

Prevailing Wage Program

The Washington State **Prevailing Wage Law**



*Understand your responsibilities and
rights when performing public work.*

ABC

**Associated Builders and Contractors
Western Washington**

Contractors on public works

June 2021

Public Works

Prevailing Wage Law

Chapter 39.12 RCW

Chapter 296-127 WAC

Washington State Law - Federal Law

- This presentation is on the Washington State prevailing wage law, chapter 39.12 RCW and chapter 296-127 WAC.
- There is also a federal prevailing wage law: The Davis-Bacon Act applies to federally funded projects.
- The laws apply to publicly funded contracts for trades work
- The two laws have similarities and significant differences
 - Overtime (state law has daily overtime and prevailing overtime)
 - Paperwork (weekly certified payroll records required for Davis-Bacon – State law requires Intents & Affidavits and weekly certified payroll records submitted at least monthly)
 - Off-site work (covered under state law when specific to the project)
 - Zone pay (federal but not state)
- If you encounter a project where both the state and federal laws apply, you must meet the more demanding of the wage standards under the two laws and do the paperwork for both laws. WAC 296-127-025

What is a “Public Work”?

RCW 39.04.010(4): "Public work" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, **executed at the cost of the state or of any municipality**, or which is by law a lien or charge on any property therein. All public works, including maintenance when performed by contract shall comply with chapter [39.12](#) RCW. "Public work" does not include work, construction, alteration, repair, or improvement performed under contracts entered into under RCW [36.102.060](#)(4) or under development agreements entered into under RCW [36.102.060](#)(7) or leases entered into under RCW [36.102.060](#)(8).

WAC 296-127-010(7)(a): The term "public work" shall include:

- (i) All work, construction, alteration, enlargement, improvement, repair, and/or demolition that is executed by contract, purchase order, or any other legal agreement and that is **executed at the cost of the state of Washington or of any municipality**. The source of the funding shall not determine the applicability of the statute, and may include, but is not limited to, such sources as those payments made through contracts with insurance companies on behalf of the insured state or municipality;
- (ii) All work, construction, alteration, enlargement, improvement, repair, and/or demolition which, by law, constitutes a lien or charge on any property of the state or of a municipality;
- (iii) All work, construction, alteration, repair, or improvement, other than ordinary maintenance that the state or a municipality causes to be performed by a private party through a contract to rent, lease, or purchase at least fifty percent of the project by one or more state agencies or municipalities, pursuant to [RCW 39.04.260](#);
- (iv) Maintenance, except ordinary maintenance as defined by (b)(iii) of this subsection, when performed by contract. Maintenance is defined as keeping existing facilities in good usable, operational condition;
- (v) [Janitorial and building service maintenance as defined by WAC 296-127-023, when performed by contract, on public buildings and/or assets; and](#)
- (vi) The fabrication and/or manufacture of nonstandard items produced by contract specifically for a public works project as defined by (a)(i) through (v) of this subsection.

Ordinary Maintenance – Small Contracts

- Contracted maintenance work requires prevailing wages.
- The Washington Prevailing Wage on Public Works Act is remedial and should be construed liberally to effect the purpose of the statute. The purpose of the Act is "to protect the employees of governmental contractors from substandard wages and to preserve local wage standards. ..." The purpose of preserving the local wage structure is achieved when "maintenance performed by contract" is public work. **All maintenance, when performed by contract is public work, and subject to prevailing wage. Maintenance is "ordinary" under the statute, when it is performed by in house employees of the public entity, and excluded.**

City of Spokane v. Dept. of Labor & Industries, 100 Wn. App. 805, 810 (2000) (emphasis added).

- The state law has no minimum dollar amount or threshold – Even small public contracts require prevailing wages.

Interpretations of the Prevailing Wage Law

- “All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.” RCW 39.12.015.

Sources used to make determinations include:

- **Statute (RCW)** *(Laws as adopted by the legislature)*
- *Understanding the language of the statute may involve these factors:*
 - Actual Language
 - Legislative History
 - Legislative Intent
- **Rule (WAC)** *Adopted under the Administrative Procedures Act chapter 34.05 RCW*
 - Administrative rules help apply the law but do not override the statute
- **Case Law**
 - The Courts tell us how the statutes and rules function.

What is the prevailing wage?

- The hourly rate of wage, usual benefits & overtime
- Paid in the “locality”
(largest city in the county)
- To the majority of workers, laborers, or mechanics
- in the same Trade and Occupation
 - RCW 39.12.010
- Scope of work descriptions: WAC 296-127-01301 to 01398
 - The scopes describe the work performed under the various trade and occupation classifications
 - Employee *job titles* are not used to select the correct wage
 - The type and nature of the work performed by the employee will be used to identify the correct scope of work and trade and occupation classification
- Prevailing Rates of Pay are published by trade and occupation, county, and effective date

Locality

“...the locality within the state where such labor is performed...” RCW 39.12.020.

The county (or counties) in which the work is performed.

WAC 296-127-020(3): The definition of "locality" in RCW [39.12.010](#)(2) contains the phrase "wherein the physical work is being performed." [The department interprets this phrase to mean the actual work site.](#) For example, if nonstandard items specifically produced for public works projects are prefabricated in a county other than the county wherein the public works project is to be completed, the wage for the offsite prefabrication shall be the applicable prevailing wage for the county in which the actual prefabrication takes place. [Workers who deliver such nonstandard items, as well as materials pursuant to the terms of WAC \[296-127-018\]\(#\), shall be paid the applicable prevailing wage for the county in which the public works project is located.](#)

Overtime

- **Weekly** RCW 49.46.130, WAC 296-126, WAC 296-128, L&I policy ES.A.8.1
- **Daily – Over 8 hours in a calendar day on public works** RCW 49.28.010, 040, 050, & 060
- **4-10 agreements** RCW 49.28.065; WAC 296-127-022
- **Prevailing Overtime – May affect how you bid a project!**
 - Survey derived requirements
 - Check when you look up wages!
 - Overtime code (check for OT requirements for certain days or hours of work)
 - Holiday Code (list of holidays)
 - Will vary by trade and occupation and county

Scope of Work Descriptions

Trade and Occupation Classifications

- The scope of work descriptions describe the work performed in each trade and are adopted as rule WAC 206-127-01301-01398
- It's what the worker does - the *type and nature of the work* that matters (not a title) WAC 296-127-013(3)
- All determinations of the prevailing rate of wage (including the correct scope and wage to use) are made by the Industrial Statistician of the Department of Labor and Industries. RCW 39.12.015
- The applicable scope is the one in effect on the bid due date or contract award date WAC 296-127-013(4)

Prevailing Wages on Public Work

- **The laborers, workers or mechanics working upon a public work must be paid not less than the prevailing rate of wage.**
 - RCW 39.12.020
- **The Industrial Statistician of the Dept. of Labor & Industries makes all determinations of the prevailing rate of wage.**
 - RCW 39.12.015

Washington State Law – Prevailing Wage on Public Works

RCW 39.12.020

- Prevailing wages are required for work upon a public work.
- “The hourly wages to be paid to laborers, workers, or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed”

When does the law require prevailing wages?

