



SB 96: Department of Industrial Relations' New Prevailing Wage Penalties

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Goals of This Presentation



1. What is prevailing wage?
2. Explain the new rules under SB 96
3. Apply new rules to SB 854 and the registration process
4. Understand when a project is subject to prevailing wages



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What Are Prevailing Wages?

- Minimum wage on public works projects based on worker classifications
 - Completely separate from public bidding rules
- The Director of the Department of Industrial Relations determines the prevailing rate of wages.
 - <http://www.dir.ca.gov/public-works/publicworks.html>
 - Monitored by Division of Labor Standards Enforcement (Labor Commissioner)
- Must consider collectively bargained rates in determining prevailing wage



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Why Pay Prevailing Wage?



- Arguments in favor:
 - Better quality workers can compete for public work
 - Contractors with collective bargaining agreements can compete for public work
 - Protects local workers by preventing importation of cheaper labor
 - Promotes skilled workforce
 - Promotes training of apprentices



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Why Pay Prevailing Wage?

- Arguments against:
 - Raises costs for local governments
 - Administrative burden for local governments
 - Administrative burden for contractors
 - Detrimental to small businesses
 - May be ineffective



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Compliance Monitoring SB 854 Overview:

- Three-Step Program for Compliance Monitoring:
 - Registration (funds program)
 - Notice to DIR (PWC-100)
 - Electronic Filing of Certified Payroll Records

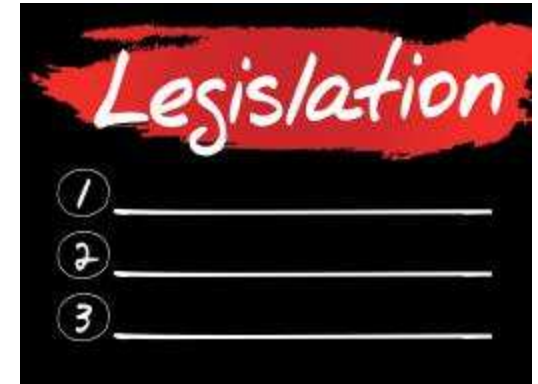


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SB 96 Overview:

- Adopted as part of a budget trailer bill
 - Became effective on July 1, 2017
- Unregistered Contractors
 - Agencies subject to \$100/day fine for hiring unregistered contractors or permitting to perform work
 - Maximum fines up to \$10,000
- PWC-100 (Notice to DIR)
 - Must file within 30 days, *but not later than the start of work*
 - \$100/day fine for failing to file
 - Maximum fines up to \$10,000



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SB 96 Overview:

- Small Contract Exemption:
 - <\$25,000 for construction, alteration, demolition, installation and repair
 - <\$15,000 for maintenance
- Stop Orders
 - DIR may order unregistered contractors to stop working on project
- Subcontractor Listing
 - Must now include subs' registration numbers



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Comparison

Prior Law/SB 854

1. Notice w/in 5 days
2. No fines for PWC-100
3. \$1,000 threshold for registration and notice
4. No stop orders
5. Listed subs must be registered

SB 96

1. Notice w/in 30 days
2. \$100/day fines (\$10k maximum)
3. \$25,000/\$15,000 threshold
4. Stop orders
5. Sub listing must include registration number



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Registration



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Contractor Registration – Basic Rules

- A contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal, or engage in the performance of any contract for public work, as defined in this chapter, unless currently registered and qualified to perform public work (Labor Code § 1771.1(a).)



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Contractor Registration

- \$400 Annual Registration Fee
 - Must be paid in advance
 - Lapses at end of State's fiscal year – June 30
 - Must renew before July 1 every year after
 - *January 1, 2018 – all contractors must register even if project predates SB 854.*



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Contractor Registration

- Conditions to register:
 - Contractor's license (unless not a contractor)
 - Worker's compensation insurance
 - No delinquent liability for back wages
 - Not debarred
 - *Has not bid on, been listed in a bid for, or performed public work without being registered*



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Penalty Registration

- \$2000 in addition to \$400 fee if bid on, listed in bid, or performed public works provided no prior violations for failing to register
 - Failure to pay renewal fee is also subject to penalty registration, even if inadvertent
 - Can “pre-register” for three years
- If multiple violations, contractor is barred from registering for one year
- Warn your contractors!



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Contractor Registration – When Required

- Prevailing wages are required on projects of \$1,000 or more
- Registration is required on all other projects subject to prevailing wage
 - **SB 96: SMALL CONTRACT EXCEPTION**
Registration is not required on a public works project:
 - of \$25,000 or less when the project is for construction, alteration, demolition, installation, or repair work or
 - \$15,000 or less when the project is for maintenance work.



