

DEPARTMENT OF INDUSTRIAL RELATIONS

NOTICE OF PROPOSED ACTION TO ADOPT

CALIFORNIA CODE OF REGULATIONS, TITLE 8, CHAPTER 8, SUBCHAPTER 6,

SECTIONS 17200 through 17270.

Prepared by:

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TITLE 8. DEPARTMENT OF INDUSTRIAL RELATIONS

NOTICE OF PROPOSED RULEMAKING

The Director of the Department of Industrial Relations (“Director”) proposes to adopt regulations setting forth the procedures for hearing disputes on the payment of prevailing wages in public works contracts under Articles 1 and 2 of Division 2, Part 7, Chapter 1 (commencing with section 1720) of the Labor Code. The Director proposes to adopt these regulations as a new Subchapter 6 of Chapter 8, Division 1 of Title 8 of the California Code of Regulations after considering all comments, objections, or recommendations regarding the proposed action.

PUBLIC HEARINGS, WRITTEN COMMENT PERIOD, AGENCY CONTACTS,

Public Hearings:

Public Hearings will be held on the proposed regulations as follows:

August 13, 2001 at 10:00 a.m.
Ronald Reagan State Building, First Floor Auditorium, South Tower
300 South Spring Street, Los Angeles, California

August 20, 2001 at 10:00 a.m.
Hiram Johnson State Building, Basement Auditorium
455 Golden Gate Avenue, San Francisco, California.

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

Written Comment Period:

Any person or authorized representative may submit written comments relevant to the proposed regulatory action to the contact person listed below. The written comment period closes on August 20, 2001, at 5:00 p.m., and the Director will only consider comments received by that deadline. Written comments may be submitted in person at one of the hearings or by letter, facsimile, or e-mail as follows:

Department of Industrial Relations
Office of the Director – Legal Unit
455 Golden Gate Avenue, Suite 9516
San Francisco, CA 94102

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

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Agency Contacts:

Inquiries concerning the proposed regulations may be directed to:

Primary Contact:

John Cumming
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San Francisco, CA 94142-0603
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Back-up Contact:

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Questions about the substance of the proposed regulations may be directed to either Mr. Cumming or Mr. Elliott.

AUTHORITY AND REFERENCE

AUTHORITY: Labor Code sections 7, 55, 59, 1742(b), and 1773.5.

REFERENCE: Stats. 2000, Chapter 954, §1; Civil Code sections 2787, 3247, and 3248; Code of Civil Procedure sections 12a, 12b, 128.5, 170.3(c)(1), 473, 1010 through 1013, 1094.5, and 1985 through 1988; California Rules of Court 985 and 1613; Evidence Code sections 451, 452, 455, 500, 502, 550, 754, 777, and 1563; Government Code sections 6250 et seq., 6700, 6701, 11405.60, 11405.70, sections 11415.20, 11425.10 et seq., 11425.20, 11425.30, 11425.50, 11430.10 through 11430.80, 11430.80(b), 11435.05 through 11435.65, 11440.50, 11450.20 through 11455.30, 11502(b), 11507, 11511.5, 11512, 11513, 11514, 11515, 68511.3, 68560, and 68566; Labor Code sections 7, 55, 59, 1720 et seq., 1722, 1722.1, 1726, 1727, 1741, 1742, 1742(a), 1742(b), 1742(c), 1742(d), 1742.1, 1743, 1771.5, 1771.6, 1771.6(a), 1771.6(b), 1773.5, 1775, 1775(b), 1776, 1776(g), and 1777.1 – 1777.7.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Overview:

The laws regulating public works projects require among other things that contractors and subcontractors pay their employees not less than the general prevailing wage rates, as determined

under the Labor Code. When a contractor or subcontractor is found to have violated prevailing wage obligations, the body awarding the public works contract is required to withhold and retain from payments due to the contractor all wages and other sums forfeited pursuant to the contract or existing law.

Under preexisting law that has been repealed effective as of July 1, 2001, a contractor or his or her assignee could appeal this action by bringing suit to recover the amounts withheld. Where the prevailing wage requirements were being enforced by an awarding body acting as a labor compliance program, the contractor also could appeal the enforcement action by requesting an administrative hearing before the Director, as an alternative to going to court.