- Work upon a “public work”

RCW 39.04.010(4), WAC 296-127-010(7), & RCW 39.12.020

- Public work performed by a “laborer, worker, or mechanic”

- Performing publically funded (grants, etc.) contracts for “construction, reconstruction, maintenance or repair”

RCW 39.12.030

- Building service maintenance (janitorial) contracts

RCW 39.12.020

- Turn-Key projects – Private Construction caused by public agreements to rent, lease, or purchase

RCW 39.04.260

- Small works (no threshold or minimum dollar amount)

- Off-site work specific to the public work – manufacturing a non-standard item specifically for the public work

The Applicable Prevailing Rate of Wage

- The correct prevailing wage rate will depend on three criteria:
 - The county (or counties) in which the work is performed (the “*locality*”);
 - The trade and occupation classification using *scope of work descriptions*; and
 - The *effective date* for prevailing wages.
- *Look-up prevailing wage rates*

Journey-level wages:

<https://secure.lni.wa.gov/wagelookup>

State Registered Apprentice Wages:

<https://secure.lni.wa.gov/wagelookup/ApprenticeWageLookup.aspx>

Effective Date for Prevailing Wage

WAC 296-127-011(3&4):

- (3) The applicable prevailing wage rates for a given public works contract will be determined as follows:
 - (a) For all public works contracts, except janitorial or building service maintenance contracts, the applicable prevailing wage rates shall be the rates that are in effect on the date when bids by prime contractors are due for submission to contract awarding agencies. These rates shall remain in effect for the duration of the contract.
 - (b) If contracts are not awarded within six months of the date bids are due, the applicable prevailing wage rates shall be those that are in effect on the date the contract is awarded. These rates shall remain in effect for the duration of the contract.
 - (c) For work orders issued under job order contracts pursuant to chapter 301, Laws of 2003, the appropriate prevailing wage rates shall be the rates that are in effect on the date when the individual work order is issued.
- (4) If a contract for public work is not awarded pursuant to bids, the applicable prevailing wage rates shall be those that are in effect on the date when the contract is executed. These rates shall remain in effect for the duration of the contract.

Effective Date - Contract Types

Process overview with Effective Date and Intent & Affidavit Requirements

- **Bid-Build Contracts under chapter 39.04 RCW**
- *Use the prime contractor's bid due date unless the contract award is not within six months of the bid due date (then use the award date instead).*
- When all the work is fully defined in the contract with no unspecified future work, one Intent for the contract and one Affidavit for the one project.

Effective Date - Contract Types

Process overview with Effective Date and Intent & Affidavit Requirements

- **Small Works Roster Contracts under RCW 39.04.155; and**
- **Limited Public Works Contracts under RCW 39.04.155(3)**
- Small Works Roster and Limited Public Works both use the prime contractor's bid due date (date of quote) unless the contract award is not within six months of the bid due date (then use the award date).
- When all the work is fully defined in the contract with no unspecified future work, one Intent for the contract and one Affidavit for the one project.

Effective Date - Contract Types

Process overview with Effective Date and Intent & Affidavit Requirements

■ Purchased Service Contracts

- If pursuant to bids: Use the prime contractor's bid due date (date of quote) unless the contract award is not within six months of the bid due date (then use the award date).
- If not awarded pursuant to bids: The date the prime contract was executed.
- When all the work is fully defined in the contract with no unspecified future work, one Intent for the contract and one Affidavit for the one project.

Effective Date - Contract Types

Process overview with Effective Date and Intent & Affidavit Requirements

- **Design-Build Contracts under chapter 39.10 RCW**
 - Awarded through RFP – Use the award date (date the contract was executed).
 - The Intent should state that contract award date under both the bid due date and the award date fields.
 - Affidavit for the “project” (usually one Intent and one Affidavit for Design-Build).

Effective Date - Contract Types

Process overview with Effective Date and Intent & Affidavit Requirements

- **Job Order Contracts under chapter 39.10 RCW**
 - Use the date that each work order is awarded per RCWs 39.10.440 and 39.10.450.
 - Intent and Affidavit by work order (there is an Intent and an Affidavit specific to each individual work order).

Effective Date - Contract Types

Process overview with Effective Date and Intent & Affidavit Requirements

- **General Contractor/Construction Manager under chapter 39.10 RCW**
 - GC/CM may have a pre-construction design phase contract and later the construction contract executed after the Maximum Allowable Construction Cost (MACC) has been *negotiated* (not an award pursuant to bids). If the MACC negotiations are not successful, the law allows a change to negotiate with the next most qualified contractor. The date the contract with the MACC is executed with the winning finalist/construction contractor is the prevailing wage effective date for that construction phase contract.
 - Two distinct sets of the Intent and the Affidavit are required. One set for the design phase, and another set for the construction phase. Both use their respective award dates.

Effective Date - Contract Types

Process overview with Effective Date and Intent & Affidavit Requirements

- **On-call Contracts (not specifically authorized in any state statute or law!)**
 - Use the date the contract was bid unless the contract award is not within six months of the bid due date – When that occurs, use the award date instead.
 - If not awarded pursuant to bids, the date the contract was executed.
 - Intent for the contract.
 - Affidavit for each call-out (task or project). Note: A call-out may be formal (e.g., a purchase order) or informal (e.g., a phone call).

Effective Date - Contract Types

Process overview with Effective Date and Intent & Affidavit Requirements

- **Unit Priced Contracts (authority in law may either be in the agency's own enabling statute or in chapter 39.04 RCW)**
- PUDs; Port Districts; Cities; Counties; Water-Sewer Districts; and Public Transit Agencies currently have statutes authorizing unit priced contracts.
- Unit priced contracts for more than one year require (by contract year) annual wage updates with annual filings of the Intent and the Affidavit.

Effective Date - Contract Types

Process overview with Effective Date and Intent & Affidavit Requirements

- **Emergency Contracts issued without competitive process under RCW 39.04.280**
- *Use the date the contract was awarded or executed (the date the call to answer the emergency occurred).*
- Generally, one Intent filed as soon as possible after the emergency is under control with one Affidavit when work is complete.

Public Works Contracts

No Minimum Dollar Amount Threshold

- **There is no threshold or minimum dollar amount for prevailing wage requirements.**
 - Even a small dollar amount contract is subject to
 - chapter 39.12 RCW
- **What makes a contract?**
 - An agreement or meeting of the minds such as an offer and some form of acceptance will form a contract.
 - Contracts can be formed in conversation (e.g. a phone call), by a purchase order, the small works process, a competitive bid process or any other legal agreement.

Grants & Public Work

A Cost to the Public Agency

- **“Public work”**
 - **“Public work” includes work executed at a cost to the state or a municipality (such as the county)**
- **Grant money from the state or local government?**
- **These *grants* are a cost to the governmental entity**
- **State or local government grant money (a “cost” to the state or any municipality) for the construction type project makes that work “public work” with a prevailing wage requirement**
- **Relevant laws and rules:**
 - **RCW 39.04.010**
 - **RCW 39.12.020**
 - **WAC 296-127-010(7)**

What if it's warranty work or an emergency?

- **Warranty Work** – More work on the public work
 - Warranty work involves additional work on the same public works contract for no additional payment
 - *The same prevailing rates and the original Intent still apply*
 - The Affidavit will need to be updated for total hours worked and any new trades
- **Emergency Work - Exception to Competitive Bid**
 - *Prevailing wages apply*
 - Not awarded by competitive bid
 - No exceptions to the contract bond, the contract retainage, or the prevailing wage law under RCW 39.04.280
 - First, deal with the emergency
 - Then do the paperwork – Intent & Affidavit

Materials Delivery – WAC 296-127-018

- Delivery of sand, gravel, crushed rock, concrete, asphalt and similar materials requires prevailing wages unless the delivery meets the narrow definition of a “stockpile” in WAC 296-127-018.
- To have a “stockpile” and the exception to prevailing wages, the conditions of the rule need to be satisfied including:
 - The materials supplier delivers material to only one location on the job;
 - The one stockpile is located away from where the material will be placed and used on that project;
 - The materials supplier performs no other work on the project; and
 - In order to use the stockpiled materials on the project, someone else who *is* working on that project must be pick up, move, and place the materials where they will be used and remain in the project

WAC 296-127-018 - Materials Delivery

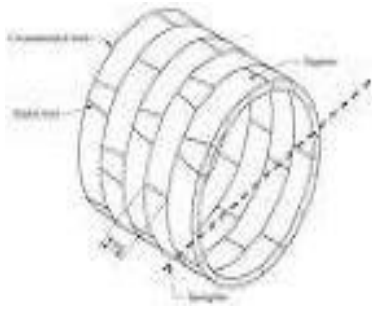
Coverage and exemptions of workers involved in the production and delivery of gravel, concrete, asphalt, or similar materials.

