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October 2008

CONSTRUCTION UPDATE

### **New Guidelines Issued on Prevailing Wage Law**

On September 9, 2008, Governor Ted Strickland and the Ohio Department of Commerce released new guidelines intended to clarify any confusion, inconsistency or misapplication of the prevailing wage law to public/private partnerships. The guidelines take effect on October 15, 2008 and may have an impact on projects that were previously not considered subject to Ohio's prevailing wage law.

Ohio's prevailing wage law, codified at Ohio Revised Code §4115.03, *et seq.*, requires contractors to pay "prevailing" rates to certain workers on many, but not all, publicly funded projects. These wage rates are administratively determined by the Department of Commerce and closely track the wage rates in union collective bargaining agreements in the locality where the work is to be performed. Ohio's prevailing wage law applies to any activity, other than maintenance, which results in a physical change to a public improvement. The Code defines a public improvement to include:

...all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by a public authority of the state or any political subdivision thereof or by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof.

It goes on to state that to qualify as a "public improvement," where not undertaken by the public authority itself, the construction must be undertaken "pursuant to a contract with a public authority" as well as being undertaken "for a public authority."

For many years, there has been inconsistency in the manner in which the Department of Commerce and other state agencies have interpreted the "public improvement" definition. To eliminate this perceived uncertainty, the Strickland administration issued the following guidance to be applied by the Department to all commitments of public funds:

When the primary purpose for publicly-supported construction activity is to facilitate the use of privately-funded construction within six months of the completion of the public construction, all such construction will be presumed to comprise a single "public improvement project" subject to prevailing wage.

The primary purpose for publicly-supported construction activity will be presumptively established by the facts and circumstances at the time public funds are committed by the public entity.



This new clarification focuses less on the public improvement aspect of a project and more on the funding sources for the project, which is likely to cause more projects to become subject to the law and require that prevailing wages be paid when in the past they would not have been. A spokesman for the governor's office said the policy change would not amount to an expansion of prevailing wage rules, only a clarification of rules that have existed for years – but are now decided on an ad hoc basis. But critics of the policy change argue it would expand the use of prevailing wage in Ohio and fear that if businesses have to pay prevailing wage more frequently, the state's already shaky business climate will be further damaged.

The Department of Commerce also provided specific guidance for five different scenarios, specifically, when public funds are used to support: 1) infrastructure improvements on public land or easements granted to a public authority; 2) infrastructure improvements on private land; 3) remediation of environmental hazards when a developer or end-user has been identified; 4) remediation of environmental hazards when no developer or end-user has been identified; and 5) machinery and/or equipment being installed in a newly constructed or remodeled private structure.

Because the Department of Commerce acknowledges that application of the prevailing wage law is inherently fact specific, it will provide a determination as to whether prevailing wage applies to a given project within 30 days of request.

As developers consider whether to undertake new projects and the manner for funding them, this new policy should be carefully weighed and considered in light of the Strickland administration's expansion of the law to projects not previously subject to it. Moreover, contractors and construction managers should exercise diligence to seek and understand the funding sources for projects on which they intend to bid.

A copy of these guidelines and other FAQs from the Department of Commerce can be found at <http://www.com.ohio.gov/laws>.

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