

AB 1851 and PREVAILING WAGE

What Does this Mean for DOT Truckers?

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February 3, 2023**

NCECA

Prevailing Wage Law

1. Enacted in 1931 after the Great Depression-
2. Purpose was "to protect and benefit employees on public works projects.
3. To benefit the public through the superior efficiency of well-paid employees

Prevailing Wage Law

“ . . .not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.” Labor Code 1771

Public Works under the Labor Code

“Public works means: Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, . . .” Labor Code Section 1720(a)(1)

(also includes maintenance Section 1771)

Prevailing Wage Law

“Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.” Labor Code 1772

Public Works under the Labor Code

Ready Mix Concrete

...the hauling and delivery of ready-mixed concrete to carry out a public works contract, with respect to contracts involving any state agency . . . or any political subdivision of the state.

Labor Code Section 1720.9

Public Works under the Labor Code-Drivers

Off-hauling refuse:

“ . . . “public works” also means the hauling of refuse from a public works site to an outside disposal location . . .” Labor Code Section 1720.3

On-Hauling Material



Background

Case law tried to fill in the gap:

OG Sansone Co. vs. DOT (1976):

“immediately utilized on the improvement” as an
“integrated aspect of the flow of construction”

Background

Williams vs. Snsands Corp. (2007)

Driver must be hauling materials from a bona fide materials supplier and "does not himself immediately and directly incorporate the hauled material into the ongoing public works project."

Background

Bona Fide Material Supplier:

1. Supplier must be in business of selling supplies to general public
2. Plant where material is obtained cannot be established specifically for that project
3. Plant cannot be at work site
4. Material being hauled cannot be immediately incorporated into the project (must be rehandled outside the flow of construction)
5. Commercial supplier employees must do the delivery

Background

Triple E. Trucking (2008)

Driver must actually leave their truck and do more than just deliver materials

Strict Reading of Statute

Caselaw:

In 2021, Courts began holding that unless specific work was specifically mentioned in the prevailing wage statutes, it is not covered.

1. Kaanaana vs. Barrett Business Services
2. Mendoza v. Fonseca McElroy Grinding Co.
3. Busker vs. Wabtec Corp.

Mendoza vs. Fonseca:
strict reading of statute

OG Sansone Co. vs.
Department of Transportation:
“immediately incorporated into
flow process”

AB 1851- Changes for the Trucking Industry

AB 1851

Labor Code Section 1720.3 - Hauling of refuse from public works

(a) . . . "public works" also means both of the following:

(1) The hauling of refuse from a public works site to an outside disposal location.

(2) The on hauling of materials used for paving, grading, and fill onto a public works site, if the individual driver's work is integrated into the flow process of construction.

AB 1851

1. Sponsored by Teamsters
2. Opposed by Contractors Associations:
Contractors do not have control over working conditions of material suppliers. Labor Code Section 1743 holds the contractor responsible for wage violations
3. Opposed by Trucking Associations: long history of “materialman exemption”; de minimus amount of time spent on site; administrivia burden

Labor Code Section 1720.3

- Public Works =

1. Paving, Grading and Fill Material



2. Integrated into the flow process of construction

“integrated into the flow process of construction”

Stockpiling vs.
integration [into flow process]















Public Works under the Labor Code

Labor Code Section 1720.3

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Prevailing Wage Trucking Guidelines

1. What does Contract require?
2. What is employment status of the hauler?
3. What is site of work?
4. Where is the material coming from?
5. Who owns the material at off haul?
6. What is final destination of material?
7. What is the value of the material?

Site of Work

1. Does the material supplier have a batch plant, pit, etc.?
2. Is the batch plant, etc., adjacent to the work site?
3. Is it dedicated to the work site? (no commercial sales are made)
4. When was it opened?

Commercial Supplier

1. Supplier must be in business of selling supplies to general public
2. Plant where material is obtained cannot be established specifically for that project
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Public Works under the Labor Code

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Owner-Operators

Independent contractor owner-operator drivers engaged in on-haul and off-haul driving to or from a public works site are not exempt from the payment of prevailing wage.

1. List on certified payrolls to the same extent as employee drivers.

2. Absent any other rates posted by DIR, prevailing wage rates for owner-operators are the same as for employee drivers.

Material Supply Truckers

1. How will suppliers know if an order is for public works?
2. Who's responsible if the customer doesn't tell them?

Material Supplier Truckers

What portion of the driver's work is covered?

Material Supplier Truckers

What if the driver is delivering to some prevailing wage projects and some non-prevailing wage projects?

Overtime DOT Drivers

1. DOT Drivers: OT over 40 hours in week
2. Prevailing Wage OT: 8 hours a day/40 hours a week

Example

Monday: 8 hours Prevailing Wage

Tuesday: 10 hours Prevailing wage

Wednesday: 3 hours Regular; 7 hours Prevailing wage

How many hours of overtime?

What rate?

Example

Monday: 8 hours Prevailing Wage

Tuesday: 10 hours Prevailing Wage

Wednesday: 3 hours Regular; 7 hours Prevailing Wage

Thursday: 10 hours Regular

Friday: 10 hours Regular

Total hours worked: 48

How many hours of overtime?