- (1) The materials covered under this section include but are not limited to: Sand, gravel, crushed rock, concrete, asphalt, or other similar materials.
- (2) All workers, regardless of by whom employed, are subject to the provisions of chapter [39.12](#) RCW when they perform any or all of the following functions:
 - (a) They deliver or discharge any of the above-listed materials to a public works project site:
 - (i) At one or more point(s) directly upon the location where the material will be incorporated into the project; or
 - (ii) At multiple points at the project; or
 - (iii) Adjacent to the location and coordinated with the incorporation of those materials.
 - (b) They wait at or near a public works project site to perform any tasks subject to this section of the rule.
 - (c) They remove any materials from a public works construction site pursuant to contract requirements or specifications (e.g., excavated materials, materials from demolished structures, clean-up materials, etc.).
 - (d) They work in a materials production facility (e.g., batch plant, borrow pit, rock quarry, etc.) which is established for a public works project for the specific, but not necessarily exclusive, purpose of supplying materials for the project.
 - (e) They deliver concrete to a public works site regardless of the method of incorporation.
 - (f) They assist or participate in the incorporation of any materials into the public works project.
- (3) All travel time that relates to the work covered under subsection (2) of this section requires the payment of prevailing wages. Travel time includes time spent waiting to load, loading, transporting, waiting to unload, and delivering materials. Travel time would include all time spent in travel in support of a public works project whether the vehicle is empty or full. For example, travel time spent returning to a supply source to obtain another load of material for use on a public works site or returning to the public works site to obtain another load of excavated material is time spent in travel that is subject to prevailing wage. Travel to a supply source, including travel from a public works site, to obtain materials for use on a private project would not be travel subject to the prevailing wage.
- (4) Workers are not subject to the provisions of chapter [39.12](#) RCW when they deliver materials to a stockpile.
 - (a) A "stockpile" is defined as materials delivered to a pile located away from the site of incorporation such that the stockpiled materials must be physically moved from the stockpile and transported to another location on the project site in order to be incorporated into the project.
 - (b) A stockpile does not include any of the functions described in subsection (2)(a) through (f) of this section; nor does a stockpile include materials delivered or distributed to multiple locations upon the project site; nor does a stockpile include materials dumped at the place of incorporation, or adjacent to the location and coordinated with the incorporation.
- (5) The applicable prevailing wage rate shall be determined by the locality in which the work is performed. Workers subject to subsection (2)(d) of this section, who produce such materials at an offsite facility shall be paid the applicable prevailing wage rates for the county in which the offsite facility is located. Workers subject to subsection (2) of this section, who deliver such materials to a public works project site shall be paid the applicable prevailing wage rates for the county in which the public works project is located.

What about off-site work?

Off-Site Manufacture or Fabrication of a non-standard item made specifically for a public work requires prevailing wages.

- *Everett Concrete Products* – 1988 State Supreme Court case - 109 Wn.2d 819 (1988).
- The concrete tunnel liners (in the *Everett case*) were made to specifications (custom made) for the public work – Prevailing Wages were required.
- The manufacture of standard items for sale on the general market will not require prevailing wages.
- Work “within the state” RCW 39.12.020.



Off-Site Work

Pre-cast Concrete Tunnel Liners



1/1 slide

- *Everett Concrete Products v. L&I, 109 Wn.2d 819 (1988).*
- Off-Site Manufacture or Fabrication of a non-standard item made specifically for a public work requires prevailing wages.
- A Standard or Non-Standard checklist was developed by PWAC and can be found on the WSDOT web site.

<https://www.wsdot.wa.gov/sites/default/files/2007/07/31/Wage-Rate-Supplemental-State-2020-03-04.pdf>

OFF-SITE FABRICATION OR MANUFACTURE: APPLICATION OF CHAPTER 39.12 RCW

Helpful criteria to use in determining whether a prefabricated item is "standard" or "non-standard".

In the State of Washington, the off-site production of non-standard items for a public work is covered by the prevailing wage requirements of RCW 39.12, and the off-site production of standard items is not.

The production of any item outside the State of Washington is not covered by RCW 39.12.

1. Is the item fabricated for a public works project? If not, it is not subject to RCW 39.12. If it is, go to question 2.
2. Is the item fabricated on the public works jobsite? If it is, the work is covered under RCW 39.12. If not, go to question 3.
3. Is the item fabricated in an assembly/fabrication plant set up for, and dedicated primarily to, the public works project? If it is, the work is covered by RCW 39.12. If not, go to question 4.
4. Does the item require any assembly, cutting, modification or other fabrication by the supplier? If not, the work is not covered by RCW 39.12. If yes, go to question 5.
5. Is the prefabricated item intended for the public works project typically an inventory item which could reasonably be sold on the general market? If not, the work is covered by RCW 39.12. If yes, go to question 6.
6. Does the specific prefabricated item, generally defined as standard, have any unusual characteristics such as shape, type of material, strength requirements, finish, etc? If yes, the work is covered under RCW 39.12.

<https://www.wsdot.wa.gov/sites/default/files/2007/07/31/Wage-Rate-Supplemental-State-2020-03-04.pdf>

Federal and State Law Differences

Federal law (the Davis-Bacon Act) only covers the work performed on the site of the public work

State law: Chapter 39.12 RCW applies prevailing wages to work specific to the public work including off-site work

State law: Work “contemplated” by the contract for public work requires prevailing wages See RCW 39.12.030

State law: Materials delivery: WAC 296-127-018

Trucking and off-site fabrication or manufacture specific to the public work when performed anywhere within the State of Washington are covered under the state prevailing wage law

Prevailing Wage on Public Work

Joint Application of Federal and State Law

- The Davis-Bacon Act and Chapter 39.12 RCW

Joint Application:

What if both Federal and State prevailing wage requirements apply to the same contract and project? - WAC 296-127-025 **Perform to the higher standard to comply with both of the prevailing wage laws.**

- Don't forget the overtime requirements in the state prevailing wage law! OT can alter which wage rate is higher!

U.S. Dept. of Labor Resources

Federal Laws

- Federal Prevailing Wage Resources

<https://www.dol.gov/agencies/whd/government-contracts/construction/seminars/resources>

Guidance

- [Presentations: Virtual Prevailing Wage Seminars - 2020](#)
- [Prevailing Wage Resource Book](#) (May 2015)
- [Field Operations Handbook: Chapter 15 \(PDF\)](#) — Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act

L&I Responsibilities Under the Prevailing Wage on Public Works Act, Chapter 39.12 RCW

- **Establish prevailing wage rates.** RCW 39.12.015
- **Determine classifications of labor (scope of work descriptions).** Chapter 296-127 WAC, WAC 296-127-01301-01398
- **Process and certify Intent & Affidavit forms.**
RCW 39.12.040
- **Investigate all timely complaints alleging violations of the Public Works Act.** RCW 39.12.050 & RCW 39.12.065
- **Receive and distribute requested Certified Payroll records.** RCW 39.12.120 & WAC 296-127-320

Contract Awarding Agency Responsibilities

- Award only to a “Responsible” Contractor RCW 39.04.350
 - Verify registration, workers comp: <https://secure.lni.wa.gov/verify/>
RCW 39.06.010; RCW 18.27 (contractor reg.); and RCW 19.28 (electrical licensing)
- Award contracts only to properly registered or licensed contractors
RCW 39.06.010; RCW 18.27 (contractor reg.); and RCW 19.28 (electrical licensing)
- Do not award contracts to contractors not allowed to perform public work. Check the “Contractors not allowed to bid on, or work on public works projects” list:
<https://lni.wa.gov/licensing-permits/public-works-projects/strike-and-debar/contractors-not-allowed-to-bid>
RCW 39.12.050; RCW 39.12.065; & RCW 39.12.055
- Obtain an approved Statement of Intent to Pay Prevailing Wages from each and every contractor and subcontractor at all tiers of subcontracting prior to any payment for work by that contractor
RCW 39.12.040
- Obtain an approved Affidavit of Wages Paid from each and every contractor and subcontractor at all tiers of subcontracting prior to release of retainage held under RCW 60.28.011 RCW 39.12.040 & chapter 60.28 RCW

Contractor Duties & Responsibilities

- Be eligible to bid on public work (not debarred)

RCW 39.12.050; RCW 39.12.055; & RCW 39.12.065

- Pay prevailing wages to the laborers, workers, and mechanics employed on public works RCW 39.12.020

- Be a registered or licensed contractor as required

RCW 18.27 (contractor registration) or RCW 19.28 (electrical licensing).

