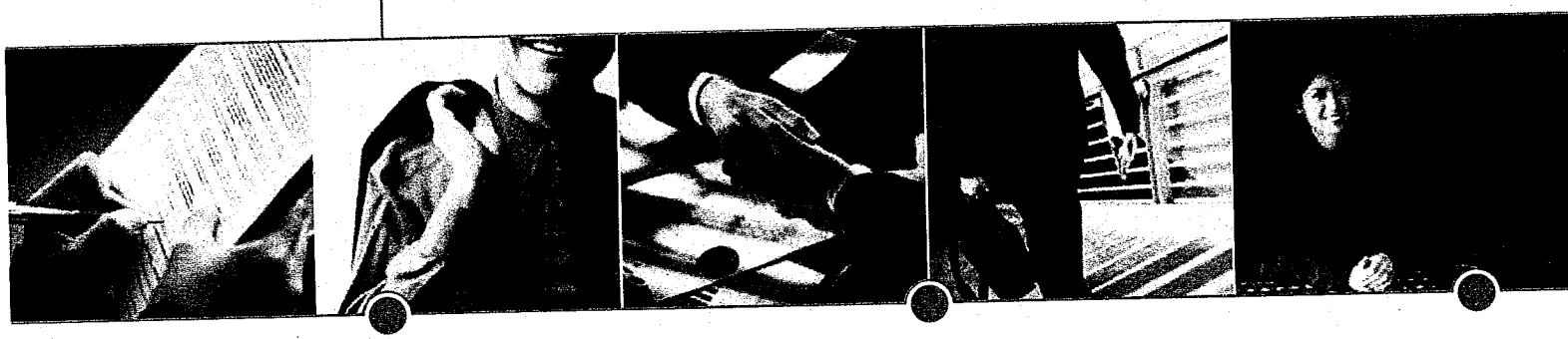
WHY PUBLIC WORKS LAW MATTERS IN PROJECT DESIGN AND ADMINISTRATION – HOT TOPICS TODAY FOR LABOR LAWYERS



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Once upon a time, prevailing wage and public works law existed in the dusty corner of law firm libraries with treatises exposed to light and air on the rare occasions when "prevailing wages" applied.

In today's development marketplace much has changed. Prevailing wage has become a primary tool in controlling and expanding labor union market share, and in many cases, the battlefield by which labor unions compete over jurisdiction - today just another name for market share.

In the past, prevailing wages meant a preset wage floor for government projects. Now it represents, especially in states like California, New York and Washington, establishment of working conditions for entire industries.

It has also expanded into a tool to control private marketplaces, from transportation to solar, industrial refining and now, even private housing development.

Even the concept of public monies has substantially shifted, from direct public dollars to wholly indirect private funding vehicles where even mega private projects can be unexpectedly transformed into public ones where a public purpose or indirect public subsidies are determined by a legislature to exist.

The current wave of expansion is not even based on traditional funding or labor justifications. Under California's SB 54 (and similar legislation introduced in other states) the Clean Air Act has been used as a tool to expand the reach of prevailing wage to private large scale industrial projects.

This is of national import and being viewed as part of the challenges for new infrastructure spending. For example, some projects may be funded through labor union funding banks which will likely have intrinsic conditions. In other situations, especially in large scale transit projects, project labor agreements and industry stabilization agreements may be negotiated. When this happens, all work on a project is affected at all levels

A part of the challenges to come is that both state and federal prevailing wage setting structures are not well developed to adapt to such vehicles. There is currently no mechanism for such agreements to become part of Davis-Bacon federal wage determination processes. Similar challenges exist to the extent project successes could be greatly facilitated if wages could be determined on an industry basis, rather than a craft worker basis.

This is evolving in a highly complicated way when construction is regulated by nontraditional entities, especially state utility or energy commissions, who function in a rate regulation and licensing matrix. In these areas, the impact is not reserved for mega projects but can drill down to the individual contractor working on HVAC or electrical or solar projects.

Further, regulation of projects is integrated into how modalities are related to the public, whether triggered by environmental or emission concerns, proximity to regulated emissions or sources or, separately, OSHA or high hazard process regulations.