AB 1646 (Stat. 2000 Chapter 954) made various substantive and procedural changes to the laws governing payment of prevailing wages on public works projects. Among other things, AB 1646 repealed Labor Code sections 1731–1733, that permitted contractors and assignees to sue for recovery of withheld contract payments, and section 1771.1, that provided the alternative of requesting a hearing before the Director. AB 1646 replaced those provisions with a new Labor Code section 1742, that provides for prevailing wage disputes to be appealed administratively, with a hearing conducted by an impartial hearing officer, and a final decision made by the Director. The Director’s decision will be subject to court review only by writ of administrative mandate under Code of Civil Procedure section 1094.5, using the “substantial evidence” test. These procedural changes take effect on July 1, 2001 and will remain in effect until January 1, 2005. On that date another version of Labor Code section 1742 will take effect and provide for administrative law judges to conduct the hearings and make final decisions.

The last sentence of Labor Code section 1742(b) requires the Director to adopt regulations setting forth procedures for these hearings. The purpose of this rulemaking is to comply with that mandate and set forth appropriate procedures that give effect to specific statutory requirements and afford due process to the parties involved in these proceedings.

AB 1646 made additional changes that are reflected in these proposed rules. New Labor Code section 1741, which also becomes operative on July 1, 2001, provides for the Labor Commissioner to initiate an enforcement action by issuing a Civil Wage and Penalty Assessment, which must contain certain information and must be issued and served in a prescribed manner within a prescribed period of time. Labor Code section 1771.6, as amended effective on July 1, 2001, imposes similar requirements on labor compliance programs, who will initiate an enforcement action by issuing a Notice of Withholding of Contract Payments. Section 1771.6(b), as amended, also provides that such Notices are reviewable in the same manner as Civil Wage and Penalty Assessments under Labor Code section 1742.

AB 1646 expanded the right to appeal these actions to affected subcontractors, and this right is reflected in these proposals. (*See Lujan v. G & G Fire Sprinklers, Inc.*, 121 S.Ct. 1446 (2001) [subcontractor had no due process right to hearing under prior statutory scheme].) AB 1646 also added a new Labor Code section 1742.1, providing for liquidated damages and an early settlement procedure. These changes are also reflected in these proposed rules, which include a proposed standard of proof required to avoid the imposition of liquidated damages.

These proposed rules will also provide a way for affected contractor and subcontractors to appeal penalty assessments for certified payroll violations issued by either the Labor Commissioner or the Division of Apprenticeship Standards under Labor Code section 1776. Conversely, these rules will not apply to criminal proceedings related to the violation of prevailing wage laws nor will they preclude other authorized remedies for enforcing those laws.

Proposed Regulations:

The Director proposes to add a new Subchapter 6 to Chapter 8 (Office of the Director) of Division 1, Title 8 of the California Code of Regulations. There are 49 proposed rules divided into six articles. The Director proposes to codify the regulations at sections 17200 – 17270 of Title 8, but also intends that each regulation be referred to as a Rule, using only its last two digits. (*For example*, proposed section 17210 may be referred to as Rule 10.)

Through these proposals, the Director intends to provide a complete set of rules governing prevailing wage appeals, from issuance of the Assessment or Notice of Withholding through the preparation of a record following the Final Decision of the Director. Some repetition of statutory language was necessary to make these rules the most coherent and accessible guide for parties who become involved in these cases. The Director anticipates that some participants in these cases will be non-lawyers who will find it easier to follow regulations that set out the procedures completely rather than having to go back and forth between the statute and rules.

Consideration was given to the alternatives of either incorporating these hearings into one of the Department's preexisting administrative hearing systems or just adopting the hearing rules of the Administrative Procedure Act (found at Government Code section 11500 and following) for these proceedings. However, because of the peculiar requirements of AB 1646, including the short time frames for hearings and decisions with the due process requirements attendant to substantial evidence review, neither approach seemed feasible.

On the other hand, the structure and language of these proposed rules are derived almost entirely from other sources. The primary sources for the language used in these proposals include the underlying Public Works/Prevailing Wage statutes (Labor Code sections 1720 and following), the Administration Adjudication Bill of Rights (Government Code sections 11425.10 and following) and other parts of the Administrative Procedure Act, relevant cited provisions of the Code of Civil Procedure and the Evidence Code, and the rules governing hearings and appeals before the Occupational Health & Safety Appeals Board (8 Cal.Code Regs. sections 345 and following [also supplying the basic outline for these draft regulations]) and the California Unemployment Insurance Appeals Board (22 Cal.Code Regs. sections 5000 and following).