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Definition of Maintenance

- (1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.
- (2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.
- (3) Landscape maintenance (mowing, watering, trimming, pruning, planting, replacement of plants, servicing and irrigation of sprinkler systems)



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Formal Bids and Registration Monitoring

- What if the prime contractor is unregistered?
 - Bid must contain proof of registration
 - If no proof, bid should be rejected
 - Non-responsive or not responsible?
- What if an unregistered subcontractor is listed in a bid?
 - 3 options if error is inadvertent:
 - Sub registers prior to bid opening
 - Sub registers within 24 hours of bid opening (and pays penalty to DIR)
 - Bidder replaces sub pursuant to procedures in the Public Contract Code for replacing subs (PCC 4107)
 - Requires notice and due process hearing



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Compliance Monitoring: Formal Bids

- SB 96 – The listing must contain the registration number of all listed subcontractors
 - *Compliance with SB 96 helps prevent inadvertent disclosures
 - **Update your bid forms!
- Subcontractors might still be inadvertently listed if:
 - Mistakenly gave registration number that expired
 - Mistakenly gave registration number of incorrect entity
- TIP: Inform contractors during pre-bid process



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Contracts Without Formal Bidding

- Registration is still required even if the contract is not formally bid
 - Verify registration before entering contract
- *NO EXCEPTION FOR EMERGENCY CONTRACTS.*
Even if occurrence is sudden and unexpected, there is no exception to the registration requirement
- Prequalification – must be registered before being prequalified to perform any public work



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Performance of Contract

- The overlooked aspect of SB 854:
 - Contractor must maintain registration
 - Subs of ALL tiers must be registered and maintain registration
- SB 96: DIR may issue Stop Orders to unregistered subs
 - May result in work stoppages/delays
 - Especially critical for unlisted subs



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Registration - Consequences

- SB 96: Entering a contract with an unregistered contractor, or allowing an unregistered contractor to perform work is subject to:
 - civil penalty of \$100 for each day in violation
 - not to exceed an aggregate penalty of \$10,000 for each project.
- Labor Commissioner may:
 - Waive the penalty for a first time violation if unintentional
 - Determine the amount of the fine, considering whether it was a good faith mistake, whether it was promptly and voluntarily corrected, and whether there is a prior history of noncompliance.



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Tips



- Include affirmative contractual obligations that:
 - Require maintaining registration
 - Prohibit unregistered subs
 - Require notice of unregistered subs and their registration numbers
- Keep a list of registered contractors to call in case of emergency
 - Consider which agency officials hire emergency contractors
 - Have “on-call” contracts for emergency services
 - *Remember* - \$25,000/\$15,000 threshold
- Immediately remove unregistered contractors or correct violations
 - Have a paper trail



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Notice



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Form PWC-100 Basic

- Notifies DIR of prevailing wage projects
- Electronic form – must be completed online
 - Only required if a prevailing wage project
 - Only required by the awarding agency
 - One form per contract; not per task order
- SB 96:
 - No need to file if under \$25,000 for construction and \$15,000 for maintenance
 - Must be filed within 30 days of award
 - “Award” = the date the Council/Board awards, not the date the contract is entered



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Form PWC-100 Penalties

- SB 96 (Labor Code 1773.3(c)):
 - Failing to file PWC-100 on time may result in:
 - civil penalty of \$100 for each day in violation
 - not to exceed an aggregate penalty of \$10,000 for each project.
- Labor Commissioner may:
 - Waive the penalty for a first time violation if unintentional
 - Determine the amount of the fine, considering whether it was a good faith mistake, whether it was promptly and voluntarily corrected, and whether there is a prior history of noncompliance.



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Form PWC-100

- Practical Issues:
 - Who is responsible for filing PWC-100 in each agency?
 - TIP: Develop procedures for designating filing employees
 - What if you're not sure whether it's a prevailing wage project?
 - Form requires listing of worker classifications of subcontractors
 - May need to obtain information from bidder
 - Should provide bidder with appropriate classifications
 - Require bidders to assist?



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Certified Payroll Records



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Certified Payroll Records

- Contractors and subs required to maintain certified payroll records
- Must be submitted directly to DIR electronically
- Redacted records will be available on DIR's website
- Agency does not need to require submittal of certified payrolls to agency
 - But may choose to do so
 - Still must respond to public records requests
 - Still must take cognizance of violations



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Certified Payroll Records

- SB 96:
 - Small contract exemption does NOT apply to certified payroll record filing
 - Must still pay prevailing wage if project is over \$1,000
 - Must still file certified payroll records online with DIR even if not registered



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Projects Subject to Prevailing Wage



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Projects Subject to PWL

- Primary Rule: Prevailing wage must be paid on all projects that involve work:
 - Of \$1,000 or more
 - Done under contract
 - Involving “public work”
 - Paid for “in whole or in part out of public funds”
- STEP 1 – What is the value of the contract?



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Step 2: Done Under Contract



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STEP 2: Is it Done Under Contract?

- Does not apply to work done by public agency's own forces
- Applies to ANY contract – does not have to be publicly bid
 - Even sole proprietors, small businesses, etc.
- Do not have to directly contract with contractor (i.e., may contract with developer, who contracts with contractor)



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Step 3: Is it “Public Work”?