Finally, the inner details of employment are being regulated. What started as craft licensing now extends to so-called "skilled and trained" workforce requirements which purportedly require graduation from an approved apprenticeship program as a condition of employment. Such requirements create parallel regulation of who can work on a project when and affect mobility of workforces.

Finally, the overall standard of due diligence is much higher especially when complicated regulations bring equally complicated and expensive regulatory penalties. This update will summarize some of the more recent issues of note as well as some of the expected impact of some recent political developments.

EXPANSION OF PREVAILING WAGE OUTSIDE OF CONSTRUCTION

OFF SITE FABRICATION

Historical Background of the "Offsite" Rule in California

California's Department of Industrial Relations ("DIR") has long struggled with conflicting demands to expand prevailing wage to private manufacturing and construction. In two pivotal (but now no longer controlling decisions) the DIR sought to establish a rule that if an item was manufactured to jobsite specifications, prevailing wages might apply, regardless of where the work was done or by whom. (http://www.dir.ca.gov/OPRL/PWDecision.asp)

The DIR's "designed to spec" rule sparked national controversy from the moment it was announced. Extensive public hearings gave voice to challenges from many different construction and industry associations. Ultimately, the decisions containing the "designed to spec" rule were voluntarily withdrawn by the DIR. (http://www.dir.ca.gov/OPRL/ImportantNoticeOffsite.doc)

A company Mechanical ("A company") was the air conditioning/HVAC subcontractor on a community college district administration building modernization project. The subcontract provisions were industry standard. The project was to be built to the specifications of the prime contract and A company was to "furnish all labor, materials, equipment, services and supplies to complete" the HVAC work. Ductwork on the project was to be fabricated according to industry standards. The prime contract did not specify who was required to fabricate those materials. The subcontract was a conventional public works prevailing wage contract, such that A company was to "pay not less than the [applicable prevailing wage] to all laborers, workmen, and mechanics employed by him at the project site in the execution of [the work.]" A company did not sell its fabricated materials to the general public but it did have a longstanding permanent offsite facility which it used to fabricate materials for various projects and it used that facility to do fabrication for later installation on the community college project..

A company employee complained to the Division of Labor Standards Enforcement ("DLSE") that he had not been paid prevailing wage for the fabrication work he performed in the A company fabrication shop related to the public works project. None of his work was done at the project site.

In public works projects, the DIR is empowered to issue coverage determinations that establish the scope and application of public works laws.

In these situations, interested industry partners from labor and the construction associations are permitted to participate, in addition to the involved parties. In this case,

A state official initially issued a coverage determination that the work performed by the employee was subject to the prevailing wage laws, focusing on whether a company had acted as a material supplier. That approach was narrowly construed against a company as it did not sell its materials to the general public. A company filed an administrative appeal and the DIR reversed itself. The new DIR determination looked to the federal Davis-Bacon regulations which are more restrictive in their application to off-site work.

Appeal from final DIR determinations are via petitions for writ in the Superior Court. Sheet Metal Local 104 filed the appeal. The Superior Court granted the writ. This company decision became the basis for the ensuing appellate case. The trial court rejected the Director's reliance on Davis Bacon law, focusing instead on yet another approach to potential liability, drawing on the decision in *Williams v. Sands Corp.* (2007) 156 Cal.App.4th 742 ("Sands"). The *Sands* case, relied, in part, on a definitional section of the California Labor Code, Section 1720 which provides, in pertinent part, that " (b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following: (1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works, contractor, subcontractor, or developer; (2) Performance of construction work by the state or political subdivision in execution of the project." (Emphasis supplied)

At the oral argument, substantial discussion focused on whether *Sands*, a "hauling" case provided effective guidance to the Court in making an off-site fabrication decision in A company.

In *Sands*, the Court's intellectual focus had been on whether the phrase "in execution" imposed an obligation to determine whether certain functions are integral to the performance of a public works contract The A company court found the "in execution" inquiry in Sands was reached in a hauling context that did not provide clear and authoritative guidance concerning the question before it - whether fabrication and manufacturing is subject to the prevailing wage law when performed in a permanent, offsite facility of a contractor or subcontractor that does not sell supplies to the general public.

