

## TITLE 8. DEPARTMENT OF INDUSTRIAL RELATIONS

### NOTICE OF PROPOSED RULEMAKING

The Acting Director of the Department of Industrial Relations (“Acting Director”) proposes to amend one regulation governing Labor Compliance Programs and five regulations governing fee-based monitoring and enforcement by the Department of Industrial Relations on state bond-funded and other specified public works projects.

#### PUBLIC HEARING, WRITTEN COMMENT PERIOD, AGENCY CONTACTS

##### **Public Hearing:**

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

**August 15, 2011 at 10:00 a.m.**  
Hiram Johnson State Building  
Senator Milton Marks Conference Center  
455 Golden Gate Avenue  
San Francisco, California 94102

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

##### **Written Comment Period:**

Any person or authorized representative may submit written comments relevant to the proposed regulatory action to the contact person listed below. The written comment period closes on August 15, 2011, at 5:00 p.m., and the Acting Director will only consider comments received by that deadline. Written comments may be submitted in person at the hearing *or* by letter, facsimile, or e-mail as follows:

DIR, Office of the Director, Legal Unit  
455 Golden Gate Avenue, Suite 9516  
San Francisco, CA 94102  
Facsimile: (415) 703-4277  
E-mail: [SBX2-9Comments@dir.ca.gov](mailto:SBX2-9Comments@dir.ca.gov)

##### **Agency Contacts:**

Inquiries concerning the proposed regulations may be directed to:

Primary Contact:

John Cumming  
Department of Industrial Relations  
Office of the Director, Legal Unit  
455 Golden Gate Avenue, Suite 9516  
San Francisco, CA 94102  
(415) 703-4265

Back-up Contact:

Nance Steffen  
Department of Industrial Relations  
Office of the Director  
160 Promenade Circle, Suite 330  
Sacramento, CA 95834  
(916) 928-4756

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

### AUTHORITY AND REFERENCE

**Authority:** Labor Code Sections 54, 55, 1742(b), 1771.55(b), and 1773.5.

**Reference:** Sections 17250.30 and 81704, Education Code; section 6531, Government Code; sections 1771.3, 1771.5, 1771.55, 1771.7, 1771.75, 1771.8, 1771.85, and 1771.9, Labor Code; and sections 6804, 20133, 20175.2, 20193, 20209.7, 20688.6, and 20919.3, Public Contract Code.

### INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

**Overview:**

The laws regulating public works projects require among other things that contractors and subcontractors pay their workers not less than the general prevailing wage rates as determined under the Labor Code. State prevailing wage requirements customarily are enforced by the State Labor Commissioner (also known as the Chief of the Division of Labor Standards Enforcement) through the investigation of complaints and the issuance of civil wage and penalty assessments to compel the payment of sums found due. Historically, public agencies that award public works contracts (known as “awarding bodies”) have also shared responsibility for monitoring compliance with prevailing wage requirements, taking cognizance of violations, and pursuing appropriate enforcement action.

Through the adoption of Labor Code section 1771.5<sup>1</sup> in 1989, the legislature formally recognized and encouraged awarding bodies to initiate and enforce labor compliance programs (“LCPs”) to monitor and enforce prevailing wage requirements on their projects. LCPs must be approved by the Director and are subject to specified statutory and regulatory requirements under the oversight of the Labor Commissioner and the Director. Initially, Labor Code section 1771.5 provided for higher prevailing wage exemptions for awarding bodies that used an approved LCP for all of their public works projects. Subsequently legislation began to require awarding bodies to use LCPs on specific projects as a condition for using certain bond funds or alternative pro-

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<sup>1</sup> Stats. 1989, ch. 1224, §2.

curement methods such as design-build for those projects.<sup>2</sup>

The required use of LCPs, especially under Labor Code section 1771.7, which applied to projects funded by the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004, led to a proliferation in the number of approved LCPs. However, after a Legislative Analyst's Office study of the cost-effectiveness of LCPs, the legislature and governor concluded that the mandated use of LCPs was a flawed enforcement model and that the Department could monitor and enforce compliance more effectively for less cost. This led in turn to the adoption in early 2009 of SBX2-9,<sup>3</sup> which replaced the required use of LCPs for specified projects with a requirement to pay a fee to the Department for compliance monitoring and enforcement on those projects. SBX2-9 also extended this requirement to projects funded by *any* state-issued public works construction bond (rather than just specified bonds).