ARTICLE 1 (Sections 17201 – 17212) sets forth rules of general application throughout the proceedings.

Section 17201 [Rule 01] is an introductory provision setting forth the scope and application of the rules.

Section 17202 [Rule 02] sets forth definitions of terms used throughout the rules. Definitions were provided and in some cases terminology created to address two particular concerns: (1) providing shorthand terms such as “Enforcing Agency” in order to avoid repeating cumbersome statutory language throughout the rules; and (2) providing “term of art” meanings to avoid definitional disputes based on other statutory or common usage meanings.

Section 17203 [Rule 03] sets forth rules for the computation of time, including extensions of time to respond or act when documents are served by mail. This is *not* a rule on proper methods of service, which is set forth later in Rule 10.

Section 17204 [Rule 04] sets forth the standards governing the appointment of an impartial Hearing Officer in a given case. Subpart (b) specifies that Hearing Officers will be appointed from among the Director’s own legal staff as has been customary in other cases in which the Director has the responsibility to conduct an administrative hearing. However, if no one is available from the Director’s legal staff, the rule (and statute) provide that the Director may appoint a lawyer or administrative law judge from another one of the Department’s divisions, other than the Division of Labor Standards Enforcement (*i.e.* the Labor Commissioner) who will usually be one of the parties. Subpart (c) incorporates the Government Code sections which set forth the minimum qualifications for serving as an administrative law judge (expressly required by Labor Code section 1742(b)) and the standards that would preclude an individual from hearing a particular matter (implied from the statutory requirement that the hearing officer be “impartial”). Through subpart (d) the Director intends to delegate the authority to appoint hearing officers in all cases to the Chief Counsel of the Office of the Director.

Section 17205 [Rule 05] sets forth the authority of hearing officers, which includes all adjudicative authority normally possessed by administrative law judges except that the hearing officer can prepare only a recommended decision, with final decision-making authority reserved to the Director (as provided in the statute). Subpart (b) is intended to clarify that the Director has no review or supervisory authority over the actions of the appointed Hearing Officer other than through the issuance or reconsideration of a final decision.

Section 17206 [Rule 06] specifies that hearing case records are available to the public as public records.

Section 17207 (Rule 07) sets forth the rules governing *ex parte* communications with the Hearing Officer or the Director. The Administrative Adjudication Bill of Rights (Government Code sections 11425.10 and following) requires certain standards, and this proposal incorporates those standards by reference. Subpart (g) addresses a particular concern regarding *ex parte* communications with the Director. As a cabinet level officer, the Director inevitably will hear about and discuss major labor and employment law issues with the Labor Commissioner and other parties who may participate in or be affected by these cases. Legal authorities recognize that a cabinet officer is different from an ordinary judicial officer and cannot be isolated from related policy discussions. However, subpart (g) is designed to protect the integrity of the Director’s role as decision-maker when the Director has a matter under active review.

Section 17208 [Rule 08] specifies how non-parties may intervene or participate in a proceeding. The statute and this rule provide that the Labor Commissioner may intervene as a matter of right in proceedings in which the awarding body is acting as the Enforcing Agency. Because the statute recognizes the right of bonding companies and sureties to receive notice of Wage Assessments, this proposal also permits those parties to intervene as a matter of if they do so promptly. Two options are proposed for intervention by another person. The first option does not extend intervention rights to anyone else, but it does authorize the hearing officer to allow other interested persons upon application to present arguments in a given case. The other option would give the Hearing Officer discretion to determine how others would be permitted to intervene in accordance with the standards found in Government Code section 11440.50.

