Good News, Bad News On Prevailing Wages In Ohio
Changes To Law Promise Some Relief From Recent Activity

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Ohio contractors have faced high activity levels on the prevailing wage front in recent months, owing both to heightened federal enforcement experienced in most states, as well as a boom in prevailing wage cases under state law.

The good news is that the litigation surge is in part attributable to plaintiffs seeking to file in advance of significant changes to Ohio's prevailing wage law on public projects that took effect Sept. 28, 2011. While Gov. John Kasich's more sweeping original proposals were whittled back significantly by the General Assembly, the law nonetheless implements some helpful changes at all stages of prevailing wage projects.

Threshold for Coverage. As an initial matter, the threshold for covered “vertical construction” projects has increased to $125,000 for new projects and $38,000 for changes to existing construction. The thresholds will increase further on Sept. 29 of 2012 and 2013. After the last changes, Ohio will have some of the highest prevailing wage thresholds in the nation. The thresholds are somewhat lower for road and bridge construction, or "horizontal" projects.

Prevailing wage requirements have been eliminated entirely in some areas. Certain projects financed by “Chapter 165 bonds” -- bonds issued pursuant to Ohio Revised Code Chapter 165 to preserve or create jobs and improve the economic welfare of the state -- are no longer subject to prevailing wage requirements. Also no longer subject to prevailing wage are subjects financed by port authorities, and certain projects under the auspices of the Ohio Department of Development. In short, projects previously subject to prevailing wage warrant careful scrutiny to ensure that they are still subject to prevailing wage requirements.

Setting Prevailing Wage. For the purposes of establishing prevailing wages, unions are now required to file relevant portions of union contracts with the Department of Commerce. This addresses a concern that renegotiated agreements were not being timely filed with the Department to be incorporated in prevailing wages.

Proper Parties to Bring Action. The law aims to cut back on prevailing wage litigation under Ohio law, in two ways. First, the Ohio Department of Commerce is now provided 120 days to investigate a complaint, with the possibility of even further extension; previously, a complaint could be filed in court if the Department had not completed its investigation in only 60 days, making it highly unlikely that the Department could complete an investigation in advance of litigation. Administrative complaints to the Department must now be made on Department-prescribed forms
that are intended to require more specificity and evidence. Who may file the complaint is also more limited, such that "interested parties" such as unions, trade associations, and other employers must be specifically involved in the project being complained about in order to have standing as a complainant.

**Limitations on Liability.** The law also limits potential liability for certain violations. Significantly, there is a safe harbor from liability where a contractor makes full restitution and violations are less than $1,000 per employer. In other words, minor mistakes or misinterpretations will not subject contractors to potential significant attorney fees recoveries. Contractors' liability for violations by its subcontractors where the contractor makes good faith efforts to ensure the subcontractor paid prevailing wages. Liability is also limited in certain instances where a contractor exceeds the permitted apprentice-to-skilled worker ratio.

Contractors should distinguish these changes from the federal Davis Bacon Act, applicable to federal contracts. The Obama administration has significantly heightened Davis Bacon Act enforcement in the last two years, including by greatly increasing staff focused on Davis Bacon issues.

In this environment, and despite the positive changes in Ohio law, contractors doing government work in any state should give great attention that they are complying with applicable requirements. Contractors using subcontractors will likely be held responsible for the compliance – or lack thereof – of their subcontractors, and should consult with counsel in advance about how to best manage those situations. Contractors should also consult with counsel immediately if they are contacted by a government agency on prevailing wage issues.

For more information on the prevailing wage issue, please contact William Nolan at (614) 628-1401 or by e-mail at bill.nolan@btlaw.com.

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