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**SENATE BILL 6654**

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**State of Washington 64th Legislature 2016 Regular Session**

**By** Senators Chase and Hasegawa

AN ACT Relating to extending the application of prevailing wage requirements to publicly subsidized projects; amending RCW 39.12.010, 39.12.030, 39.12.040, 39.12.042, 39.12.050, 39.12.065, and 39.12.070; adding a new section to chapter 39.12 RCW; adding a new section to chapter 82.32 RCW; creating a new section; and providing an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

**Sec.**  RCW 39.12.010 and 1989 c 12 s 6 are each amended to read as follows:

(1) The "prevailing rate of wage", for the intents and purposes of this chapter, ((~~shall~~)) must be the rate of hourly wage, usual benefits, and overtime paid in the locality, as hereinafter defined, to the majority of workers, laborers, or mechanics, in the same trade or occupation. In the event that there is not a majority in the same trade or occupation paid at the same rate, then the average rate of hourly wage and overtime paid to such laborers, workers, or mechanics in the same trade or occupation ((~~shall~~)) must be the prevailing rate. If the wage paid by any contractor or subcontractor to laborers, workers, or mechanics on any public work is based on some period of time other than an hour, the hourly wage for the purposes of this chapter ((~~shall~~)) must be mathematically determined by the number of hours worked in such period of time.

(2) The "locality" for the purposes of this chapter ((~~shall be~~)) is the largest city in the county wherein the physical work is being performed.

(3) The "usual benefits" for the purposes of this chapter shall include the amount of:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers, laborers, and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the workers, laborers, and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of such benefits.

(4) An "interested party" for the purposes of this chapter ((~~shall~~)) includes a contractor, subcontractor, an employee of a contractor or subcontractor, an organization whose members' wages, benefits, and conditions of employment are affected by this chapter, and the director of labor and industries or the director's designee.

(5) "Public work" has the same meaning as in RCW 39.04.010, except for the purposes of this chapter, "public work" also includes publicly subsidized work.

(6) "Publicly subsidized work" means a private construction project, including the constructing of new structures or the repairing, altering, or improving of existing structures, when:

(a) A qualifying tax preference applies to the project;

(b) The project occurs on land that the party undertaking the project leases from the state or any county, municipality, or political subdivision; or

(c) The party undertaking the project is headquartered on land leased from the state or any county, municipality, or political subdivision.

(7) "Qualifying tax preference" means any exemption or deferral of state sales or use tax under Title 82 RCW on all or a portion of (a) the labor and services rendered in the constructing of new structures or the repairing, altering, or improving of existing structures, or (b) materials incorporated into such new or existing structures during the course of the constructing, repairing, altering, or improving. "Qualifying tax preference" does not include a sale that is not subject to state sales tax because it is taxed under any provision of chapter 82.04 RCW other than RCW 82.04.250(1).

(8) "Subsidy recipient" means the private party undertaking publicly subsidized work.

**Sec.**  RCW 39.12.030 and 2009 c 62 s 1 are each amended to read as follows:

(1) The specifications for every contract for the construction, reconstruction, maintenance or repair of any public work ((~~to which the state or any county, municipality, or political subdivision created by its laws is a party, shall~~)) must contain a provision stating the hourly minimum rate of wage, not less than the prevailing rate of wage, which may be paid to laborers, workers, or mechanics in each trade or occupation required for such public work employed in the performance of the contract either by the contractor, subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract, and the contract ((~~shall~~)) must contain a stipulation that such laborers, workers, or mechanics ((~~shall~~)) must be paid not less than such specified hourly minimum rate of wage. If the awarding agency or subsidy recipient determines that the work contracted for meets the definition of residential construction, the contract must include that information.

(2) If the hourly minimum rate of wage stated in the contract specifies residential construction rates and it is later determined that the work performed is commercial and subject to commercial construction rates, the state, county, municipality, ((~~or~~)) political subdivision, or subsidy recipient that entered into the contract must pay the difference between the residential rate stated and the actual commercial rate to the contractor, subcontractor, or other person doing or contracting to do the whole or any part of the work under the contract.