- Award subcontracts only to “responsible” subcontractors eligible to bid public work and properly registered or licensed

RCW 39.06.020 & RCW 39.04.350

- Include contract provisions to all subcontractors stating the prevailing wage rates and requirements WAC 296-127-011(5)

- Projects over \$10K: Post the Statement of Intent RCW 39.12.020

- Failure to Post is a violation of RCW 39.12.050

Responsible Contractors RCW 39.06.020

- *Before entering into a subcontract, first determine if the subcontractor meets the “bidder responsibility” criteria of RCW 39.04.350:*
 - Is the contractor a registered contractor or licensed electrical contractor?
<https://secure.lni.wa.gov/verify/>
 - Does the contractor have a UBI?
 - If the contractor has employees does it have industrial insurance coverage?
 - Does the contractor have an employment security department number?
 - Does the contractor have a state excise tax registration number?
 - Is the contractor debarred (not eligible to bid on any public works contract);
<https://lni.wa.gov/licensing-permits/public-works-projects/strike-and-debar/contractors-not-allowed-to-bid>
 - Does the contractor have any final L&I Notice of Assessment for willful violations of chapters 49.46, 49.48, or 45.82 RCW in the three years prior to bid solicitation?
 - *Does the subcontractor have the training on public works and prevailing wages or meet the experience requirement (three years in business and successfully completing three public works projects)?*
 - If the public works project has apprenticeship utilization requirements in RCW 39.04.320, has the contractor been found out of compliance by the Washington state apprenticeship and training council for the one-year period preceding the date of the bid solicitation?

Responsible Contractors on Public Works

RCW 39.04.350

- **Before awarding a contract, the public agency must verify a prime contractor is “responsible”**
RCW 39.04.350
 - NEW: After July 1, 2019, have experience completing three public works projects or have this training on public works and prevailing wages.
- **Contracts with unregistered contractors are prohibited** RCW 39.06.010
- **A hiring contractor must verify the subcontractor’s responsibility** RCW 39.06.020
 - This applies to all tiers of subcontracting on a public work

RCW 39.06.010

Contracts with unregistered or unlicensed contractors and with other violators prohibited

No agency of the state or any of its political subdivisions may execute a contract:

(1) With any contractor who is not registered or licensed as may be required by the laws of this state other than contractors on highway projects who have been prequalified as required by RCW 47.28.070, with the department of transportation to perform highway construction, reconstruction, or maintenance; or

(2) For two years from the date that a violation is finally determined, with any person or entity who has been determined by the respective administering agency to have violated RCW 50.12.070(1)(b), 51.16.070(1)(b), or * 82.32.070(1)(b). During this two-year period, the person or entity may not be permitted to bid, or have a bid considered, on any public works contract.

[1997 c 54 § 1; 1984 c 7 § 43; 1967 c 70 § 3.]

Notes:

***Reviser's note:** RCW 82.32.070 was amended by 1999 c 358 § 14, changing subsection (1)(b) to subsection (2).

Severability -- 1984 c 7: See note following RCW 47.01.141.

Construction building permits -- Cities, towns or counties prohibited from issuing without verification of registration: RCW 18.27.110.

Title 50 RCW is on unemployment compensation (Employment Security Dept.)

Title 51 RCW is on Industrial Insurance (L&I Workers Comp)

Title 82 RCW is on Excise Taxes (Dept. of Revenue)

RCW 39.06.020

RCW 39.06.020

Verification of subcontractor responsibility criteria.

A public works contractor must verify responsibility criteria for each first tier subcontractor, and a subcontractor of any tier that hires other subcontractors must verify responsibility criteria for each of its subcontractors. Verification shall include that each subcontractor, at the time of subcontract execution, meets the responsibility criteria listed in RCW [39.04.350](#)(1) and possesses an electrical contractor license, if required by chapter [19.28](#) RCW, or an elevator contractor license, if required by chapter [70.87](#) RCW. This verification requirement, as well as the responsibility criteria, must be included in every public works contract and subcontract of every tier.

The Applicable Prevailing Rate of Wage

- The correct prevailing wage rate will depend on three criteria:
 - The county (or counties) in which the work is performed (the “*locality*”);
 - The trade and occupation classification(s) using *scope of work descriptions*; and
 - The *effective date* for prevailing wages.
- Look-up journey-level wages at this link: <https://secure.lni.wa.gov/wagelookup>

Locality - County

- The prevailing rate of wage may vary by county (locality) and trade
- On-site: Use the county where the project is located
- Off-site fabrication: Use the county in which the work is performed
- Delivery of non-standard items manufactured off-site: Use the county where the project is located (the delivery point)
- Multiple counties may be listed on an Intent or Affidavit

Residential Rates

RCW 39.12.017(3):

(3) For purposes of this section:

(a) "Residential construction" means construction, alteration, repair, improvement, or maintenance of single-family dwellings, duplexes, apartments, condominiums, and other residential structures not to exceed four stories in height, including the basement, in the following categories:

(i) Affordable housing, including permanent supportive housing and transitional housing, which may include common spaces, community rooms, recreational spaces, a management office, or offices for the purposes of service delivery;

(ii) Weatherization and home rehabilitation programs for low-income households; and

(iii) Homeless shelters and domestic violence shelters.

(b) "Residential construction" does not include the utilities construction, such as water and sewer lines, or work on streets, or work on other structures unrelated to the housing.

Owners

- **Certain owners of at least 30% of the business do not have to pay themselves prevailing wages (all other provisions of the law such as the paperwork still apply) WAC 296-127-026**
- **WAC 296-127-026 Exemptions for sole owners and their spouses, partnerships, corporations, and employees of public agencies**
- The prevailing wage requirements of chapter [39.12](#) RCW do not apply to:
 - (1) Sole owners and their spouses.
 - (2) Any partner who owns at least thirty percent of a partnership.
 - (3) The president, vice-president and treasurer of a corporation if each one owns at least thirty percent of the corporation.
 - (4) Workers regularly employed on monthly or per diem salary by the state or any political subdivision created by its laws.
- *NOTE: the exception is to the wage requirement, the Intent and Affidavit paperwork is still required by RCW 39.12.040*

Apprentices on Public Works

■ RCW 39.12.021

Apprentice workers employed upon public works projects for whom an apprenticeship agreement has been registered and approved with the state apprenticeship council pursuant to chapter 49.04 RCW, must be paid at least the prevailing hourly rate for an apprentice of that trade. Any worker for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journey level worker, and, therefore, shall be paid at the prevailing hourly rate for journey level workers.

Apprenticeship

- State-registered apprentices can be paid reduced apprentice wages on public works – All other workers are paid full journey-level wages
RCW 39.12.021
- The use of apprentices is detailed on the Affidavit and certified payroll and wages are checked for each individual apprentice during the approval process
- Contractors must be a registered apprenticeship program, or a training agent for a registered apprenticeship program to use apprentices
- Apprenticeship questions? Contact L&I Apprenticeship Staff:
 - James Kaltenbaugh James.Kaltenbaugh@Lni.wa.gov 360-902-5373
 - Patrick Martin Patrick.Martin@Lni.wa.gov 360-485-3313

Apprenticeship Utilization Requirements (AURs)

- **The legislature created AURs for certain large public works:**
 - State agencies that report to the Governor (DES)
 - School districts
 - Four-year institutions of higher education
 - WSDOT

RCW 39.04.320(1&4).
- Apprenticeship ensures the supply of qualified construction crafts workers for future public works projects.
- Apprenticeship is a pathway to creating family wage careers in our communities.
- Apprenticeship is the most cost effective training method for hands on occupations for all parties (workers, employers and government).
- State registered apprentices have a lower, apprentice wage on public works.

