the Labor Commissioner, unless the Labor Commissioner notifies the LCP (within the 20-day period) that the proposed forfeiture is subject to further review. (8 CCR § 16437(e)(2).) In this situation, the Labor Commissioner has an additional 30 days (from the date of service of the Labor Commissioner's notice of extension to the LCP) to serve the LCP with the Labor Commissioner's approval, modification, or disapproval of the proposed forfeitures. Although the language of the regulation is couched in mandatory terms ("shall"), there is no specific mention in the regulation that the Labor Commissioner would lose the authority to respond in an untimely manner. Under longstanding Supreme Court precedent, it would therefore appear that delays by the Labor Commissioner in responding timely would have no effect on the authority to approve, modify, or disapprove the proposed forfeitures in an untimely manner. (See, *Edwards v. Steele* (1979) 25 Cal.3d 405.) Nevertheless, staff assigned to handle requests for approval of forfeitures from LCPs is expected to respond timely.

5.3

Director's Authority to Approve / Revoke LCPs.

Although the LCP regulations authorize only the Director to approve or revoke LCPs to operate as approved labor compliance programs (8 CCR §§ 16425-16429), the Director's Office has historically relied upon staff to make recommendations to the Director concerning an applicant's qualifications to become an approved LCP, or to assist in various ways during the course of LCP

revocation proceedings. The Labor Commissioner's staff will, of course, assist the Director in whatever manner is required in performing these functions.

6 **Public Works Reforms (SB854).**

The Legislature has made several changes to the laws governing how the Department of Industrial Relations (DIR) monitors compliance with the prevailing wage requirements on public works projects. New Labor Code section 1777.1 now requires that a contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal, or engage in the performance of a contract for public work unless currently registered and qualified to perform work in the manner specified in new Labor Code section 1725.5. New Labor Code section 1773.3 now requires awarding bodies to electronically notify DIR of any public works contract within five days of the award using the online PWC-100 form. The Director of Industrial Relations is in the process of establishing rules and regulations for carrying out all of these new statutory provisions. In the interim, all public works contractors, awarding bodies and the general public should refer to two informational notices currently available online:

"Important Information for Awarding Bodies":

www.dir.ca.gov/public-works/SB854.html

"Precautionary Legal Notice to Awarding Bodies":

www.dir.ca.gov/DLSE/PrecautionaryLegalNoticetoAwardingBodies.html

6.1 **SB96.**

The Legislature created new enforcement mechanisms for the Labor Commissioner to enforce the Public Works Contractor Registration requirements through the passage of SB96. The bill also provided other minor changes to assist in public works enforcement generally. SB 96 creates penalties for contractors who fail to register and establishes new penalties and sanctions for

awarding bodies that hire or permit unregistered contractors to work on public works projects.

6.1.1 **Penalties Assessed Against Unregistered Contractors.**

Labor Code section 1771.1(g) provides that a contractor that is required to be registered in order to work on a public works contract and fails to do is subject to penalties of \$100 per day for each day the unregistered contractor performs work in violation of the registration requirements, not to exceed a total penalty of \$8,000. This \$8,000 limit is *in addition to* the \$2,000, which the contractor will be required to pay in order to become qualified to register. (Labor Code §1771.1(g).)

6.1.2 **Penalties Assessed Against Contractors That Employ Unregistered Subcontractors.**

Labor Code section 1771.1(h) provides that a higher-tiered public works contractor or subcontractor found to have entered into a subcontract with a lower-tiered unregistered contractor is subject to penalties of \$100 per day for each day the unregistered lower-tier subcontractor performs work in violation of the registration requirements, not to exceed a total penalty of \$10,000. The only exception to this liability for a higher tiered contractor is where a lower tiered subcontractor's performance violates the registration requirements because its registration was revoked. Higher-tiered contractors are prohibited from requiring subcontractors to indemnify them from liability for these penalties.

6.1.3 **Stop Orders Issued to Unregistered Contractors.**

Labor Code section 1771.1(j) provides that if an unregistered contractor or subcontractor is found performing on a public works project, the Labor Commissioner shall issue a stop order prohibiting the unregistered contractor or subcontractor from performing work on all public works until the unregistered

contractor or subcontractor become registered. A contractor or subcontractor, owner, director, officer, or managing agent of the contractor or subcontractor who fails to observe a stop order issued and served upon him or her, is guilty of a misdemeanor punishable by imprisonment in county jail not exceeding 60 days or by a fine not exceeding ten thousand dollars (\$10,000), or both.