**Sec.**  RCW 39.12.040 and 2013 c 113 s 5 are each amended to read as follows:

(1)(a) Except as provided in subsection (2) of this section, before payment is made by or on behalf of the state, or any county, municipality, or political subdivision created by its laws, or subsidy recipient, of any sum or sums due on account of a public works contract, it is the duty of the officer or person charged with the custody and disbursement of public funds or the subsidy recipient's funds to require the contractor and each and every subcontractor from the contractor or a subcontractor to submit to such officer or person a "Statement of Intent to Pay Prevailing Wages". For a contract in excess of ten thousand dollars, the statement of intent to pay prevailing wages must include:

(i) The contractor's registration certificate number; and

(ii) The prevailing rate of wage for each classification of workers entitled to prevailing wages under RCW 39.12.020 and the estimated number of workers in each classification.

(b) Each statement of intent to pay prevailing wages must be approved by the industrial statistician of the department of labor and industries before it is submitted to the disbursing officer or person. Unless otherwise authorized by the department of labor and industries, each voucher claim submitted by a contractor for payment on a project estimate must state that the prevailing wages have been paid in accordance with the prefiled statement or statements of intent to pay prevailing wages on file with the public agency or subsidy recipient. Following the final acceptance of a public works project, it is the duty of the officer or person charged with the disbursement of public funds((~~,~~)) to require the contractor and each and every subcontractor from the contractor or a subcontractor to submit to such officer or person an affidavit of wages paid before the funds retained according to the provisions of RCW 60.28.011 are released to the contractor. On a public works project where no retainage is withheld pursuant to RCW 60.28.011(1)(b), the affidavit of wages paid must be submitted to the state, county, municipality, or other public body charged with the duty of disbursing or authorizing disbursement of public funds prior to final acceptance of the public works project. For publicly subsidized work, following the contract completion date of the project the officer or person charged with the disbursement of funds must require the contractor and every subcontractor to the contractor or subcontractor to submit an affidavit of wages paid before final payment is made to the contractor. If a subcontractor performing work on a public works project fails to submit an affidavit of wages paid form, the contractor or subcontractor with whom the subcontractor had a contractual relationship for the project may file the forms on behalf of the nonresponsive subcontractor. Affidavit forms may only be filed on behalf of a nonresponsive subcontractor who has ceased operations or failed to file as required by this section. The contractor filing the affidavit must accept responsibility for payment of prevailing wages unpaid by the subcontractor on the project pursuant to RCW 39.12.020 and 39.12.065. Intentionally filing a false affidavit on behalf of a subcontractor subjects the filer to the same penalties as are provided in RCW 39.12.050. Each affidavit of wages paid must be certified by the industrial statistician of the department of labor and industries before it is submitted to the disbursing officer.

(2) As an alternate to the procedures provided for in subsection (1) of this section, for public works projects of two thousand five hundred dollars or less and for projects where the limited public works process under RCW 39.04.155(3) is followed:

(a) An awarding agency or subsidy recipient may authorize the contractor or subcontractor to submit the statement of intent to pay prevailing wages directly to the officer or person charged with the custody or disbursement of public funds in the awarding agency or the subsidy recipient's funds without approval by the industrial statistician of the department of labor and industries. The awarding agency or subsidy recipient must retain such statement of intent to pay prevailing wages for a period of not less than three years.

(b) Upon final acceptance of the public works project, the awarding agency or subsidy recipient must require the contractor or subcontractor to submit an affidavit of wages paid. Upon receipt of the affidavit of wages paid, the awarding agency may pay the contractor or subcontractor in full, including funds that would otherwise be retained according to the provisions of RCW 60.28.011. Within thirty days of receipt of the affidavit of wages paid, the awarding agency or subsidy recipient must submit the affidavit of wages paid to the industrial statistician of the department of labor and industries for approval.

(c) A statement of intent to pay prevailing wages and an affidavit of wages paid must be on forms approved by the department of labor and industries.