SBX2-9 further specified that its requirements would go into effect upon the determination and adoption of the fees to be charged for these services and the adoption of regulations setting forth the manner in which the Department would ensure compliance with and enforce prevailing wage compliance on subject projects. The former Director commenced a rulemaking in November of 2009 to establish fees, with related notice and fee waiver requirements, and to set forth the specific monitoring and enforcement activities to be undertaken by a new Compliance Monitoring Unit ("CMU") within the Division of Labor Standards Enforcement. Final regulations were approved by the Office of Administrative Law and filed with the Secretary of State on June 29, 2010, and were set to become effective on August 1, 2010.<sup>4</sup>

Just prior to the effective date of the new regulations, other state agencies and their bond counsel within the Attorney General's Office raised concerns regarding the consistency of SBX2-9's fee requirements with other legal requirements governing the expenditure of bond funds. In light of these concerns, bond counsel was unwilling to write an unqualified opinion letter for an upcoming bond sale, thereby jeopardizing the state's ability to sell bonds to fund public works projects. The former Director then conducted an emergency rulemaking to delete the new subchapter 4.5 regulations, thereby delaying the applicability of SBX2-9's fee requirements and removing the impediment to issuing unqualified bond opinions and selling bonds while the concerns raised by bond counsel were addressed.

Because emergency regulations can only remain in effect up to a maximum of 360 days (per Government Code section 11346.1), the emergency rulemaking had the effect of suspending but not fully repealing the new subchapter 4.5 regulations.<sup>5</sup> By law, the suspended regulations will become effective unless replaced by permanent regulations or an order of repeal adopted

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<sup>2</sup> A list of these laws is available at <http://www.dir.ca.gov/lcp/StatutesRequiringLCPs.pdf>.

<sup>3</sup> Stats. 2009-2010, 2d Ex. Sess., ch. 7.

<sup>4</sup> This rulemaking added a new subchapter 4.5, consisting of sections 16450 – 16455 and 16460 – 16464, to Chapter 8, Division 1, of Title 8 of the California Code of Regulations. The same rulemaking also made several revisions to the LCP regulations in Subchapter 4 that were mostly unrelated to the new Subchapter 4.5 requirements.

<sup>5</sup> The emergency rulemaking also made revisions to section 16423 of the LCP regulations to delete references to the new subchapter 4.5 regulations. With this one exception, the amendments to the LCP regulations that became effective on August 1, 2010, were *not* affected by the emergency rulemaking.

through a regular rulemaking within that same time period. At the present time, the emergency action has been extended once and is set to expire on August 1, 2011, but is potentially eligible for one more 90 day extension through October 31, 2011.

The Acting Director is now conducting this regular rulemaking for the purpose of modifying certain requirements in the subchapter 4.5 regulations in order to accommodate concerns raised by bond counsel. These proposed modifications are principally related to fees and to the effective date of the new requirements. The Acting Director is not proposing to modify the standards governing the operation of the Compliance Monitoring Unit in sections 16460 through 16464 or other regulatory requirements that were not implicated in the concerns raised by bond counsel. Instead, the provisions will be restored once the emergency rulemaking expires and the requirements of SBX2-9, as modified by this regular rulemaking and any new legislation, become effective.