Applicable Statutes – Apprenticeship Utilization

- **RCW 39.04.300** –
 - Defines why apprentice utilization is required
- **RCW 39.04.310** –
 - Defines Apprenticeship as “registered Apprenticeship”
 - Defines the utilization requirement as applying to all labor hours on a project and defines which hours count
- **RCW 39.04.320** –
 - Defines the requirement as 15% of all labor hours have to be performed by apprentices
 - Defines who the utilization requirement applies to
 - Defines reporting requirements, and allowable adjustments to the utilization requirement

APPRENTICESHIP

RESOURCES & TECHNICAL ASSISTANCE

Tracking & Reporting

- Contract awarding agencies with apprentice utilization requirements track apprentice utilization using the L&I on-line certified payroll system.
- Online public Apprenticeship Registration & Tracking database – ARTS:

<https://lni.wa.gov/licensing-permits/apprenticeship/apprenticeship-registration-and-tracking-system>

- **LNI Apprenticeship Staff:** apprentice@Lni.wa.gov
James Kaltenbaugh James.Kaltenbaugh@Lni.wa.gov 360-902-5373
- **Patrick Martin** Patrick.Martin@Lni.wa.gov 360-485-3313

Supervisors

- **Supervisors may need to be paid prevailing wages depending on the percentage of their time working with tools.** WAC 296-127-015
- (2) Supervisors (e.g., foremen, general foremen, superintendents, etc.,) are entitled to receive at least the journey level prevailing rate of wage for performing manual or physical labor:
 - (a) For each hour spent in the performance of manual or physical labor if it is for more than twenty percent but less than fifty percent of their hours worked on a public works project during any given week.
 - (b) For all hours worked in any given week if they perform manual or physical labor for fifty percent or more of their hours worked on a public works project during such week.
- (3) If supervisors subject to the journey level prevailing wage rate are paid a salary, the compensation (salary divided by number of hours worked) must be equal to or greater than the prevailing wage rate for the type of work performed.

Usual Benefits

Overtime and Holiday Codes

Usual Benefits.

- *Medical, pension, vacation, holiday and apprenticeship training*
RCW 39.12.010(3); WAC 296-127-014
- The hourly rate actually paid to the worker must be not less than the prevailing rate of wage minus the annualized hourly rate of the cost of Usual Benefits.

Overtime.

- **Daily:** *Over 8 hours in a day on public work – RCW 49.28.010*
- **Weekly:** *Over 40 hours in the work week – RCW 49.46.130*
- **4 – 10 overtime agreements** – WAC 296-127-022
- **Prevailing Overtime** – *Check the OT & Holiday codes*

Certified Payroll (CP) requirements:

State – RCW 39.12.120 Weekly CPs submitted online to L&I at least once a month

Federal Davis-Bacon Act weekly CPs to the awarding agency

US Dept. of Labor Prevailing Wage resources:

<https://www.dol.gov/agencies/whd/government-contracts/construction/seminars/resources>

Contracts and Subcontracts

Duty to Communicate Requirements for Prevailing Wages

- The parties involved in public works, prevailing wage contracts have a duty to communicate the prevailing wage requirements – This includes:
 - The Public Agency
 - The Prime Contractor
 - Subcontractors at all tiers
- When hiring a contractor or subcontractor on public works, the prevailing wage requirements must be shared and communicated.
 - Relevant statute and rule:
 - RCW 39.12.030
 - WAC 296-127-011(5)

Contract Specifications – Prevailing Rates of Pay

Duty to Communicate Requirements for Prevailing Wages

RCW 39.12.030; WAC 296-127-011(5)

- **Include a schedule of the applicable prevailing wages in your subcontract documents, or...**
- *The bid and contract specifications may provide the required*
- *prevailing wage rate information in this alternate format:*
- **Provide the URL to the Dept. of L & I's prevailing wage rates**
- Identify the exact wage publication date to use (the effective
- date)
- State the county in which the public works project is located
Note: off-site work will use the rates for the county where that off-site work is performed
- Providing a copy of the prime contractor's Intent or its number is helpful.

Contract Bond - Chapter 39.08 RCW

Limited Exceptions

- Public works contracts require a contract bond (*payment and performance bond*) that guarantees contract performance; payment to workers and material suppliers; and payment of taxes increases and penalties to the state – Commonly called the performance bond RCW 39.08.010
- **RCW 39.08.015: Failure to obtain the contract bond as required makes the awarding agency liable for claims**
- **RCW 39.08.010(3): For contracts of \$150,000 or less, the awarding agency and the prime contractor may agree to retain 10% of the contract amount in place of having the contract bond**
- **RCW 39.04.155(3): Limited Public Works: The awarding agency may waive the RCW 39.08 contract bond and the RCW 60.28 contact retainage, but the AA assumes liability for any claims**

Retainage

Chapter 60.28 RCW

RCW 60.28.011 requires contract retainage, not to exceed 5% of the moneys earned by the contractor, on “public improvement contracts”

Retainage serves as a trust fund for claims arising under the contract

The term “Public improvement contract” is defined for purposes of contract retainage in RCW 60.28.011(12)(d)

RCW 39.12.040 requires the approved Affidavit of Wages Paid forms from all the contractors and all the subcontractors prior to release of the retainage - When no retainage is held, all Affidavits are required before the awarding agency can accept the contract work as complete.

For contracts over \$35,000 (without tax), RCW 60.28.051 requires the contract awarding agency to send a Notice of Completion to DOR, ESD, and L&I and obtain all three of their releases before the retainage can be released to the contractor

Retainage Exceptions

- *Federal transportation funds (full or partial funding) – an exception to retainage requirements in RCW 60.28.011(1)(b) – claims rely on the chapter 39.08 RCW contract bond instead of retainage*
- RCW 39.04.155 Small Works Roster: The public contract awarding agency (AA) *may* waive the RCW 60.28 contract retainage, but then the AA assumes liability for any claims and will seek recovery from the contractor
- RCW 39.04.155(3): Limited Public Works: The public contract awarding agency (AA) *may* waive the RCW 39.08 contract bond and the RCW 60.28 contract retainage, but then the AA assumes liability for any claims and will seek recovery from the contractor

Required Paperwork

Intent & Affidavit; Certified Payroll Records

- File the Statement of Intent to Pay Prevailing wages at the beginning of the contract work - Public agencies need an approved Intent to legally pay you for your work. RCW 39.12.040
- The Affidavit of Wages Paid is required at the end of the project work – A prerequisite to release of any retainage held or acceptance of the contract as complete if no retainage is withheld. RCW 39.12.040
- On public works, all the contractors and subcontractors including owner/operators must file Intent & Affidavit forms. RCW 39.12.040
- List all the subcontractors you hired on your Affidavit of Wages Paid.
- Weekly certified payroll records are required to be submitted online to L&I at least once a month. RCW 39.12.120
- State Certified Payroll records are filed on-line through your Prevailing Wage Intent and Affidavit (PWIA) system *Contractor Portal*.
- Step by step instructions for on-line filing (certified payroll instructions start on pg. 17):

<https://lni.wa.gov/licensing-permits/docs/PWIA%20Step-by-Step%20Instructions.pdf>

Intent and Affidavit Filing Fees

2019 legislation changed the filing fees

- Through June 30, 2021, the Intent and the Affidavit filing fees are \$20.
- After June 30, 2021, L&I will do rulemaking to set fees at an amount not to exceed \$40.

Posting the Intent

- On projects over \$10,000 the contractor and the subcontractors are required to post the Intent to inform the workers of the prevailing wage requirement.
- Failure to Post:
- A failure to post is a violation of RCW 39.12.050 with a \$500 penalty. Two violations in five years results in a one year debarment.

File Your Intent & Affidavit Paperwork

Step by step instructions for completing the paperwork:

https://lni.wa.gov/licensing-permits/_docs/PWIA%20Step-by-Step%20Instructions.pdf

To meet the state's prevailing wage requirements, there are steps you must take to get paid:

First time filing? Create a My L&I account to sign up for [PWIA portal access](#). This will allow you to file required forms and manage certified payroll records.