This proposed rule has already drawn considerable comment in pre-notice discussions with interested persons. Government Code section 11440.50 suggests but does not require an agency to adopt a rule for permissive intervention. The recognized parties in these proceedings are the Enforcing Agency and the affected contractor or subcontractor seeking to recover withheld contract payments and avoid penalties. Labor Code section 1742 will now provide the exclusive means for contractors and subcontractors to appeal an Assessment or Notice, and the statute guarantees them a prompt review. Bonding companies and sureties also have a right to notice but no other express rights under Labor Code section 1742. Affected employees and their unions have an obvious interest in the proceedings; but the statute neither gives them any recognized status nor precludes the pursuit of other enforcement remedies. (AB 1646, section 1.) These factors and the limited time frame for hearing and deciding cases seem to argue against allowing others to participate as parties. However, it is also apparent that the rights and interests of others would be affected by the outcome of these proceedings. The Director encourages further comment.

Section 17209 [Rule 09] permits a party to be represented by a non-lawyer, consistent with the norm for administrative hearings. It also provides that when there is an authorized representative, service on that representative will control the running of deadlines, whether or not copies are also sent to the party. Subpart (d) requires parties and representatives to keep the hearing officer and other parties informed of their current address and telephone number.

Section 17210 [Rule 10] sets forth the rules for serving documents and providing a Proof of Service. Subpart (e) provides that the Hearing Officer will maintain an official address record of parties and participants.

Section 17211 [Rule 11] permits fax and e-mail service and filing as authorized by the hearing officer on a case by case basis. The intent is to encourage the use of such technologies provided they are not used in an abusive fashion or as a club against parties with limited resources. Fax filing will not be authorized for a Civil Wage and Penalty Assessment, a Notice of Withholding of Contract Payments, nor a decision of the Director, all of which are required by statute to be served by mail.

Section 17212 [Rule 12] clarifies that Article 6 of the Administrative Adjudication Bill of Rights applies to these proceedings (as required by Government Code section 11425.10(b)). It specifies that ex parte communications between the Hearing Officer and the Director are

permitted under Government Code section 11430.80(b). It also specifies that the formal hearing procedures of the Administrative Procedure Act (Government Code sections 11500 and following) will *not* apply to these proceedings except insofar as specific parts of those procedures have been incorporated into a given rule.

ARTICLE 2 (Sections 17220 – 17229) govern the issuance of the Assessment or Notice of Withholding of Contract Payments and the filing of the Request for Review.

Section 17220 [Rule 20] reiterates the requirements for serving the Assessment or Notice of Withholding of Contract Payments and it clarifies what information must be included in the Assessment or Notice.

Section 17221 [Rule 21] sets forth the right under Labor Code section 1742.1(b) to have an early settlement meeting with the Enforcing Agency. Subpart (c) clarifies that the parties are not precluded from having later settlement discussions. Subpart (d) specifies that the early settlement procedures, whether observed or not observed, do not extend the time for filing a Request for Review.

Section 17222 [Rule 22] sets forth the time limits and requirements for filing of Request for Review, which is the appeal document in these proceedings. In accordance with the statute, the Request for Review must be served on the Enforcing Agency, but the rule encourages sending a courtesy copy to the Director's Legal Unit in order to facilitate prompt scheduling of the hearing. Subpart (e) requires the Request for Review to include a statement of the basis for the Request, and it permits the Hearing Officer to require a further specification of the basis for seeking review. The intent of this subpart is also to facilitate prompt scheduling by giving the Hearing Officer an early understanding of the potential issues.

Section 17223 [Rule 23] specifies where the Enforcing Agency must transmit the Request for Review and other specified documents to commence the review proceeding.

Section 17224 [Rule 24] sets forth and explains the Enforcing Agency's statutory duty to disclose the evidence it intends to use at the hearing. Subpart (d) precludes the Enforcing Agency from using evidence not disclosed within the statutory deadline, but also permits an affected contractor or subcontractor to extend the deadline. Subpart (e) excepts from this preclusion rule any after-acquired evidence that is promptly disclosed as well as evidence used solely to rebut new or collateral claims raised by another party.

Section 17225 [Rule 25] permits an affected contractor or subcontractor to withdraw a Request for Review, and it also sets forth procedures and time limits for seeking to reinstate a withdrawn Request.

Section 17226 [Rule 26] governs the authority of the Enforcing Agency to dismiss or amend a Civil Wage and Penalty Assessment or Notice of Withholding of Contract Payments. Upon notice, which is intended to allow for objections and provide a cooling off period, the Enforcing Agency will essentially have a near-automatic right to dismiss or to amend the

Assessment or Notice downward. A motion to amend an Assessment or Notice upward will require a showing of good cause based upon new information.