Through research and continuing consultations the legal concerns raised by bond counsel have been substantially narrowed and are focused on not construing SBX2-9 fee provisions as authorizing expenditures that would go beyond the authority provided by any specific bond measure to which the fee provisions apply. The parties to these discussions believe that some legislative changes are needed to fully resolve these concerns. Unfortunately, because the emergency suspension of the subchapter 4.5 regulations can only remain in effect until October 31, 2011, at the latest, it is necessary to commence this regular rulemaking (to supersede the emergency action) without knowing what will be adopted in any corrective legislation. Consequently, the language of these proposals has been drafted with a focus on avoiding continuing concerns under bond law but without the same level of public input and precision that went into the original language and that may be desired by the regulated public. At the same time, the Acting Director is attempting, insofar as possible, to leave intact the original regulatory language that was produced through a full and robust public rulemaking and was not implicated by the issues raised by bond counsel.

## **Proposed Amendments**

The Acting Director proposes to amend section 16423 within Subchapter 4 of Chapter 8, Division, Title 8 of the California Code of Regulations (Labor Compliance Programs) and sections 16450, 16451, 16452, 16453, and 16455, within Subchapter 4.5 (Compliance Monitoring by Department of Industrial Relations). Some of these changes are substantive and others are clarifying or technical, including some revisions to Reference notes.

*Section 16423* pertains to the statutory requirement to have a labor compliance program pursuant to Labor Code Section 1771.5, including the findings an awarding agency must make and notices it must send when adopting such a program. Subpart (e) of this section refers specifically to the higher exemptions from prevailing requirements available to awarding bodies that use an LCP to monitor and enforcement compliance on *all* of their projects. The Acting Director proposes to delete the concluding phrase “all public works projects in which the Awarding Body participates” and replace it with “every public works project under the authority of the Awarding Body.”

*Section 16450* pertains to the applicability of the Subchapter 4.5 regulations governing Compliance Monitoring and Enforcement by the Department of Industrial Relations. The Acting Director proposes to delete the phrase “awarded on or after August 1, 2010” in the first line of subpart (a) and add the phrase “and for which the public works contract is awarded on or after January 1, 2012, or the effective date of these regulations, whichever is later” at the end of both subpart (a) and subpart (b). The Acting Director is also proposing to correct the Reference note by adding two more statutory sections that will require fee-based monitoring and enforcement by the Department.

*Section 16451* pertains to notice requirements for awarding bodies. The Acting Director proposes to change the title of this section from “Notice of Projects Subject to Fees” to “Notice of Projects Subject to Requirements of Subchapter.” In subpart (a), pertaining to project notices provided by awarding bodies to the Department, the Acting Director proposes to revise the language of subpart (a)(3)(G) to read as follows: “The estimated total project costs, including the gross amount of every contract for “public works” within the meaning of sections 1720 and following of the Labor Code, but not including amounts paid for land acquisition or for internal costs or contracts that are not for public works within the meaning of sections 1720 and following of the Labor Code.” The Acting Director is also proposing to correct the Reference note by adding two more statutory sections that will require fee-based monitoring and enforcement by the Department.

*Section 16452* pertains to the fees to be charged for compliance monitoring and enforcement by the Department. The Acting Director proposes to delete subparts (a), (b), and (c) and replacing them with the following:

“(a) The Department shall charge a fee for purposes of recovering its reasonable and necessary costs that are directly related to the monitoring and enforcement of prevailing wage requirements on a project that is subject to the fee.

“(b) For projects that use funds from any bond issued by the state to fund public works projects, the maximum fee that is payable from those bond proceeds and the manner for billing and collecting that fee shall be in accordance with standards approved by the Department of Finance and any constitutional or statutory standards and limits governing the bond in question. These standards may provide for the direct billing and payment of fees by the state board, commission, department, agency, or official that awards or administers the bond funding on the state’s behalf.

“(c) The maximum fee assessed for any project shall not exceed one-quarter of one percent of the total amount of the total project costs, including the gross amount of every contract for “public works” within the meaning of sections 1720 and following of the Labor Code, but not including amounts paid for land acquisition or for internal costs or contracts that are not for public works within the meaning of sections 1720 and following of the Labor Code.”