File the Intent. The “Statement of Intent to Pay Prevailing Wages” should be filed immediately after the contract is awarded and, if possible, before work begins and can be done online from the PWIA portal. To complete this filing, you will need the basic information about the project – such as the who, what, where, and when of what's involved.

Post the Intent. For contracts over \$10,000, the approved Intent needs to be posted on the jobsite. If the approval is pending, the complete listing of applicable prevailing wage rates should be posted until the Intent is approved.

Note: The agency administering the contract cannot make any payments to contractors until the Intent form is submitted and approved by L&I.

Certified Payroll Reports on Public Works File Online with L&I

- Employers on public works projects are required to keep certain records in addition to the pay statements for each worker.
- Contractor and subcontractors must file their weekly certified payroll reports online with L&I at least once a month.
- Step by step instructions (CPs on pages 31 to 57)

<https://lni.wa.gov/licensing-permits/docs/PWIA%20Step-by-Step%20Instructions.pdf>

My Certified Payroll

8—

Intent ID

Last Week From

Last Week To

Project Name or Contract No.

Awarding Agency

[Clear Search](#)

Show rows

Showing records 1 to 5 of 8

Intent Id	Project	Last Week Filed	Actions
123456	Tower Repairs ISLAND COUNTY PUBLIC WORKS Contract No: 2017-ABCD	1/14/2017	View All Reports File Certified Payroll

Resources to Assist Contractors Filing Certified Payroll Records

L&I YouTube Videos

- Start at the Labor & Industries website <https://www.lni.wa.gov/>
- Scroll down to bottom
- Under “FOLLOW” select the YouTube icon
- On YouTube, search for “Labor & Industries” and select the L&I HOME page <https://www.youtube.com/user/LaborandIndustries1>
- L&I videos are found here:
 - “PLAYLISTS” tab
 - L&I Certified Payroll Training
 - “VIDEOS” tab
 - Introduction to Certified Payroll
 - Getting Started with Filing Online
 - Add Employees and Rates
 - Enter Hours Worked & Deductions
 - Review Totals & Sign
 - How to Upload certified Payroll records

Errors on the Statement of Intent to Pay Prevailing Wages

No New Intent Required - Correct These Errors on the Affidavit:

- Inaccurate Contract dollar amount
- Wrong Start Date
- Incorrect “Yes” or “No” answer to use of subcontractors
- Incorrect “Yes” or “No” answer to owners performing work
- Missing or incorrect trade
- Missing a county

New Intent Filing Required to Correct Errors misstating these details:

- Project Name
- Contract Number
- Awarding Agency Information
- County (incorrect or missing a county)
- Bid Due Date
- Contract Award Date
- “No” to having employees, but will have employees

Affidavit of Wages Paid

- *The Affidavit is filed after the work is completed.*
- All the approved Affidavits are required for the release of contract retainage or the formal acceptance of the contract. RCW 39.12.040
- All the Affidavits are required for Contract release by ESD, DOR, and L&I. RCW 60.28.051.
- False filing or a failure to file is a violation of RCW 39.12.050.
- More work performed after the filing (such as warranty work)? File an updated Affidavit with the new totals of hours worked, number of workers, and trade and occupation classifications used.

Affidavit Filing Fee

Certain Forms Will Not Require Any Filing Fee!

Exceptions to the filing fee:

- No Employees to report on the Affidavit
- The Owner-operator performed all the work without any employees
- All work was subcontracted
- Contract dollar amount was less than \$750

For these specific situations, the contractor can file the Affidavit without any filing fee

- Filing fees will apply to the Intent and to any Affidavits that do not qualify for these exceptions

Combined Intent & Affidavit Form

Small Contracts of \$2,500 or less

- *Up to \$2,500 Combined Intent & Affidavit*
- The public agency decides if this form can be used
- Online filing initiated by the contract awarding agency
- This method makes the public contract awarding agency directly liable to workers for unpaid prevailing wages – RCW 39.12.040(2)(d)
- Dividing a project to come under the dollar limit is prohibited – RCW 39.12.040(2)(e)
- Form fee waived by L&I policy
- \$500 civil penalty for failure to file

Limited Public Works - Projects up to \$35,000 that are awarded under RCW 39.04.155(3)

- *Limited Public Works Combined Intent/Affidavit form*
- The public agency decides if this form can be used
- Online filing initiated by the contract awarding agency
- The contract public awarding agency is liable to the workers for unpaid prevailing wages *See RCW 39.12.040(2) and also see RCW 39.04.155(3)*
- Breaking in units or phasing projects to come in under the dollar limit is prohibited *RCW 39.04.155(4)*
- \$40 filing fee (temporary reduction through 6/30/2021)
- \$500 civil penalty for failure to file

Restrictions on use of alternative combined forms

- **The contract awarding agency decides** if the alternative process may be used. The contractor must file the form with the public contract awarding agency. The public contract awarding agency must send a copy to L&I within 30 days. Note: Non-governmental organizations (NGOs) may not use combined forms since they are not subject to the relevant laws that control public agency use of the combined forms and assign liability for wages.
- **Liability to the public agency** for unpaid wages is a condition of using an alternative filing process. See RCW 39.12.040(2)(d) and RCW 39.04.155(4)
- **No subcontractors.** No subcontractors are allowed in this alternative process. This helps control exposure to possible liabilities.
- **Single payment.** Multiple payments require using a separate (regular) Intent before any initial payment and a separate (regular) Affidavit before the final payment is made. See RCW 39.12.040.
- **No time and materials.** Total cost with tax must be within the form's dollar limit.
- **No dividing or phasing of projects.** The law prohibits breaking the project into units or phases to avoid the maximum dollar limit.
- **The public agency must approve** the combined forms by signature.
- **No payment may be made** until the form is approved by the public agency.
- **\$500 civil penalty.** Failure to file subject to penalty. RCW 39.12.050.

Failure to File the Affidavit?

Subcontractor fails to file?

- **Filing On Behalf Of (FOBO):**
- By statute and policy, the hiring contractor can assume liability for any unpaid wages, *document an allowable basis for the FOBO*, and get a FOBO Affidavit.
- The policy is on the L&I web site at:
<https://lni.wa.gov/licensing-permits/docs/FOBOPolicyWithAddendum.pdf>
- Because FOBOs involve a compliance investigation (failure to file) , they take longer to process. Please do encourage the hiring contractor to request the FOBO ASAP.

Contractor violations: What are the consequences?

- **Fines and Penalties - ESSB 5035.....**
- RCW 39.12.050 & RCW 39.12.065
- **Responsible Contractor**
- RCW 39.04.350 & RCW 39.06.020
- **Notice of Violation**
- WAC 296-127-150
- **Liens - Notice of Claim** (against bond and retainage)
- Chapters 39.08 & 60.28 RCW; WACs 296-127-190; 200; 210; & 220
- **Debarment** Contractors not eligible to bid public work because of prior violations.
- RCW 39.12.055, RCW 39.12.050, & RCW 39.12.065

What kind of violations cause a Debarment?

- **Debarment – Contractors not eligible to bid public work.**
- **Multiple violations of these issues will result in debarment:**
 - Failure to pay the prevailing rate of wage - RCW 39.12.065
 - Two violations in five years results in a two year debarment.
 - Failure to file or false filing of prevailing wage paperwork - RCW 39.12.050
 - Two violations in five years results in a one year debarment.

Violations of RCW 39.12.055 (any two violations in five years results in a one year debarment) :

- Industrial Insurance account violations - RCW 39.12.055
 - Violation of RCW 51.48.103 (also at least a gross misdemeanor – certain violations are class C felonies)
- False reporting or failure to pay Workers' Comp. premiums RCW 39.12.055
 - Violation of RCW 51.48.020(1) (certain violations are class C felonies)
- Violations of the contractor registration law - Chapter 18.27 RCW
- Apprenticeship violations - RCW 39.12.055
 - Violation of chapter 49.04 RCW as determined by the State Apprenticeship Council

Contract Close-Out

- All the contractor and subcontractor Affidavits are required before the release of retainage RCW 39.12.040
- For contracts over \$35,000, the contract awarding agency submits a Notice of Completion to three state agencies, the Departments Of Revenue (DOR), Employment Security (ESD), and L&I (industrial insurance/workers comp) RCW 60.28.051
- The three state agencies check to see if the contractors are current in taxes and premiums – If everything checks out, releases are issued that allow the awarding agency to release retainage. RCW 60.28.060
- To avoid claims against retainage and be paid promptly, good practices will carefully follow all the subcontractors to find and correct any problems early on.