Section 17227 [Rule 27] will permit cases to be disposed of early without the need for a hearing on the merits where it appears that either the Assessment or the Request for Review were not served or filed within the statutory time limits. The Hearing Officer will have discretion to decide whether or not to use this procedure as well as discretion not to recommend an early disposition when the evidence is uncertain. If the evidence shows that the Assessment or Request was untimely, the Hearing Officer will recommend that the Director issue a final decision dismissing the Assessment or Request. That decision will then be subject to reconsideration or judicial review in the same manner as any other final decision by the Director.

Section 17228 [Rule 28] specifies that a Civil Wage and Penalty Assessment or Notice of Withholding of Contract Payments that has not been appealed through the filing of a timely Request for Review is a “final order” within the meaning of the statute. Subpart (b) clarifies the duty of awarding bodies to retain and not disburse withheld amounts when an appeal remains pending as to at least one affected contractor or subcontractor.

Section 17229 [Rule 29] addresses the situation in which the wages, penalties, and damages due exceed what is available for withholding from contract payments. Once these awards are final, authority to enforce them is vested in the Labor Commissioner by Labor Code section 1742(d).

ARTICLE 3 (Sections 17230 - 17237) sets forth prehearing procedures.

Section 17230 [Rule 30] provides in subpart (a) that the Hearing Officer will set the date of the hearing on the merits, usually after consulting with the parties. The succeeding subparts set forth standards for granting continuances and for the waiver and tolling of the 90 day statutory deadline for starting the hearing. Two options are proposed for granting continuances. One option states that once a hearing date is set, continuances ordinarily will not be granted absent extraordinary circumstances. This is consistent with the standards underlying court delay reduction rules. *See* California Rule of Court 375 and Standards of Judicial Administration Recommended by the Judicial Council, section 9. The other option offers a relaxed standard for granting continuances when requested by all parties to the proceeding. Some believe this option may facilitate settlement of cases. The Director invites comments on which option is more appropriate or whether another approach would best reflect the requirements of the statute.

Section 17231 [Rule 31] permits the Hearing Officer to hold a prehearing conference to facilitate preparation of the case for hearing. Two draft Orders are included which are not intended to have regulatory effect but which reflect the types of matters which might arise in a prehearing conference and provide a guideline for how a case will proceed.

Section 17232 [Rule 32] permits multiple cases to be consolidated for hearing and decision when appropriate, and it also authorizes consolidated matters to be severed.

Section 17233 [Rule 33] sets forth standards for prehearing motions, including required information and cut-off dates for motions that must be resolved in advance of the hearing. The intent is that such motions would be disposed of on paper without oral hearings, unless an oral hearing is requested *and* the matter involves a fundamental right, such as a compelled waiver of a privilege. Because of the short deadline for starting a hearing on the merits, the procedure is not intended for use for dispositive (*e.g.* summary adjudication) motions other than a timeliness challenge handled under Rule 27 above.

Section 17234 [Rule 34] provides for the introduction of testimony by affidavit or declaration and for the treatment of that testimony as direct evidence (*i.e.* not hearsay) unless a party has requested an opportunity to cross-examine the witness. This procedure is authorized by the Administrative Procedure Act (Government Code section 11514) and is also a feature of judicial arbitration (California Rule of Court 1613) and economic litigation for limited civil cases (Code of Civil Procedure section 98). If another party requests the opportunity to cross-examine, this proposal places the burden of producing the witness on the party who offered the written testimony, which is the approach followed in Rule of Court 1613. If the witness cannot be produced for cross-examination, the written testimony will still be admissible but will be treated as hearsay evidence.

Section 17235 [Rule 35] provides that subpoenas and subpoenas duces tecum may be issued by a Hearing Officer or by an attorney for a party (consistent with an attorney's authority in civil cases and in adjudications under the Administrative Procedure Act). A subpoena duces tecum may require documents to be produced in advance of the hearing.

Section 17236 [Rule 36] sets forth a separate rule for compelling another party to attend and testify by issuing a Notice to Appear to that party's attorney in lieu of a subpoena.