The Acting Director is not proposing any changes to the text of subpart (d), but proposes to delete and not replace subpart (e). The Acting Director is also proposing to correct the Reference note by adding two more statutory sections that will require fee-based monitoring and enforce-

ment by the Department.

*Section 16453* pertains to the voluntary payment of fees for compliance monitoring and enforcement by the Department as an option for meeting an existing statutory requirement to have a labor compliance program. The Acting Director proposes to make conforming changes in subparts (b) and (d) of this section in light of the proposed revisions to section 16452. As amended, the subparts would read as follows:

“(b) The fee for services provided pursuant to this section shall be subject to the limitations specified in section 16452 above.

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“(d) Notwithstanding subpart (c) of this section, for any project that requires both the use of a labor compliance program under Public Resources Code Section 75075 and the payment of a fee for compliance monitoring and enforcement by the Department under any other statute, the Labor Commissioner shall enter into an agreement to provide these services upon the request of the Awarding Body.”

The Acting Director is also proposing to correct the Reference note by adding two more statutory sections that will require fee-based monitoring and enforcement by the Department.

*Section 16455* pertains to the standards governing fee waivers for awarding agencies with approved labor compliance programs that want to continue using those programs for projects that otherwise would be subject to the fee. The Acting Director’s only proposed change is to correct the Reference note by adding two more statutory sections that will require fee-based monitoring and enforcement by the Department.

### **Comparable Statutes and Regulations:**

Federal law requires the payment of prevailing wages and adherence to other minimum employment standards for work performed on federal public works projects through the Davis-Bacon Act, 40 U.S.C. section 3141 - 3148, the Contract Work Hours and Safety Standards Act, 40 U.S.C. sections 3701 - 3708, and related statutes that incorporate these requirements into specific federal programs. (See 29 C.F.R. § 5.1 for a list of 60 such laws.) Some local entities, including the City and County of San Francisco, have their own prevailing wage ordinances. However, these laws all have distinct requirements in terms of the types of work covered, how prevailing wages are determined, and how prevailing wage requirements are enforced. In addition, a majority of states have long-standing prevailing wage laws, although with considerable variety as to coverage and methods of enforcement, and five other states (Alaska, New Mexico, New York, Oregon, and Washington) have some form of statutory fee that is used to fund compliance monitoring and enforcement.

### **DISCLOSURES REGARDING THE PROPOSED ACTION**

The Acting Director has made the following initial determinations with respect to these

proposals. The Acting Director notes that she is proposing revisions to regulations that were designed to implement SBX2-9's mandate to assess fees "sufficient to support the department's costs in ensuring compliance with and enforcing prevailing wage requirements." The proposed amendments impose no significant mandates, costs, or savings that are different or distinct from what the Legislature has required by statute, although these amendments are likely to result in greater administrative costs than the original text based on the anticipated need for more precise calculation and accounting of fees, for additional billings, invoicing and payments, and related efforts to adjust or collect delinquent fees. These proposals will also further delay the implementation of fee-based compliance monitoring and enforcement by the Department, resulting in higher compliance monitoring costs for many awarding bodies that must continue to comply with existing LCP requirements, and delaying the benefits of improved compliance monitoring and enforcement on bond-funded projects that currently are not overseen by LCPs. The Acting 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. 17 of the 18 statutory sections that were added or amended by SBX2-9, and four others that were added or amended by SBX2-4<sup>6</sup> require local agencies and school districts to do one or both of the following as a condition for obtaining construction bond funds, using specified contracting authority, or having higher prevailing wage exemptions: (1) establish or contract for use of an approved labor compliance program, or (2) pay a fee to the Department for prevailing wage monitoring and enforcement. Under these laws, most existing requirements to use a labor compliance program will be replaced by a requirement to pay a fee to the Department for monitoring and enforcement for any project awarded after these regulatory proposals become effective. The new fee requirement also will apply to projects funded by any state-issued public works construction bond rather than just to projects funded by specific bonds. The choice to undertake public works projects that are subject to either requirement is voluntary. For local agencies and schools districts that choose to undertake these projects, the fees required for compliance monitoring and enforcement by the Department will be substantially less than the fees they have been paying for labor compliance programs under existing statutory requirements.