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STEP 3: Is it a “Public Work”?

- *Overly Simplified Explanation:* If there is a physical change to real property, it is subject to prevailing wage
 - Law of Fixtures



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“Public Work”

- The (almost) full explanation:
 - Construction
 - Pre-construction work (inspection and land surveying)
 - Post-construction (clean-up)
 - Alteration
 - Demolition
 - Installation
 - Repair Work
 - Maintenance Work



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Maintenance

- (1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.
- (2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.
- (3) Landscape maintenance. (mowing, watering, trimming, pruning, planting, replacement of plants, servicing and irrigation of sprinkler systems)



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Maintenance

- Example:
 - Street work
 - Street sweeping is not subject to prevailing wage
 - Merely aesthetic
 - Does not preserve or protect the street
 - No physical change
 - Sealing is subject to prevailing wage
 - Protects street
 - Maintains street for future use
 - Physical change to street



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“Public Works” – Other Definitions

- Specific projects identified by statute:
 - Street, sewer, or other improvement work
 - Laying of carpet
 - Installation of modular office furniture



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“Public Works” – Other Definitions

- Improvements to property leased by Agency if
 - More than 50% of sq. ft. is leased to Agency
 - Lease entered before, during, or upon completion of construction.
- Hauling of refuse from a public works site
 - Hauling and delivery of ready-mix concrete to site (AB 219)
 - But not hauling of recyclables for resale
- Renewable energy projects if:
 - On Agency property
 - Agency purchases 50% of energy produced or improvements are primarily to reduce Agency's energy costs.



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Step 4: Paid in Whole or in Part out of Public Funds



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STEP 4:

Is it Paid for out of Public Funds?

- “Paid for in whole or in part out of public funds”
- *Follow the Money:*
 - Payment of money or equivalent of money
 - Performance of a portion of work by the Agency
 - Money loaned on a contingent basis
 - Credits against repayment obligations
 - Transfer for less than fair market value
 - Rent, fees, charges, etc. that are reduced below fair market value



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Private Projects

- *Hensel Phelps Construction v. San Diego Unified Port District*
 - Hired developer to construct waterfront hotel on land leased from Port
 - Lease of land included \$46.5 million subsidy, taken as a 100% rent credit for first two years, and 60% credit in subsequent years
 - Two years later, union requested prevailing wage determination
 - Contractor ordered to pay more than \$8 million in back wages and penalties



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Private Projects

- *Oxbow Carbon and Minerals, LLC v. Dept. of Industrial Relations*
 - Oxbow leased a facility from the City
 - Oxbow constructed conveyors and a roof. The City reimbursed for the conveyors but not the roof
 - Court held that entire project was subject to prevailing wage because City reimbursed for part of a single integrated project.



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Public Funding Exceptions



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Public Improvement Exception

- Labor Code section 1720(c)(2)
- Four requirements must be met:
 - The public improvements must be a condition of approval
 - It must be an otherwise private project
 - The public agency contributes no more money to the overall project than the cost of public improvements,
 - and the public agency maintains no proprietary interest in the project.
- Then, only public improvement work is subject to prevailing wage



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Public Improvements Exception

- *Azusa Land Partners v. Department of Industrial Relations*
- Two key holdings:
 - Community Facilities District Financing is considered public funding triggering prevailing wage, and
 - If any public improvements are funded with public funds, then ALL public improvements are subject to prevailing wage



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Public Funds – *De Minimis* Exception

- *De Minimis* exception:
 - DIR opinion - 1.64% subsidy is *de minimis*
 - AB 302 (2013) – Governor vetoed bill that would have defined *de minimis* as less than 1% and less than \$25,000
 - Veto message states longstanding practice is to consider 2% as a general threshold



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Public Funds – Other Exceptions

1. Private residential projects on private property not done under agreement with state agency, redevelopment agency or local housing authority.
2. Reimbursement to private developer of costs normally borne by the public
3. Certain affordable housing projects (low/mod housing fund, self-help housing construction, non-profit homeless housing, LIHTC projects)
4. Mortgage/downpayment assistance to single family residence
5. Work done by Conservation Corps or volunteers



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Summary



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Summary

- Applies to:
 - Work done under contract,
 - Of \$1,000 or more,
 - Involving public work, and
 - Paid for in whole or in part out of public funds



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Summary

- Before beginning a project, ask:
 - Will there be a physical change?
 - How will the Project be funded?
 - How much will the Project cost?
 - Is the Project for construction or maintenance?



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Summary

- If prevailing wage over \$1,000:
 - Make sure the contract documents contain prevailing wage requirements
 - Inform the prospective bidders at the pre-bid meeting



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Summary

- If prevailing wage over \$25,000/\$15,000:
 - Include registration requirements in contract
 - Require registration number
 - Follow procedure for filing PWC-100



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Summary

- If you're not sure:
 - Contact legal counsel
 - Consider whether coverage determination is necessary
 - Consider whether it would be better to require payment of prevailing wages



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