Section 17237 [Rule 37] precludes depositions in most cases except when needed to obtain testimony from a party who cannot appear at the hearing. The statute contemplates that the Enforcing Agency will have done a full investigation prior to issuing an Assessment or Notice of Withholding of Contract Payments, and that it will turn over its evidence to the party who files a Request for Review, similar to what occurs in criminal cases. This appears to be the only discovery contemplated by the statute, and a rule that would permit other investigative discovery appears to be incompatible with the statutory 90 day deadline for starting the hearing.

ARTICLE 4 (Sections 17240 - 17253) sets forth rules governing the Hearing.

Section 17240 [Rule 40] provides for giving notice of the person appointed to serve as Hearing Officer as well as procedures and a time limit for objecting to that person's appointment.

Section 17241 [Rule 41] reiterates the 90 day deadline for commencing the hearing, and sets the county where the Hearing Officer is employed (San Francisco, Sacramento, or Los Angeles) as the default venue for the hearing. The parties may have the venue changed to another location that is more convenient to them but will have the burden to arrange for the availability of a suitable hearing site in that venue.

Section 17242 [Rule 42] sets forth customary standards for conducting hearings that are open to the public while giving the Hearing Officer the authority to protect information that is properly deemed confidential and to exclude witnesses prior to their testimony.

Section 17243 [Rule 43] sets forth customary standards for the conduct of hearings by a presiding officer in an administrative case.

Section 17244 [Rule 44] states the customary rule that administrative hearings are not bound by formal rules of evidence and that generally all relevant evidence is admissible unless subject to exclusion by reason of privilege or because unduly cumulative. Subpart (d) sets forth the customary standard governing the admissibility and weight accorded hearsay evidence in administrative cases.

Section 17245 [Rule 45] sets forth the authority of the Hearing Officer to take official notice (similar to judicial notice) of certain facts and information, including technical facts within the special expertise of the Department.

Section 17246 [Rule 46] sets forth the Hearing Officer's authority to act when a party fails to appear. Subpart (b) provides a procedure and deadline for a party to seek relief from the consequences of its failure to appear.

Section 17247 [Rule 47] sets forth the authority and procedure through which the Hearing Officer may certify a person for being in contempt or sanction a party for bad faith or frivolous tactics. This proposal follows the standards for administrative hearings found in the Administrative Procedure Act (Government Code sections 11455.10 – 11455.30).

Section 17248 [Rule 48] sets forth standards and procedures for obtaining the services of an interpreter, consistent with the requirements of the Administrative Procedure Act.

Section 17249 [Rule 49] provides that the Hearing Officer and Director will maintain and control the official Hearing Record and that the proceedings will be recorded by audiotape unless the Hearing Officer agrees to a different method. A parties may request a court reporter or other means for recording testimony but will then have the burden of procuring and paying for the reporter or other means.

Section 17250 [Rule 50] sets forth the respective burdens of the parties to come forward with evidence and then to persuade the decision-maker. The Director notes that the statute imposes differing burdens for certain findings and determinations.

Section 17251 [Rule 51] is a separate rule covering awards of liquidated damages under new Labor Code section 1742.1. The statute provides for waiver of liquidated damages “[i]f the contractor or subcontractor demonstrates to the satisfaction of the director that he or she substantial grounds for believing the assessment or notice to be in error[.]” Subpart (b) of this proposal offers a standard of what will constitute an adequate showing for purposes of obtaining a waiver. This standard is derived from the one applied to potential liquidated damages awards in cases arising under the federal Fair Labor Standards Act, 29 U.S.C. sections 216 and 260. The

Davis-Bacon Act, 40 U.S.C. sections 276a - 276a-7, which provides for the payment of prevailing wages in federal public works projects, is governed by many of the same interpretive standards as the Fair Labor Standards Act (*see* 29 U.S.C. sections 251 and following) although it does not have a liquidated damages provision.

Section 17252 [Rule 52] gives parties the right to file briefs prior to the hearing and to make a closing argument at the conclusion of the hearing. Subparts (b) and (c) give the Hearing Officer discretion to determine what post-hearing submissions will be permitted and include the option of drafting proposed findings.

Section 17253 [Rule 53] specifies the time when the hearing is deemed concluded for purposes of the 45 day deadline for the Director to issue a decision.

Because Article 4 runs through Rule 53, there is no Article 5.

ARTICLE 6 (Sections 17260 - 17263) sets forth rules governing the Decision of the Director.