As appellant and some amici had expressly argued Sands was distinguishable precedent. It was not a typical construction job site case, but involved the independent issue of trucking/hauling in connection with a public works project. Indeed, the California Legislature has followed this same point of view, crafting detailed provisions of the Labor Code dealing with hauling on and off public works. (See Labor Code section 1720.3)

The decision follows this line of analysis, largely rejecting Sands as a controlling or even helpful precedent. Vigorous discussion at oral argument led some observers to conclude, as the Court ultimately did, that the phrase "in execution" on which *Sands* relied derives from Labor Code provisions defining the scope of public works law was of little practical guidance in the case at hand.

Petitioners also argued that the analysis should focus on whether the manufactured or fabricated items are standard or customized and if customized to specifications, they would be more closely integrated into the process of construction. The Court found this proposed test unhelpful and a source of confusion since customization could mean a variety of things. At argument the Justices expressly explained their obligation was to derive a clear standard to permit parties to predict the public-works consequences of their actions. Petitioner's suggestion that a product was not covered if it could be purchased off the rack at Home Depot was not accepted.

Finally, the Court also rejected the argument that the DIR was not permitted to look to federal prevailing wage laws (also known as Davis-Bacon and related acts) which limited prevailing wage laws to work done "directly on the site," because such language is not included in the California prevailing wage statutes. The Court held that the Davis-Bacon Act was appropriate as guidance on the issue when California authority does not provide clear answers, and, unless Davis-Bacon is fundamentally inconsistent with California law, it can provide useful guidance, especially on a national level

However, contracting parties should be especially sensitive to inclusion of offsite provisions in project contracts. This should be a primary point of attention in infrastructure projects in multi modal projects, including high speed rail and air and shipping terminals and urban mass transit.

OTHER RELATED INDUSTRIES

Efforts to expand public works have now extended to spin off and related industries, notable industrial refinery operations and peripheral support industries, such as pre-fabrication, pre cast concrete and now, the ready mix industry.

READY-MIXED CONCRETE INDUSTRY

In 2016, Assembly Bill 219, codified as Labor Code section 1720.9, expanded the definition of "public works" to include "the hauling and delivery of ready-mixed concrete to carry out a public works contract, with respect to contracts involving any state agency..." The statute applied to ready-mixed concrete drivers *only*, and not to

drivers of other construction materials used in the construction of public works projects which require the payment of prevailing wage. This was a significant change in the law, including the establishment of a procedure to set wages based on the location of the ready-mix concrete batch plants, not the locations of the jobsites.

The statute was immediately challenged by a group of ready-mixed concrete companies ("the group") in United States District Court, Central District of California, *Allied Concrete and Supply Co. et al v. Brown*, USDC 2:16-cv-04830-RGK (FFM). The Division of Labor Standards Enforcement of the California Department of Industrial Relations has continued to enforce the law, which the 9th Circuit Court of Appeal specifically authorized. Earlier this month, a motion for summary judgment filed in their pending challenge to the lawsuit was granted, leaving more uncertainty regarding the roll out of this new provision. Specifically, on March 6, 2017, U.S. District Judge R. Gary Klausner found the group's arguments persuasive, and issued summary judgment. The group argued that the statute violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, which Judge Klausner found to be correct. The court found the ready-mixed concrete drivers to be similarly situated to drivers of other construction related materials. In that capacity, the rationale for singling out ready-mixed concrete drivers was inappropriate. The District Court found (1) there was no need to address perceived problems incrementally, by starting with ready-mixed concrete drivers, (2) that targeting ready-mixed concrete drivers simply because they could comply was unjustified, (3) that targeting ready-mixed concrete drivers did not necessarily ensure high quality work on public infrastructure, which is one of the rationales behind CPWL, (4) that the protection of unions might be an intended effect of the statute, but if the sole purpose of protecting union employers from non-union competition was insufficient to pass constitutional muster, and (5) that legislative clarification regarding the application of CPWL did not justify carving out all other construction material drivers from compliance. Because the court found the statute unconstitutional, it issued a permanent injunction against its enforcement. It is anticipated that the ruling will be appealed, so the future of Labor Code section 1720.9 remains uncertain.