(d) In the event of a wage claim and a finding for the claimant by the department of labor and industries where the awarding agency or subsidy recipient has used the alternative process provided for in this subsection (2), the awarding agency or subsidy recipient must pay the wages due directly to the claimant. If the contractor or subcontractor did not pay the wages stated in the affidavit of wages paid, the awarding agency or subsidy recipient may take action at law to seek reimbursement from the contractor or subcontractor of wages paid to the claimant, and may prohibit the contractor or subcontractor from bidding on any public works contract of the awarding agency for up to one year.

(e) Nothing in this section may be interpreted to allow an awarding agency or subsidy recipient to subdivide any public works project of more than two thousand five hundred dollars for the purpose of circumventing the procedures required by subsection (1) of this section.

**Sec.**  RCW 39.12.042 and 1993 c 404 s 3 are each amended to read as follows:

If any agency of the state, or any county, municipality, or political subdivision created by its laws ((~~shall knowingly fail~~)), or any subsidy recipient, knowingly fails to comply with the provisions of RCW 39.12.040 ((~~as now or hereafter amended, such agency of the state, or county, municipality, or political subdivision created by its laws, shall be~~)), it is liable to all workers, laborers, or mechanics to the full extent and for the full amount of wages due, pursuant to the prevailing wage requirements of RCW 39.12.020.

**Sec.**  RCW 39.12.050 and 2009 c 219 s 3 are each amended to read as follows:

(1)(a) Any contractor or subcontractor who files a false statement or fails to file any statement or record required to be filed under this chapter and the rules adopted under this chapter, ((~~shall~~)) must, after a determination to that effect has been issued by the director after hearing under chapter 34.05 RCW, forfeit as a civil penalty the sum of five hundred dollars for each false filing or failure to file, and ((~~shall~~)) may not be permitted to bid, or have a bid considered, on any public works contract until the penalty has been paid in full to the director. The civil penalty under this subsection ((~~shall~~)) does not apply to a violation determined by the director to be an inadvertent filing or reporting error. Civil penalties ((~~shall~~)) must be deposited in the public works administration account.

(b) To the extent that a contractor or subcontractor has not paid wages at the rate due pursuant to RCW 39.12.020, and a finding to that effect has been made as provided by this subsection, such unpaid wages ((~~shall~~)) constitute a lien against the bonds and retainage as provided in RCW 18.27.040, 19.28.041, 39.08.010, section 8 of this act, and 60.28.011.

(2)(a) If a contractor or subcontractor is found to have violated the provisions of subsection (1) of this section for a second time within a five year period, the contractor or subcontractor ((~~shall be~~)) is subject to the sanctions prescribed in subsection (1) of this section and ((~~shall~~)) is not ((~~be~~)) allowed to bid on any public works contract for one year. The one year period ((~~shall~~)) runs from the date of notice by the director of the determination of noncompliance. When an appeal is taken from the director's determination, the one year period ((~~shall~~)) commences from the date of the final determination of the appeal.

(b) The director ((~~shall~~)) must issue his or her findings that a contractor or subcontractor has violated the provisions of this subsection after a hearing held subject to the provisions of chapter 34.05 RCW.

**Sec.**  RCW 39.12.065 and 2009 c 219 s 4 are each amended to read as follows:

(1)(a) Upon complaint by an interested party, the director of labor and industries ((~~shall~~)) must cause an investigation to be made to determine whether there has been compliance with this chapter and the rules adopted hereunder, and if the investigation indicates that a violation may have occurred, a hearing ((~~shall~~)) must be held in accordance with chapter 34.05 RCW. The director ((~~shall~~)) must issue a written determination including his or her findings after the hearing. A judicial appeal from the director's determination may be taken in accordance with chapter 34.05 RCW, with the prevailing party entitled to recover reasonable costs and attorneys fees.