Section 17260 [Rule 60] sets forth the statutory requirements for the contents and service of the Decision, including the statute's requirement that the Decision be served by first class mail pursuant to Code of Civil Procedure section 1013.

Section 17261 [Rule 61] sets forth the very limited time frame allowed by statute for the Director to reconsider a Decision. Subpart (d) notes that a Request for Reconsideration is neither a prerequisite for nor does it extend the time limits for seeking court review.

Section 17262 [Rule 62] specifies that the Decision issued under Rule 60 is a final decision for purposes of seeking court review unless the Director has issued a modified decision within the 15 days allowed under Rule 61. Subpart (c) provides that the deadline for seeking court review is determined from the date of service of the Decision and *includes* any extension of time (for service by mail) provided under Code of Civil Procedure section 1013.

Section 17263 [Rule 63] sets forth the obligation of a party seeking court review to designate and pay for preparation of the hearing record. There is an exception for parties granted in forma pauperis status, consistent with the requirements of the Code of Civil Procedure section 1094.5(a).

ARTICLE 7 (Section 17270 [Rule 70]) includes a single rule governing transitional cases in which contract payments were withheld within the 90 days preceding the July 1, 2001 effective date of the new statute and review procedure.

Comparable Statutes and Regulations:

Federal law requires the payment of prevailing wages and adherence to other minimum employment standards for work performed on federal public works projects through the Davis-Bacon Act, 40 U.S.C. sections 276a – 276a-7, the Contract Work Hours and Safety Standards

Act, 40 U.S.C. sections 327 – 334, and related statutes that incorporate these requirements into specific federal programs. (See 29 C.F.R. section 5.1 for a list of nearly 60 other such laws.) The regulations which implement these federal statutes are found at 29 C.F.R. Parts 1 through 8. Davis-Bacon and the provisions of Articles 1 and 2 of Division 2, Part 7, Chapter 1 (commencing with section 1720) of the Labor Code impose similar requirements in a similar manner. However, they are distinct in that Davis-Bacon applies only to contracts in which the federal government or the District of Columbia is a party, while the state statutes exclude from their coverage projects that are funded, carried out, and controlled by the federal government, even when a state or local agency cosponsors the project. 8 Cal.Code Reg. section 16001(b); and ***Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry***, 54 Cal.App.4th 873 (1997). The statutes also have different methods for determining prevailing wage rates, which sometimes result in a higher state rate.

The regulations governing Davis-Bacon and related federal statutes provide for an administrative appeal and hearing on a prevailing wage determination similar to what is provided in these proposals but also with differences that reflect the requirements of federal law and the organizational structure of the U.S. Department of Labor. See 29 C.F.R. Parts 6 through 8. These proposals have been drafted to follow the requirements of new Labor Code section 1742 and related statutes as well as provisions of California’s Administrative Procedure Act that govern administrative adjudications before state agencies.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Director has made the following initial determinations with respect to these proposals. The Director notes that these proposals implement Labor Code section 1742(b)’s duty to adopt regulations setting forth hearing procedures, and these proposals impose no significant mandates, costs, or savings that are different or distinct from what the Legislature has required by statute. The Director invites further comment on these specific impacts.

Mandates on Local Agencies or School Districts:

The proposals do not impose mandates on local agencies or school districts. For local agencies or school districts who seek and obtain approval to act as Labor Compliance Programs, these proposal impose some procedural requirements which may change how those Programs handle prevailing wage appeals but which will leave unchanged or may lower the overall cost of handling such appeals. (*Note: the choice to seek certification as a Labor Compliance Program is voluntary, and provides it a significant benefit by raising the threshold for projects deeded exempt from prevailing wage requirements from \$1,000 to \$25,000.*)

Costs or Savings to State Agencies; Reimbursable Costs Imposed on Local Agencies or School Districts; other nondiscretionary costs or savings imposed on local agencies; and costs or savings in federal funding to the state:

The statute imposes increased costs on the Office of the Director of the Department of Industrial Relations, and these proposals specifically impose those costs on the Director's Legal Unit which will supply hearing officers and administer the hearing procedures. There may be some corresponding reduction in costs for the courts and the Labor Commissioner who have handled prevailing wage appeals under the old statute. All agencies who are parties to these proceedings may also realize some savings through having the cases handled as administrative hearings rather than as formal court litigation.