SKILLED AND TRAINED WORKFORCE – A NATIONAL SIGN OF THINGS TO COME

On August 17, 2015 California Governor Brown approved AB 566, which prohibits the governing board of a school district from entering into a lease-leaseback contract unless the entity makes "an enforceable commitment" that the entity and its subcontractors at every tier will use "a skill and trained workforce" for all work on the project that falls within an "apprenticeable occupation" in the building and construction trades. On September 28, 2016, Governor Brown approved SB 693, which supplements and modifies AB 566 in certain key respects. Under AB 566, an entity's "commitment" that a skilled and trained workforce will be used on a school lease-leaseback project may be established in any of the following ways:

The entity's agreement with the governing board of the school district that the entity and its subcontractors at every tier will comply with the requirements of AB 566, and that the entity will provide to the governing board of the school district, on a monthly basis while the project or contract is being performed, a report demonstrating that the entity and its subcontractors are complying with the requirements of AB 566;

The governing board may enter into a project labor agreement that will bind all contractors and subcontractors performing work on the project or contract and that includes the requirements of AB 566; or

The entity may enter into a project labor agreement that includes the requirements of this section and that will bind the entity and all its subcontractors at every tier performing the project or contract to the requirements of AB 566.

AB 566 requires that if the entity fails to provide to the governing board of the school district the monthly report, the governing board of the school district shall immediately cease making payments to the entity. SB 693 states that the contractor's monthly compliance report shall be a public record under the California Public Records Act.

Effective January 1, 2017, SB 693 imposed a uniform set of standards for the use of a skilled and trained workforce across the various statutes that now utilize the concept. SB 693 imposed the following defined terms:

An "apprenticeable occupation" is defined as an occupation for which the Chief of the Division of Apprenticeship Standards ("DAS") has an approved apprenticeship program before January 1, 2014.

A "skilled and trained workforce" is defined as a workforce that meets all the following conditions:

All of the workers are either skilled journeypersons or apprentices registered in an approved apprenticeship programs; and

As of January 1, 2017, at least 30% of the skilled journeypersons employed to perform work on the project by the entity and each of its subcontractors at every tier are graduates of an apprenticeship program for the applicable occupation that was either approved by the DAS or located outside the State of California and approved for federal purposes under regulations adopted by the federal Secretary of Labor.

The requirement of graduated journeypersons steps annually by 10% until January 1, 2020, when 60% of the skilled journeypersons must either be graduates of a qualifying California apprenticeship program, or a federal program located outside the State of California.

A worker can qualify as a "skilled journeyperson" in one of two ways. First, a "skilled journeyperson" is a worker who has either graduated from an apprenticeship program approved the chief of the DAS, or from a program located outside California and approved for federal purposes by the federal Secretary of Labor. Alternatively, a "skilled journeyperson" is a worker who has at least as many hours of on-the-job experience as would be required to graduate from an apprenticeship program for the applicable occupation that is approved by the chief of the DAS.

Per SB 693, a "graduate of an apprenticeship program" is either an individual "that has been issued a certificate of completion under the authority of the California Apprenticeship Council," or an individual that has completed an apprenticeship program located outside California and that is approved by the federal Secretary of Labor.

Per SB 693, the "apprenticeship graduation requirements" are satisfied if, in a particular month, either of the following is true: (1) at least the required percentage of skilled journeypersons employed to work on the project meet the graduation percentage requirement; or (2) for the hours of work performed by skilled journeypersons [], the percentage of hours performed by skilled journeypersons who met the graduation requirement is at least equal to the required graduation percentage.

SB 693 excuses contractors performing de minimis work from the skilled and trained workforce requirements. The requirements do not apply where the subcontract does not exceed one-half of one percent of the price of the prime contract. Further, a contractor need not meet the graduation requirements where the hours performed by skilled journeypersons are less than 10 hours of work in the calendar month.

It is also worth noting that currently proposed California Assembly Bill 199, if enacted, would require the payment of prevailing wages on private residential projects built on private property pursuant to an agreement with the state or a political subdivision. This would extend the requirement beyond the current scope over projects involving redevelopment agencies, public agencies and low income housing projects. There are concerns that the proposed new law may be interpreted very broadly.

FUNDING OF PUBLIC WORKS ENFORCEMENT AND CURRENT CONTROVERSIES IN PREVAILING WAGE - TRANSFORMATION OF PREVAILING WAGE INTO A SELF FUNDING ENFORCEMENT TOOL

As a result of SB 854 (codified in Labor Code section 1773.3) which has, since 2014, required public works contractors to pay an annual $300 registration fee, a fund has been created to ensure that compliance with CPWL is enforced. The funds collected are placed into the State Public Works Enforcement Fund ("SPWEF"), solely used to support public works enforcement.