(b) A complaint concerning nonpayment of the prevailing rate of wage ((~~shall~~)) must be filed with the department of labor and industries no later than thirty days from the acceptance date of the public works project. The failure to timely file such a complaint ((~~shall~~)) does not prohibit a claimant from pursuing a private right of action against a contractor or subcontractor for unpaid prevailing wages. The remedy provided by this section is not exclusive and is concurrent with any other remedy provided by law.

(2)(a) To the extent that a contractor or subcontractor has not paid the prevailing rate of wage under a determination issued as provided in subsection (1) of this section, the director ((~~shall~~)) must notify the agency or subsidy recipient awarding the public works contract of the amount of the violation found, and the awarding agency ((~~shall~~)) or subsidy recipient must withhold, or in the case of a bond, the director ((~~shall~~)) must proceed against the bond in accordance with the applicable statute to recover, such amount from the following sources in the following order of priority until the total of such amount is withheld:

((~~(a)~~)) (i) The retainage or bond in lieu of retainage as provided in RCW 60.28.011;

((~~(b)~~)) (ii) If the claimant was employed by the contractor or subcontractor on the public works project, the bond, assigned savings account, cash deposit, or other negotiable security filed by the contractor or subcontractor with the department of labor and industries as provided in RCW 18.27.040 and 19.28.041;

((~~(c)~~)) (iii) A surety bond, or at the contractor's or subcontractor's option an escrow account, running to the director in the amount of the violation found; and

((~~(d)~~)) (iv) That portion of the progress payments ((~~which~~)) that is properly allocable to the contractor or subcontractor who is found to be in violation of this chapter. Under no circumstances ((~~shall~~)) may any portion of the progress payments be withheld that are properly allocable to a contractor, subcontractor, or supplier, that is not found to be in violation of this chapter.

(b) The amount withheld ((~~shall~~)) must be released to the director to distribute in accordance with the director's determination.

(3)(a) A contractor or subcontractor that is found, in accordance with subsection (1) of this section, to have violated the requirement to pay the prevailing rate of wage ((~~shall be~~)) is subject to a civil penalty of not less than one thousand dollars or an amount equal to twenty percent of the total prevailing wage violation found on the contract, whichever is greater, and ((~~shall not be~~)) is not permitted to bid, or have a bid considered, on any public works contract until such civil penalty has been paid in full to the director. If the contractor or subcontractor performs work on a subsidized public works project, the subsidy recipient is subject to a civil penalty in the amount of the unpaid wages. Civil penalties must be deposited in the public works administration account.

(b) If a contractor or subcontractor is found to have participated in a violation of the requirement to pay the prevailing rate of wage for a second time within a five-year period, the contractor or subcontractor ((~~shall be~~)) is subject to the sanctions prescribed in (a) of this subsection and as an additional sanction ((~~shall not be~~)) is not allowed to bid on any public works contract for two years. ((~~Civil penalties shall be deposited in the public works administration account.~~)) If a previous or subsequent violation of a requirement to pay a prevailing rate of wage under federal or other state law is found against the contractor or subcontractor within five years from a violation under this section, the contractor or subcontractor ((~~shall not be~~)) is not allowed to bid on any public works contract for two years. A contractor or subcontractor ((~~shall~~)) may not be barred from bidding on any public works contract if the contractor or subcontractor relied upon written information from the department to pay a prevailing rate of wage that is later determined to be in violation of this chapter.

(c) The civil penalty and sanctions under this subsection ((~~shall~~)) do not apply to a violation determined by the director to be an inadvertent filing or reporting error.

(d) To the extent that a contractor or subcontractor has not paid the prevailing wage rate under a determination issued as provided in subsection (1) of this section, the unpaid wages ((~~shall~~)) constitutes a lien against the bonds and retainage as provided herein and in RCW 18.27.040, 19.28.041, 39.08.010, section 8 of this act, and 60.28.011.