To the extent local agencies or school districts participate in prevailing wage cases as awarding bodies or local compliance programs, they will incur the same costs and savings under the statute as other state agencies performing those functions. Analyses prepared for both houses of the state legislature found that the statute would have a fiscal impact on local government, although the final Senate analysis described the bill as "streamlining" the review process and the final Assembly analysis referred to these costs as "minor [and] absorbable." Section 22 of AB 1646 found that no reimbursement of local agency costs was required under Section 6 of Article XIII B of the Constitution and Government Code section 17556(g) [statute related to crime or infraction]; however, it also authorized the State Mandates Claims Fund to determine and pay up to one million dollars (\$1,000,000) in reimbursement claims.

The proposals do not involve any costs or savings in federal funding to the state.

Initial Determination of Economic Impact on Business:

The Director has made an initial determination that these proposals will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The statute itself impacts only businesses that choose to enter into public works contracts, and it is neutral in its treatment of California businesses as compared to businesses from other states. The change from a system of court review to an administrative hearing procedure may result in some savings for businesses who appeal prevailing wage determinations, simply because administrative hearings are often cheaper than court litigation.

Known Cost Impacts on Representative Private Person or Business:

The Director is not aware of any cost impact that a representative private person or business would necessarily incur in reasonable compliance with these proposals.

Creation, Elimination, or Expansion of Jobs or Businesses (Results of Assessment under Government Code section 11346.3(b)):

The Director has made initial determinations that (1) these proposals will not affect the creation or elimination of jobs within the State of California; (2) these proposals will not affect the creation of new businesses or the elimination of existing businesses within the State of California; and (3) these proposals will not affect the expansion of businesses currently doing business within the State of California.

Reporting Requirements (Finding under Government Code section 11346.3(c)):

These proposals impose no reporting requirements on businesses.

Effect on Housing Costs:

These proposals have no effect on housing costs.

Effect on Small Business:

Small businesses that participate in public works projects may be affected by these proposals. To the extent these proposals result in greater compliance with the prevailing wage laws, businesses that willingly pay prevailing wages will not be at a competitive disadvantage with businesses that pay lower wages than the statute permits. These proposals implement statutory changes that are designed to streamline the process for appealing prevailing wage determinations by requiring administrative hearings rather than court litigation. Since administrative hearings are often more cost efficient for participants than court litigation, these changes may reduce costs for small businesses that appeal prevailing wage determinations.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Director must determine that no reasonable alternative considered by the Director or that otherwise has been identified and brought to the Director’s attention would either be more effective in carrying out the purpose for which the action is proposed or be as effective as the proposed action and less burdensome to affected private persons. Labor Code section 1742(b) requires the Director to adopt hearing procedures, and as noted in Informative Digest above, the adoption of a new set of hearing regulations appears to be a more feasible approach for the particular requirements of this statute than attempting to incorporate preexisting schemes. The Director invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

AVAILABILITY OF INFORMATION PERTAINING TO THE PROPOSED ACTION

The Director will have the rulemaking file available for inspection and copying throughout the rulemaking process. Initially the file will consist of this notice, the initial statement of reasons, and the text of the proposed regulations. The text of the file will be available at:

Department of Industrial Relations
Office of the Director – Legal Unit
455 Golden Gate Avenue, Suite 9516
San Francisco, CA 94102

or from the contact persons John Cumming or Douglas Elliott.

Website:

Rulemaking records, including the text of the proposed regulations may be accessed through the Department's Internet website at www.dir.ca.gov.

Availability of Changed or Modified Text:

After holding the hearings and considering all timely and relevant comments received, the Director may adopt the proposed regulations substantially as described in this notice. If the Director makes modifications which are sufficiently related to the originally proposed text, the modified text (with changes clearly indicated) will be made available to the public for at least 15 days before the Director adopts the regulations as revised. Any such modifications will also be posted on the Department's website. Please send requests for copies of any modified regulations to the attention of the contact persons listed above. The Director will accept written comments on the modified regulations for 15 days after the date on which they are made available.

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

Upon completion, the Final Statement of Reasons will be available and the entire rulemaking file may be obtained from contact persons named in this notice.