### **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 proposed amendments potentially may reduce the fees paid by state and local agencies for compliance monitoring and enforcement by the Department of Industrial Relations, but there is likely to be a corresponding increase in administrative costs on both sides for invoicing, billing, payment, and collection of fees.

Because participation in any public works construction that would be subject to a fee is voluntary, no nondiscretionary costs or savings to local agencies or school districts will result

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<sup>6</sup> Stats. 2009-2010, 2d Ex. Sess., ch. 2.

from the proposed regulatory action, and the proposed regulatory action does not impose costs on any local agency or school district which must be reimbursed in accordance with Government Code Section 17561.

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 prevailing wage statutes impact only businesses that choose to enter into public works contracts, and they are neutral in their treatment of California businesses as compared to businesses from other states. These proposals do not change any obligations of contractors to awarding bodies other than to delay the implementation of SBX2-9.

**Known Cost Impacts on Representative Private Person or Business:**

These proposals will delay the implementation of SBX2-9 requirements, through which contractors will be submitting electronic certified payroll records directly to the Department of Industrial Relations on covered projects. Otherwise, these proposals will not alter the obligations of or have any known cost impact on any representative private person or business.

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

These proposals impose no reporting, recordkeeping, or compliance requirements on businesses.

**Effect on Housing Costs:**

These proposals have no effect on housing costs.

**Effect on Small Business:**

The Director has made an initial determination that these proposals will not affect small

business. These proposals are directed toward public agencies that will pay fees for compliance monitoring and enforcement of prevailing wage requirements by the Department of Industrial Relations. None of the proposals are regulations that small businesses legally would be required to comply with or that small businesses legally would be required to enforce. Small business will derive no new or distinct benefit nor will they incur any new or distinct detriment from the enforcement of these proposals.

## CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Acting Director must determine that no reasonable alternative considered by the Acting Director or that otherwise has been identified and brought to the Acting 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. The former Director previously determined that the existing regulatory language in Subchapter 4.5 constituted the most cost-effective means for complying with the objectives and specific requirements of SBX2-9. However, bond counsel in the Attorney General's Office raised concerns regarding the consistency of SBX2-9's fee requirements, as implemented through the Subchapter 4.5 regulations, with other legal requirements governing the expenditure of bond funds, and, as discussed in the Overview above, these concerns were serious enough to result in the emergency repeal of the Subchapter 4.5 regulations (still continuing) in order to avoid jeopardizing the state's ability to sell bonds to fund public works projects. To address these concerns, it appears to be necessary to adopt revisions that potentially may reduce some fees but will also increase administrative costs related to fee calculations, billing, payments, collections, and accounting. With the exception of existing regulatory language that will be superseded by these proposals and these proposals, the Acting Director is not aware of any alternatives to meet the requirements and objectives of the underlying legislation. The Acting 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 Acting Director will have the rulemaking file available for inspection and copying through out 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 the following location:

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

or from contact person John Cumming.

**Website:**

Rulemaking records, including the text of the proposed regulations may be accessed through the Department's Internet website at <http://www.dir.ca.gov/DIRRulemaking.html>.

**Availability of Changed or Modified Text:**

After holding the hearing and considering all timely and relevant comments received, the Acting Director or her successor may adopt the proposed regulations substantially as described in this notice. If modifications are proposed 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 regulations are adopted 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. Written comments on the modified regulations will be accepted for 15 days after the date on which they are made available.

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

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