**Sec.**  RCW 39.12.070 and 2014 c 148 s 1 are each amended to read as follows:

(1) The department of labor and industries may charge fees to awarding agencies or subsidy recipients on public works for the approval of statements of intent to pay prevailing wages and the certification of affidavits of wages paid. The department may also charge fees to persons or organizations requesting the arbitration of disputes under RCW 39.12.060. The amount of the fees ((~~shall~~)) must be established by rules adopted by the department under the procedures in the administrative procedure act, chapter 34.05 RCW. Except as provided in subsection (3) of this section, the fees ((~~shall~~)) apply to all approvals, certifications, and arbitration requests made after the effective date of the rules. All fees ((~~shall~~)) must be deposited in the public works administration account. The department may refuse to arbitrate for contractors, subcontractors, persons, or organizations which have not paid the proper fees. The department may, if necessary, request the attorney general to take legal action to collect delinquent fees.

(2) The department ((~~shall~~)) must set the fees permitted by this section at a level that generates revenue that is as near as practicable to the amount of the appropriation to administer this chapter, including, but not limited to, the performance of adequate wage surveys, and to investigate and enforce all alleged violations of this chapter, including, but not limited to, incorrect statements of intent to pay prevailing wage, incorrect certificates of affidavits of wages paid, and wage claims, as provided for in this chapter and chapters 49.48 and 49.52 RCW. However, the fees charged for the approval of statements of intent to pay prevailing wages and the certification of affidavits of wages paid ((~~shall~~)) must be forty dollars.

(3) If, at the time an individual or entity files an affidavit of wages paid, the individual or entity is exempt from the requirement to pay the prevailing rate of wage under RCW 39.12.020, the department of labor and industries may not charge a fee to certify the affidavit of wages paid.

NEW SECTION. **Sec.**  A new section is added to chapter 39.12 RCW to read as follows:

(1) Every contractor and subcontractor on a publicly subsidized public works project as defined in RCW 39.12.010 (5) and (6) must file with the department of labor and industries a surety bond issued by a surety insurer that meets the requirements under chapter 48.28 RCW in the sum of five percent of the amount due on the public works project. The bond must name the state of Washington as obligee with good and sufficient surety in a form to be approved by the department. The bond must be continuous and may be canceled by the surety upon the surety giving written notice to the director of labor and industries. The bond must be conditioned to recover against the contractor and its officers, agents, and employees by reason of its violation of this chapter. A change in the name of a business or a change in the type of business entity does not impair a bond for the purposes of this section so long as one of the original applicants for the bond maintains partial ownership in the business covered by the bond.

(2) As an alternative to posting a bond, the contractor or subcontractor on a publicly subsidized public works project as defined in RCW 39.12.010 (5) and (6) may deposit five percent of the amount due on the public works contract in an interest-bearing assigned savings account, upon forms provided by the department of labor and industries.

NEW SECTION. **Sec.**  A new section is added to chapter 82.32 RCW to read as follows:

(1) The department must declare the amount of qualifying tax preference claimed by a subsidy recipient on publicly subsidized work to be immediately due if, with respect to the publicly subsidized work, the subsidy recipient fails to provide the department, upon request, with copies of certified affidavits of wages paid as required by RCW 39.12.040 or the department receives notice from the department of labor and industries that a subsidy recipient has knowingly failed to comply with RCW 39.12.040. If the qualifying tax preference is a deferral of sales and use taxes and the economic benefits of the deferral are passed to a lessee, the lessee is responsible for repayment of the deferred taxes to the extent the lessee has received the economic benefit.

(2) The department must assess interest at the rate provided under this chapter for delinquent taxes, but not penalties, retroactively to the date that the qualifying tax preference was claimed. If the amount of qualifying tax preference was not reported to the department by the subsidy recipient and the subsidy recipient fails to provide that information to the department upon request, the department may proceed under RCW 82.32.100 to estimate the amount due from the subsidy recipient under this section.

(3) For purposes of this section, the definitions in RCW 39.12.010 apply to this section.

NEW SECTION. **Sec.**  This act does not apply with respect to publicly subsidized work, as defined in RCW 39.12.010, for which any contract to undertake the publicly subsidized work was executed before July 1, 2017.

NEW SECTION. **Sec.**  This act takes effect July 1, 2017.

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