This fee is new and was never initially intended to fund public works enforcement. It was a tool to register contractors to encourage enforcement. Now, in proposals in the state budget, a whole new rationale and approach has emerged. The proponents argue that the amount of funding available to ensure CPWL enforcement is

significantly less than what was anticipated when the SPWEF was established, with an expected $3 million annual shortfall. The shortfall is alleged, in part, to be due to fewer registrants than budgeted, perhaps as many as 33% fewer. The DLSE identified about 600 unregistered contractors in 2015-2016 alone that were working on public works projects. Such contractors are subject to a $2,000 penalty and temporary disqualification. It is suggested some awarding bodies were found to be doing an inadequate job of verifying the contractors working on their projects to confirm registration, perhaps in part because no penalty specific penalties are in the current scheme to motivate such a verification process.

In consideration of new funding vehicles, contractors should be especially aware of how skilled and trained workforce requirements may be enforced, especially if significant daily penalties are enforced. At present, the sole remedy is withholding of funds by public entities. So, Governor Brown has proposed a plan to address this shortfall, including a task force to reach out to awarding bodies to make sure they are aware of the registration requirements of the contractors working on their projects, including prequalification. Other approaches proposed by the Governor including increased debarment proceedings, special fund allocations, and perhaps new penalties on non-compliant contractors.

MARKET SHARE ALSO AFFECTS OTHER ASPECTS OF THE PUBLIC WORKS FIELD - LABOR COMPLIANCE AND MARKET ADVANCEMENT SUBSIDIES FROM PREVAILING WAGE CONTRIBUTIONS

Employer payments can be applied as a credit against the obligation to pay the general prevailing rate of per diem wages. They can be paid to the employee or paid consistent with the provisions of the statute. Prior to 2017, employer payments included "(8) Industry advancement and collective bargaining agreements administrative fees, provided that these payments are required under a collective bargaining agreement pertaining to a particular craft, classification, or type of work within the locality or the nearest labor market at issue, and "(9) Other purposes similar to those specified in paragraphs (1) to (8), inclusive." Thus, an employer making payments to an industry advancement fund could receive prevailing wage credit under subsection (8) if the payment was required under a CBA. An employer making a similar payment to an industry advancement fund, but which was not required by a CBA could receive a prevailing wage credit under subjection (9). That changed this year.

Pursuant to SB 954, the language of section 1773.1 was amended in 2017 to read "(8) Industry advancement and collective bargaining agreements administrative fees, provided that these payments are made pursuant to a collective bargaining agreement to which the employer is obligated" and "(9) Other purposes similar to those specified in paragraphs (1) to (5), inclusive; or other purposes similar to those specified in paragraphs (6) to (8), inclusive, if the payments are made pursuant to a collective bargaining agreement to which the employer is obligated." So, non-union employers could not receive a credit against the prevailing wage rate for such industry advancement groups. The statute was enacted as an attempt to ensure that wages owed to workers were not withheld without their consent and used by anti-union

employers to harm workers' interests, at the expense of the workers. This change has been unsuccessfully challenged by an industry advancement fund representing open shop (non-union) contractors, because contractors could no longer take a credit for funds directed to the fund, arguably resulting in the diminishment of their advocacy clout. This case is currently on appeal to the Ninth Circuit

AND THE REST

When labor agreements become public works wages unintended consequences are the rule. In large scale infrastructure projects, the Federal government is heavily reliant on labor unions and others to submit wage data. In one such set of solar projects, the lack of data from one union sector resulted in a wage entirely supported by a competing union. In another, rates with conflicting provisions applicable to union and nonunion entities were issued. While prosecutions were withdrawn, the lesson is that deep vigilance is necessary. With a renewed focus on national large scale projects, we are on the cusp of a need for major reform in Davis-Bacon wage structures to accommodate those projects. With the introduction of skilled and trained workforce requirements with training graduation mandates, we are on the cusp of creating of national training protocols that will affect all future work requirements. And to top all that off, a renewed awareness of ordinary labor law skills to understand how to do this with minimum risk to clients.