



New Virginia Prevailing Wage Law Now in Effect For State Contractors

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On May 1, 2021, the Virginia Prevailing Wage Law (the "Law"), also referred to as the "Little Davis-Bacon Act," became effective. The Law requires contractors and subcontractors working under any public contract over \$250,000 advertised or solicited after May 1, 2021 with any Virginia state agency, or with those localities that have adopted the prevailing wage ordinance, to pay prevailing wages and benefits to all employees who perform services on that contract. The law also has certification requirements for contractors and stiff penalties for non-compliance. All businesses that do business with the Commonwealth of Virginia or its agencies and with localities should take heed of these new wage payment and recordkeeping obligations, as well as the wage payment requirements under the 2020 Virginia Wage Theft Law, as amended in 2021.

I. Coverage Under the Law

The Law mandates that general contractors and subcontractors pay prevailing wages to all mechanics, laborers, or other workers (collectively, "workers") performing services on a public contract with a Virginia state agency. Paying prevailing wages on public contracts with a locality, *i.e.*, any county, city, town, school division or other political subdivision, is voluntary unless that locality has adopted an ordinance that requires bidders or contractors to pay the prevailing wage.

The prevailing wage rates for each labor classification in the geographic area where the work is to be performed are determined by the Virginia Commissioner of Labor and Industry ("DOLI") based on the prevailing wage rates determined by the U.S. Secretary of Labor under the federal Davis-Bacon Act. The prevailing wage rate may also require paid benefits and holidays depending on the labor classification. While a contractor under a qualifying public contract is required to use the official Wage Determination that is provided by DOLI, the latest reference for prevailing wage rates to be used in Virginia is available at <https://www.doli.virginia.gov/prevailing-wage-law/>^[1] under the "Virginia Prevailing Wage Rates" reference tab.

II. Contractor Certification Requirements

The Law contains mandatory certification requirements for covered contractors. First, upon award of a public contract subject to the Law, the contractor must certify to the DOLI Commissioner under oath the pay scale to be used for each craft or trade employed under the public contract. Through this sworn certification, the contractor (1) specifies the total hourly amount to be paid to workers, including wages and applicable benefits, for each craft or trade; (2) provides an itemization of the amount paid to workers; and (3) lists the names and addresses of any third party fund, plan, or program to which benefit payments will be made on behalf of workers.

Second, the contractor is required to certify that its wage payment records are being preserved, will be made available to DOLI upon request, and reflect the actual hours worked and the amount paid to its workers for the time period in a DOLI audit request. In order to comply with the Law, the contractor must preserve (1) records relating to the wages paid to and hours worked by its workers and (2) a daily and weekly work schedule for each worker including his or her job classification. These records must be kept for a minimum of six years.

Lastly, the contractor is required to certify that it complied with the requirement to post the general prevailing wage rate for each craft and classification on the project in prominent and easily accessible places at the job site or at places where the contractor pays the workers their wages. Certification of compliance with this posting requirement must be given within 10 days of such posting.

III. Penalties and Liability for Non-Compliance

Any contractor who employs any worker to perform work on a public project for or on behalf of a state agency or qualifying locality at a rate less than the prevailing wage rate will be: (1) liable to the individual worker for the payment of the prevailing wage due, plus interest at an annual rate of eight percent accruing from the date the wages were due and (2) disqualified from bidding on public contracts with any public body until the contractor pays all its workers in full in accordance with the prevailing wage rates. In an instance where the contractor's violation is found to be willful, the contractor will be guilty of a Class 1 misdemeanor, the punishment for which is confinement in jail up to twelve months, a fine of up to \$2,500 or both. Moreover, violation of the Law will provide an interested party, including a bidder, offeror, contractor, subcontractor or operator, with legal standing to challenge a bid specification, project agreement or other public contract that violates the Law. This is critical because it may provide another bidder having an interest in a public contract with a basis to protest the award.

IV. Contractors Cannot Lose Sight of Virginia's 2020 Wage Theft Law

As all Virginia employers should remember, in July 1, 2020, the new Virginia Wage Theft Law became effective and created stiff penalties and potential for liability. See *Virginia Wage Theft Law Brings New Duties and Steep Penalties for General Contractors* for a refresher on this law. One provision of the larger Wage Theft Law applies only to general contractors and provides that, if the contractor knew or should have known its subcontractor or supplier was not paying its employees all wages due, the subcontractor or supplier employees could sue the general contractor and seek to hold it jointly and severally liable for the subcontractor's or the supplier's wage payment violations.

Understandably, this provision of the 2020 Wage Theft Law was met with significant industry opposition. As such, an amendment to the Virginia Wage Theft Law was enacted and goes into effect on July 1 that will let general contractors breathe a sigh of relief. First, under the amended Wage Theft Law, the general contractor will not be held jointly and severally liable for wage payment violations by suppliers that solely furnish materials, over which the general contractor presumably has had less control. Second, the amended Wage Theft Law provides that a written certification by the first-tier subcontractor that (1) such subcontractor has paid its employees all wages due for the work performed on the project and (2) to such subcontractor's knowledge, all lower tier sub-subcontractors have similarly paid their employees all wages due, will be evidence of the general contractor's compliance with this provision of the Wage Theft Law. Moreover, if the subcontractor falsifies its certification, this constitutes a fraud under the statute for which the general contractor could seek to hold the subcontractor civilly liable. Despite the reprieve from these amendments to the Wage Theft Law, general contractors on public projects still should confirm subcontractor's compliance with the Prevailing Wage Law to mitigate legal risks.

V. Conclusion

Contractors should remember that the new Virginia Prevailing Wage Law applies to a public contract over \$250,000 with a Virginia state agency or a locality that has adopted the new prevailing wage requirements, and that it requires payment of the prevailing wages as determined by DOLI for the particular job classification in the geographic area where the work is being performed. While the solicitation issued by these agencies or localities on or after May 1, 2021 is expected to have the prevailing wage requirements incorporated into the bid solicitation or contract itself, contractors are encouraged to confirm then-current prevailing wage rates through DOLI resources (or the federal Davis-Bacon Act) to ensure compliance with the Law. In addition, despite the upcoming July 1 reprieve on joint and several liability for wage violations committed by subcontractors under the Wage Theft Law, as a good business practice, general contractors should still contractually mandate their subcontractors' compliance with all Virginia wage payment and prevailing wage laws and obtain documentation of the certification of compliance.

[1] The Virginia Prevailing Wage Rates table, dated June 11, 2021, can be downloaded at <https://www.doli.virginia.gov/prevailing-wage-law/>.

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