What rate?

Overtime

Employee performing work on public and private projects during same workday with different rates of pay and overtime?

1. If Public Work performed during OT—then Prevailing Wage OT rate
2. If Private Work performed during OT—weighted average over work week

Overtime-Weighted Average

OVERTIME-MUST BE CALCULATED ON A WEEKLY BASIS

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY

Overtime-Weighted Average

First Determine:

Which hours worked this week (if any) are overtime? Prevailing wage OT vs. Weighted Average Rate OT?

Step 1: Calculate the Regular Rate of Pay

Regular Rate of Pay =

[(Total number of regular hours worked in week plus total number of regular overtime hours worked) x hourly wage] + (total number of regular prevailing wage hours worked multiplied by prevailing wage rate) + (total number of PW OT hours worked multiplied by PW OT rate) divided by the total number of hours worked in week

Example: Regular Rate of Pay

Monday: 8 hours Prevailing Wage

Tuesday: 10 hours Prevailing Wage (8 reg PW; 2 OT PW)

Wednesday: 3 hours Regular; 7 hours Prevailing Wage (5 reg PW; 2 OT PW)

Thursday: 10 hours Regular

Friday: 10 hours Regular

Total hours worked: 48

Calculate Regular Rate of Pay:

$$\frac{(23 \text{ hrs reg} \times \$30/\text{hr}) + (21 \text{ hrs PW} \times \$69.42/\text{hr}) + (4 \text{ hrs PW OT} \times \$88)}{48}$$

= \$52

Step 2: Calculate the Premium Pay for Overtime on Regular Hours

Premium Pay =

Regular Rate of Pay divided by 2

$$\$52/2 = \$26$$

Step 3: Calculate the Add'l Premium Pay Owed for Overtime on Regular Hours

Total regular overtime hours worked in week x premium pay

$$8 \text{ hrs OT} \times \$26 = \$208$$

Total Wages Due

Calculate:

Total wages due:

Prevailing Wage:\$1,457.82

Prevailing Wage Overtime: \$352

Regular Wage: \$690

Add'l Premium Pay for OT Regular Hours: \$208

Total: \$2,707.82

Example

Monday: 8 hours Prevailing Wage

Tuesday: 10 hours Prevailing Wage

Wednesday: 3 hours Regular; 7 hours Prevailing Wage

Thursday: 10 hours Regular

Friday: 10 hours Regular

Total hours worked: 48

How many hours of overtime?

What rate?

Alternative Work Week Schedules

- Not permitted for prevailing wage jobs
- OT must be paid

Elements of Prevailing Wage

Employer Payments As Credit

- Wages
- Rate of contribution irrevocably made by the employer to a trustee or plan
- Rate of actual costs to the employer to provide benefits (vacation; medical)
- CAC payments made pursuant to Section 1777.5

Apprenticeship Payments

If craft is non-apprenticeable, training contributions are paid to employee as wages

Prime Contractor Safe Harbor

- Can avoid liability for 1775 penalties if:

1. No knowledge of sub's failure to pay
2. Contract includes a copy of labor code provisions
3. Contractor monitors payment by periodically reviewing CPRs
4. If aware of underpayment contractor take corrective action
5. Prior to final payment, contractor obtains affidavit of sub that PW has been paid

Contractor Still Liable for Wage Underpayments

Even if Safe Harbor applies, Contractor is still jointly liable for wage underpayments and liquidated damages

Statute of Limitations

1. CWPA-18 months after Notice of Completion
2. Individual Claim at Labor Commissioner-3 years
3. Individual/Class Action Lawsuit in Superior Court-4 years

DOT Drivers

MEAL AND REST BREAKS:

In 2018, FMCSA concluded that federal law preempted California's meal and rest break laws

In 2019, the Ninth Circuit upheld the FMCSA's determination that California's meal and rest break laws were preempted by the federal hours-of-service regulations. *International Brotherhood of Teamsters, Local 2785 v. Federal Motor Carrier Safety Administration*

New Laws-2023

Covid

1. Covid Pay/Exclusion Pay
2. Employers are no longer required to maintain a stand alone COVID-19 Prevention Plan
3. COVID-19 testing available at no cost and during paid time to employees following a close contact.
4. “Close contact” is now defined by looking at the size of the workplace in which the exposure takes place

NEW LAWS-2023

Bereavement Leave

1. Up to five days of bereavement leave upon the death of a qualifying family member.
2. Unpaid
3. No limit on number of times used
4. Can be intermittent, must be used within 3 months of date of death
5. Employer can require documentation

New Laws-2023

“Designated person”-CFRA

1. Up to 12 weeks leave for serious health condition or to care for family member with serious health condition;
2. “Designated person” under the CFRA as an individual related to the employee by blood or whose association with the employee is equivalent to a family relationship
3. Can limit “designated person” to one per 12 month period

New Laws 2023

Pay Transparency Law:

1. More than 15 employees
2. Must include salary range in job postings
3. Provide employees with the pay scale for their current positions upon request
4. Must maintain job title and compensation records for each employee for the duration of their employment and for three years following their termination of employment

Questions?