6.1.4 **Awarding Bodies Must Ensure that the Contractors Utilized on Public Works Projects Are Registered.**

Labor Code section 1773.3(c)(1) provides that an awarding agency is subject to penalties of \$100 per day, up to \$10,000 per project, for the following violations: (1) Failing to timely submit required notice of award pursuant to Labor Code section 1773.3(a); (2) Entering into a contract directly with an unregistered contractor; or (3) Allowing an unregistered contractor to perform work on a project it awarded. In addition, Labor Code section 1773.3(d) provides that where final payment has been made and it is later discovered that an unregistered contractor or subcontractor worked on the project, the awarding body is subject to penalties of \$100 for each calendar day of noncompliance, for a period of up to 100 days, for each unregistered contractor or subcontractor.

6.1.5 **Awarding Body's Ineligibility to Receive State Funding or Financial Assistance.**

Labor Code §1773.3(f) provides that if the Labor Commissioner determines an awarding agency has committed two or more "willful violations" of public works laws within a one-year period, the awarding agency shall be ineligible to receive state funding or financial assistance for any construction project undertaken on behalf of the awarding agency for one year. These sanctions are enforced against the most problematic awarding bodies according to the same contractor debarment procedures found in Labor Code section 1777.1.

6.1.6 **“Small Project Exception”.**

SB 96 created limited exemptions to some of the requirements created by SB 854 for contractors and awarding bodies for new construction, alteration, installation, demolition or repair projects that do not exceed \$25,000 or maintenance projects that do not exceed \$15,000. As of July 1, 2017, contractors or subcontractors who work or bid exclusively on small public works projects will not be required to register as a public works contractor or file eCPRs for those “small” projects. (Labor Code §§1771.1(n) and 1771.4(a)(4).) However, contractors are still required to maintain accurate certified payroll records, retain them for at least three years, and provide them to the Labor Commissioner’s Office upon request pursuant to Labor Code §1776. Additionally, awarding bodies are not required to submit the notice of contract award through DIR’s PWC-100 system on projects that fall within the “small project” exemption. (Labor Code §1773.3(i).)

ADDENDUM 1

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LIST OF COURT CASES

City of Pasadena v. Charleville (1932) 215 Cal. 384

DLSE v. Ericsson Information Systems, Inc. (1990) 221 Cal.App.3d 114

Edwards v. Steele (1979) 25 Cal.3d 405.

Hernandez v. Mendoza (1988), 199 Cal.App.3d 721

Johnston v. Farmers Mutual Exchange of Calhoun, Inc., 218 F. 2d 588 (5th Cir. 1955)

Lusardi Construction Co. v. Aubry (1992) 1 Cal. 4th 976

Miree Construction v. Dole (11th Cir. 1991) 930 F.2d 1536

Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575

O. G. Sansone v. Department of Transportation (1976) 55 Cal.App.3d 434

Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785

Regents v. Aubry (1996) 42 Cal.App.4th 579

Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc. (2002) 102 Cal.App.4th 765

San Francisco Labor Council v. Regents of University of California (1980) 26 Cal.3d. 785

Southern Cal. Labor Management Committee v. Aubry (1997) 54 Cal.App.4th 873

So. Cal. Roads Co. v. McGuire (1934) 2 Cal.2d 115

State Building and Construction Trades v. City of Vista (2012) 54 Cal.4th 547

Tippett v. Terich (1995) 37 Cal.App.4th 1517, 1531-32

United States v. Morris (1840) 39 U.S. 463

WSB Electric, Inc. v. Curry (9th Cir. 1996) 88 F.3d 788

ADDENDUM 2

ABBREVIATIONS USED

CAC	California Apprenticeship Council
CBA	Collective Bargaining Agreement
CCR	California Code of Regulations
CMU	Compliance Monitoring Unit
CPR	Certified Payroll Records
CWPA	Civil Wage and Penalty Assessment
DAS	Division of Apprenticeship Standards
DIR	Department of Industrial Relations
DLSE	Division of Labor Standards Enforcement or Labor Commissioner's Office
LC	Labor Code
LCP	Labor Compliance Program
OD-Legal	Office of the Director's Legal Unit
OPRL	Director's Office of Policy, Research, and Legislation
PW	Public Works