Prompt Pay to Subs: RCW 39.04.250

Payments received on account of work performed by subcontractor— Disputed amounts—Remedies.

- (1) When payment is received by a contractor or subcontractor for work performed on a public work, the contractor or subcontractor shall pay to any subcontractor not later than ten days after the receipt of the payment, amounts allowed the contractor on account of the work performed by the subcontractor, to the extent of each subcontractor's interest therein.
- (2) In the event of a good faith dispute over all or any portion of the amount due on a payment from the state or a municipality to the prime contractor, or from the prime contractor or subcontractor to a subcontractor, then the state or the municipality, or the prime contractor or subcontractor, may withhold no more than one hundred fifty percent of the disputed amount. Those not a party to a dispute are entitled to full and prompt payment of their portion of a draw, progress payment, final payment, or released retainage.
- (3) In addition to all other remedies, any person from whom funds have been withheld in violation of this section shall be entitled to receive from the person wrongfully withholding the funds, for every month and portion thereof that payment including retainage is not made, interest at the highest rate allowed under RCW [19.52.025](#). In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to costs of suit and reasonable attorneys' fees.

Anti-Bid Shopping Law – Contract Award

RCW 39.30.060

- For contracts expected to cost one million dollars or more, RCW 39.30.060 requires identification of certain subcontractors:
- Within one hour of the bid submittal time, the prime contractor must state the HVAC (heating, ventilation, and air conditioning) subcontractor; the plumbing subcontractor (as described in chapter 18.106 RCW); and the electrical subcontractor (as described in chapter 19.28 RCW), or to name itself for the work.
- *Within 48 hours of the bid submittal time, the prime contractor must state the structural steel and rebar contractor - ESSB 5457 effective June 11, 2020.*
- Substitution of a listed subcontractor in furtherance of bid shopping or bid peddling before or after the award of the prime contract is prohibited.
- Certain circumstances are listed as exceptions that allow a substitution.

2017 Legislation

Prevailing Wage & Public Works

ESHB 1538 AN ACT Relating to requiring prime contractors to bond the subcontractor's portion of the retainage upon request.

Gives subcontractors rights to have the prime obtain a bond in lieu of retainage for that subcontractor's retainage.

SB 5734 AN ACT Relating to bringing Washington state government contracting provisions into compliance with federal law as it relates to small works bonding requirements.

The RCW 39.08.010(3) retainage in lieu of the contract bond provision is expanded in SB 5734 (increased from up to \$35 K to up to \$150K contracts) and the amount retained in lieu of the contract bond in such instances is reduced (from 50% down to 10%).

Unpaid wages are the first priority for claims against this retainage held in lieu of the contract bond.

SSB 5301 AN ACT Relating to the inclusion of willful violations of chapters 49.46, 49.48, and 49.52 RCW to the state's responsible bidder criteria.

Includes repeat and willful violations of certain employment standards laws in the responsible bidder criteria. The public contract awarding agency will rely on a sworn statement now required from the contractor (not the debar/strike lists for this issue). **Checking the debarment list is still essential for the usual issues.**

SB 5036 AN Act Relating to clarifying the authority and procedures for unit priced contracting by public utility districts.

PUDs authorized to use fixed period, indefinite quantity, unit priced contracts for recurring work.

HB 1395 AN Act Relating to job order contracts and procedure.

PTBAs (a type of transit agency) authorized to use the chapter 39.10 RCW Job Order Contracting process.

2018 Legislation

Prevailing Wage & Public Works

- **HB 1672** Prevailing Wage law recovery (tolling for determination)

The statute of limitations is tolled while a prevailing wage determination is pending.

- **E2SHB 1673** Adding training on public works and prevailing wage requirements to responsible bidder criteria.

Effective July 1, 2019, contractors must have public works experience or training.

- **EHB 1849** Addressing compliance with apprenticeship utilization requirements.

Awarding Agencies must monitor apprentice hours and include goals and incentives in certain contracts.

- **SHB 2317** Concerning contractor bonding requirements for public transportation benefit areas and passenger-only ferry service districts.

Allows PTBAS to reduce the contract bond to as low as 25% of the contract amount – Allows POF Service Districts to use alternate forms of security for construction of marine vessels.

- **SSB 5493** Establishing the prevailing rate of wage based on collective bargaining agreements (CBAs) or other methods if CBAs are not available.

Directs the Industrial Statistician to use CBAs, if applicable, to establish prevailing rates.

- **ESSB 6143** Concerning unit priced contracting by cities.

Authorizes unit priced contracting by cities with annual wage updates and annual Intent & Affidavits.

- **ESSB 6329** Clarifying the authority and procedures for contracting by public port districts (bid threshold and, by amendment, unit priced contracts).

Authorizes unit priced contracting by cities with annual wage updates and annual Intent & Affidavits.

2019 Legislation

Prevailing Wage & Public Works

- **ESSB 5035** Enhancing the prevailing wage laws to ensure contractor and owner accountability and worker protection. *AG request legislation.*
- **SHB 1295** Concerning public works contracting procedures. *Amends the Design-Build and Job Order Contracting laws in chapter 39.10 RCW.*
- **HB 1743** Addressing the methodology for establishing the prevailing rate of wages for the construction of affordable housing, homeless and domestic violence shelters, and low-income weatherization and home rehabilitation public works. *Defines “residential construction” and changes the process for establishing residential construction rates.*
- **ESSB 5418** Concerning local government procurement modernization and efficiency. *Modifies contract bid limits and adds Unit Priced Contract authority for certain types of public entities (counties, water-sewer districts, and public transit agencies). Raises the dollar amounts allowed for Small Works and Limited Public Works.*
- **ESB 5958** Concerning public works contracts and interlocal agreements by second-class cities and towns. *(Revised for Engrossed Bill: Concerning public works contracts and interlocal agreements.) Clarifies process for piggyback contracts.*
- **E2SSB 5116** Supporting Washington's clean energy economy and transitioning to a clean, affordable, and reliable energy future.
- *Addressing climate change through transition to a green energy.*

ESSB 5035 *Enhancing the prevailing wage laws to ensure contractor and owner accountability and worker protection.* **January 1, 2020 effective date**

- **Certified payroll records required to be submitted to L&I (but not to the awarding agency).**
- **“Unpaid prevailing wages” defined.** A failure to pay all of the prevailing wage rate by the regularly established pay day.
- **Usual benefits must be paid by the regularly established deadline for such payments.**
- **Time period to file a wage complaint now 60 days from the acceptance date of the public works project.**
- **L&I may still investigate when a complaint is not timely filed but L&I may only recover wages owed (no sanctions or penalties).**
- **L&I may not investigate or recover unpaid prevailing wages if the complaint is filed after two years (private action may still occur).**
- **L&I may issue a notice of violation for unpaid wages, penalties, and interest on all wages owed at 1 percent per month.**
- **Increased civil penalty on violations: \$5,000 or 50 % of the wages owed, whichever is greater, plus interest at 1 percent per month.**
- **An inadvertent filing or reporting error is a mistake and is made in spite of the use of due care by the contractor or employer.**
- **Burden of proof: A preponderance of the evidence (inadvertent error - not subject to civil penalties).**
- **An inadvertent filing or reporting error includes good faith reliance on written L&I communications.**
- **Notices of violation not timely appealed are final and binding and not subject to further appeal.**
- **The director of L&I may waive or reduce a penalty or additional sanction, but may not waive or reduce wages due or interest.**
- **L&I must submit a report of the waivers granted, including the justification for any waiver, upon request of an interested party.**
- **Contractors & subcontractors must keep accurate payroll records for three years from the date of acceptance of the public works contract.**
- **Employers must pay all wages, other than usual benefits, owing to its employees not less than once a month.**
- **After a complaint is filed and before a final determination is made, if the contractor or subcontractor pays the unpaid wages, interest of 1 percent per month, and penalties of \$1,000 or an amount equal to 20 percent of the total prevailing wage violation, the matter is resolved without further penalty.**
- **If a contractor or subcontractor uses this option (above) twice in a five-year period, the contractor is subject to the higher penalty amounts and is barred from bidding on public works contracts for two years.**