ADDENDUM 3

RESOURCES AND USEFUL WEB LINKS

Prevailing Wage Rates and Coverage Information

- Director's General Prevailing Wage Determinations
 - <http://www.dir.ca.gov/OPRL/DPreWageDetermination.htm>
- Important Notices (Index 2001-1 to Present)
 - <http://www.dir.ca.gov/OPRL/NoticeIndex.htm>
- Public Works Coverage Determinations
 - <http://www.dir.ca.gov/OPRL/pwdecision.asp>
- Current Residential Prevailing Wage Determinations
 - <http://www.dir.ca.gov/oprl/Residential/reslist.html>
- Frequently Asked Questions – Prevailing Wage
 - http://www.dir.ca.gov/OPRL/FAQ_PrevailingWage.html
- Frequently Asked Questions – Off-Site Hauling
 - http://www.dir.ca.gov/OPRL/FAQ_Hauling.html

SB854 Requirements

- Certified Payroll Reporting
 - <http://www.dir.ca.gov/Public-Works/Certified-Payroll-Reporting.html>
- Public Works Contractor Registration
 - <http://www.dir.ca.gov/Public-Works/Contractors.html>
- Awarding Body Information
 - <http://www.dir.ca.gov/dlse/dlseform-pw26.pdf>

Apprenticeship

- Apprenticeship Requirements
 - <http://www.dir.ca.gov/Public-Works/Apprentices.html>
- Frequently Asked Questions – Apprenticeship
 - <http://www.dir.ca.gov/das/publicworksfaq.html>
- Apprenticeship Program Information Public Works – Search
 - <http://www.dir.ca.gov/databases/das/pwaddrstart.asp>
- Checking Apprenticeship Status of an Individual
 - <http://www.dir.ca.gov/das/appcertpw/appcertsearch.asp>
- Public Works Apprentice Wage Determinations (2004 – 2012)
 - <http://www.dir.ca.gov/DAS/PWAppWage/PWAppWageStart.asp>

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- Public Works Apprentice Wage Determinations (2012 – present)
 - <http://www.dir.ca.gov/OPRL/pwappwage/PWAppWageStart.asp>

Apprenticeship (continued)

- Public Works Contract Award Information Form (DAS Form 140 (Rev. 1/04))
 - <http://www.dir.ca.gov/DAS/dasform140.pdf>
- Request for Dispatch of an Apprentice Form (DAS Form 142 (Rev. 4/11))
 - <http://www.dir.ca.gov/DAS/dasform142.pdf>
- California Apprenticeship Council – Training Fund Contributions
 - <https://www.dir.ca.gov/das/TF/CAC2.asp>
- Apprenticeship Debarments
 - <http://www.dir.ca.gov/DAS/debarment.htm>

Enforcement

- How to File a Public Works Complaint
 - <http://www.dir.ca.gov/dlse/HowToFilePWComplaint.htm>
- Public Works Complaint Form – English (PW 1) (Rev. 9/12)
 - http://www.dir.ca.gov/dlse/Forms/PW/PW1_English.pdf
- Public Works Complaint Form – Spanish (PW 1) (Rev. 9/12)
 - http://www.dir.ca.gov/dlse/Forms/PW/PW1_Spanish.pdf
- Director's Prevailing Wage Enforcement Decisions (Labor Code Section 1742) (2007 to present)
 - <http://www.dir.ca.gov/OPRL/PrevWageEncDecision.htm>
- Debarments of Public Works Contractors
 - <http://www.dir.ca.gov/dlse/debar.html>
- Labor Code Section 1741(c) Judgments – Public Works
 - <http://www.dir.ca.gov/dlse/DLSE-Databases.htm>
- Labor Compliance Programs
 - <http://www.dir.ca.gov/lcp.asp>

Department of Industrial Relations (DIR) Regulations

- Payment of Prevailing Wages upon Public Works (Sections 1600-16414)
 - <http://www.dir.ca.gov/t8/ch8sb3.html>
- Awarding Body Labor Compliance Programs (Sections 16421-16802)
 - <http://www.dir.ca.gov/t8/ch8sb4.html>
- Department of Industrial Relations – Prevailing Wage Hearings (Sections 17201-17270)
 - <http://www.dir.ca.gov/t8/ch8sb6.html>