2020 Legislation

Prevailing Wage & Public Works

- **ESB 5457** effective June 11, 2020. Adds a requirement to name the structural steel and rebar contractor within 48 hours of the public works bid submittal time.
- **ESB 6239** effective June 11, 2020. Addressing compliance with apprenticeship utilization requirements and bidding on public works projects. Defines “apprenticeship utilization plan”. Adds new details under the optional supplemental bidder responsibility requirements related to achieving apprentice utilization requirements.
- **E2SHB 1521** effective June 11, 2020. Providing for accountability and transparency in government contracting. Addresses transparency and provides for a new “comprehensive impact assessment” regarding decisions to contract out for services.

2021 Legislation

Procurement, Public Works, & *Prevailing Wage*

- Fewer legislative changes in 2021!
- EHB 1192 Authorizes technical, non-substantive amendments to by Code Reviser
- 2SSB 5253 Pollinator health - Implementing the recommendations of the pollinator health task force – WSU & WSDA actions including outreach & education
- **SB 5032** Alternate public works contracting - CPARB recommended updates to Design-Build, GC/CM, and JOC contracting processes
 - Alternative public works are reauthorized, subject to another sunset review in ten years. Uniform notification requirements, publication in a legal newspaper of general circulation. Posting encouraged on websites for business associations, with the OMWBE, and other locations

Significant Prevailing Wage Court Cases

Case law informs us on how the law works.

DISCLAIMER:

This presentation covers some selected, significant issues for prevailing wages under Chapter 39.12 RCW.

The presentation is not a comprehensive analysis of the cases identified nor is it a full set of relevant case law on Chapter 39.12 RCW.

Everett Concrete Products

1988 State Supreme Court case - 109 Wn.2d 819 (1988).

This case law provides important details on how this prevailing wage law works.

- Chapter 39.12 RCW is a worker protection law
 - The law is “remedial”
 - The law is to be liberally interpreted for its purpose
 - The purpose is: Protecting local worker wages
 - The state law is broader than the federal law.
- This case law tells us off site work, specific to the public work, will require prevailing wages.
- This off-site coverage is limited to “within the state” RCW 39.12.020.

Silverstreak, Inc. v. L&I,

159 Wn.2d 868 (2007).

- Two conditions had to be satisfied to reach a prevailing wage requirement: (1) The drivers must deliver the materials, and (2) the drivers must perform an additional task that involves incorporation of the materials into the project.
- Although the court ruled prevailing wages should be required for this work the court also ruled that because of the employers' reliance on a 1992 L&I memo, the department was estopped from collecting the workers' wage claim.
- To eliminate such reliance on old communications, the rule on materials delivery, (sand, gravel, crushed rock, concrete, asphalt, and similar materials) WAC 296-127-018 was revised.

Supporters of the Center, Inc. v. Moore, **119 Wn. App. 352 (2003).**

- The center received a \$2.97 million CTED Building for the Arts grant (almost half of the project construction cost).
- The city paid \$700K in “advance rent” to SOC for use of the center.
- CTED & city funds paid for 52% of the project.
- The appellate court looked to both the source of funding and the character of the project and found that prevailing wages were required.
- State or local government funding (grants, etc.) brings a prevailing wage requirement to otherwise private projects.

City of Spokane v. L&I, 100 Wn. App. 805 (2000).

- The “Wheelabrator” case.
- Issue: Were prevailing wages required for the contractor’s annual maintenance shutdown at the City’s waste to energy facility (that burns garbage and generates electricity) or was this work exempt as “ordinary maintenance”?
- **“All maintenance, when performed by contract is public work, and subject to prevailing wage. Maintenance is “ordinary” under the statute, when it is performed by in house employees of the public entity, and excluded.”** *City of Spokane* at 810.
- Public agency employees are already exempted in RCW 39.12.020(2).
- Prevailing wages must be paid for contracted public maintenance work.

Lockheed Shipbuilding Co. v. L&I, **56 Wn. App. 421 (1989).**

- Project: Construction of a Wastewater treatment plant and its outfall pipe.
- Scope of Work Issue: The correct prevailing rate of wage for welding a waste water treatment plant outfall pipe off-site in a shipyard: Shipyard Boilermaker or Construction Plumber/Pipefitter?
- The “..work performed... was of the same type and similar nature as work done by pipefitters in the construction industry.”
- The type and nature of the work (*not an employee's title*) is important in determining which scope of work description (and prevailing rate of wage) applies to the work.

Heller v. McClure, 92 Wn. App. 333 (1998).

- On-site repair of equipment used to perform the public work.
- The court focused on the phrase “upon all public works” in its analysis. See RCW 39.12.020.
- The employer argued the mechanic’s work was not prevailing wage work because it was not “incorporated into the project.”
- The court did not require such incorporation in this fact set.
- ***“Heller’s work was both directly related to the prosecution of the contracted work and necessary for its completion.”***
- The appellate court found that prevailing wages were required for this on the site of the public works equipment.
- The on-site repair of equipment being used to perform the public work will require prevailing wages.
- Off-site equipment repair may have a different answer – Check with L&I about your facts.

Prevailing Wage Tools

- Contractor Strike and Contractor Debarment Lists
 - Searchable app. with sort and download capability
<https://lni.wa.gov/licensing-permits/public-works-projects/strike-and-debar/>
 - Contractors not eligible to bid on public works
<https://secure.lni.wa.gov/debarandstrike/ContractorDebarList.aspx>
- PWIA Project Dashboard
 - Your Intent and Affidavit searches are assisted by the project dashboard showing project details (*based on the Intent & Affidavit filings*)
 - Intents and Affidavits filed on the project
 - A list of the contractors and subcontractors on the project
 - Possible identification of missing forms
- PWIA Portals
 - Awarding Agency Portal
 - Contractor Portal

WA State Dept. of Labor & Industries Website

<https://lni.wa.gov/>

Verify a Contractor - Check Registration and More!

<https://secure.lni.wa.gov/verify/>

Look Up Prevailing Wages

<https://lni.wa.gov/licensing-permits/public-works-projects/prevailing-wage-rates/>

Scope of Work Descriptions

<https://lni.wa.gov/licensing-permits/public-works-projects/scopes-of-work>

Approved Intents & Affidavits

<https://secure.lni.wa.gov/wagelookup/searchforms.aspx>

Prevailing Wage Policies & Determinations

<https://lni.wa.gov/licensing-permits/public-works-projects/prevailing-wage-policies> Use Ctrl F to search

Debarment List

<https://lni.wa.gov/licensing-permits/public-works-projects/strike-and-debar/contractors-not-allowed-to-bid>

Contractor Violation History

<https://secure.lni.wa.gov/debarandstrike/ContractorStrikeList.aspx>

Prevailing Wage Resources

- **Sign up for the Prevailing Wage Electronic Mailing Lists:**

https://public.govdelivery.com/accounts/WADLI/subscriber/new?topic_id=WADLI_40

Scroll down to “Trades and Licensing” and select any or all of these three options as needed:

- ✓ Prevailing Wage
- ✓ Prevailing Wage – Awarding Agencies
- ✓ Prevailing Wage – Intents & Affidavits

- **L&I on-line:** <https://www.lni.wa.gov/>

Prevailing Wage information is found under:

- “Licensing & Permits” and
- “PUBLIC WORKS PROJECTS”:

L&I Prevailing Wage *Ask Your Questions!*

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Questions

