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**SENATE BILL 5035**

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**State of Washington 66th Legislature 2019 Regular Session**

**By** Senators Saldaña, Hasegawa, Conway, Keiser, Wellman, and Kuderer; by request of Attorney General

AN ACT Relating to enhancing the prevailing wage laws to ensure contractor and owner accountability and worker protection; amending RCW 39.12.010, 39.12.050, and 39.12.065; adding a new section to chapter 39.12 RCW; creating a new section; prescribing penalties; and providing an effective date.

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

NEW SECTION. **Sec.**  The legislature finds:

(1) That from the shift in the 1980s from criminal to civil penalties for prevailing wage violations that the law needs some enhancements to effectively provide the department of labor and industries with the ability to utilize its civil remedies to both discourage and penalize repeat and willful violations of the law.

(2) The doctrine of substantial compliance shall not be used by the department of labor and industries in the application and construction of chapter 39.12 RCW. Anyone engaged in public works construction is presumed to know the requirements of chapter 39.12 RCW.

(3) Revisions to chapter 39.12 RCW are long overdue and are necessary to appropriately address filing and reporting procedures and penalties, which are necessary to strengthen enforcement of and deterrence from repeat and/or willful violations of the chapter.

**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 be~~)) is 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 be~~)) is 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 be~~)) is 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~~)) includes 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; and

(c) The effective annual rate of contributions for all hours, public and private, worked during the year by an employee, commonly referred to as annualization of 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) An "inadvertent filing or reporting error" is a mistake that occurs only once and is made notwithstanding the use of due care by the contractor or employer.

(6) "Unpaid prevailing wages" or "unpaid wages" means the employer fails to pay all compensation owed for any workweek by the regularly established pay day for the period in which the workweek ends. Every employer must pay all wages, other than fringe benefits, owing to its employees not less than twice a month.

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

(1) Any contractor or subcontractor who files a false statement or fails to file any statement or record required to be filed or posted under this chapter and the rules adopted under this chapter, shall, 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 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. The director shall consider whether or not the contractor or employer has attended the required training under RCW 39.04.350 both for determining if the violation may be applied and for enhancing the curriculum of the required training provided by the department. The burden of proving that an error is inadvertent rests with the contractor or employer charged with the error. Civil penalties shall be deposited in the public works administration account.

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, and 60.28.011.

(2) 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 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.

The director shall 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) Upon complaint by an interested party, the director of labor and industries shall 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 be held in accordance with chapter 34.05 RCW. The director shall 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 interest on the wages at the highest rate allowed under RCW 19.52.025, and reasonable costs and attorneys' fees.

A complaint concerning nonpayment of the prevailing rate of wage shall be filed with the department of labor and industries no later than ((~~thirty~~)) one hundred twenty days from the acceptance date of the public works project. The failure to timely file such a complaint ((~~shall~~)) does not prohibit the department from investigating the matter in pursuit of the recovery of unpaid wages for the worker(s). However, the department may only recover owed wages and may not charge a contractor or subcontractor with a violation of this section if the complaint is filed after the one hundred twenty day limit. The failure to timely file such a complaint also 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) 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 notify the agency awarding the public works contract of the amount of the violation found, and the awarding agency shall withhold, or in the case of a bond, the director shall 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) The retainage or bond in lieu of retainage as provided in RCW 60.28.011;

(b) If the claimant was employed by the contractor or subcontractor on the public works project, the bond 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) 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) That portion of the progress payments which is properly allocable to the contractor or subcontractor who is found to be in violation of this chapter. Under no circumstances ((~~shall~~)) does 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.

The amount withheld shall be released to the director to distribute in accordance with the director's determination.

(3) 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~~)) five thousand dollars or an amount equal to ((~~twenty~~)) fifty percent of the total prevailing wage violation found on the contract, whichever is greater, and ((~~shall~~)) is not ((~~be~~)) 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 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 this subsection and as an additional sanction ((~~shall~~)) is not ((~~be~~)) 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 allowed to bid on any public works contract for two years. A contractor or subcontractor ((~~shall~~)) is 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. 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. 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~~)) constitute a lien against the bonds and retainage as provided herein and in RCW 18.27.040, 19.28.041, 39.08.010, and 60.28.011.

(4) If, after a complaint has been filed, the contractor or subcontractor elects to pay the unpaid wages that precipitated the complaint, interest on the wages at the highest rate allowed under RCW 19.52.025, and penalties in the amount of one thousand dollars or twenty percent of the total prevailing wage violation determined by the department of labor and industries, whichever is greater, is considered resolved without further penalty under subsection (3) of this section.

(5) If a contractor or subcontractor utilizes the process outlined in subsection (4) of this section for a second time within a five-year period, the contractor or subcontractor is subject to the sanctions prescribed in subsection (3) of this section and as an additional sanction, may not be allowed to bid on any public works contract for two years.

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

(1) Each contractor shall keep accurate payroll records for three years from the date of acceptance of the public works project by the contract awarding agency, showing the employee's full name, address, social security number, trade or occupation, classification, straight and overtime rates, hourly rate of usual benefits, and hours worked each day and week, including any employee authorizations executed pursuant to RCW 49.28.065, and the actual gross wages, itemized deductions, withholdings, and net wages paid, for each laborer, worker, and mechanic employed by the contractor for work performed on a public works project.

(2) A contractor shall, at least biweekly file a copy of its certified payroll records using the department of labor and industries' online system and/or directly with the awarding agency in a format approved by the department.

(3) A contractor's noncompliance with this section constitutes a violation of RCW 39.12.050.

NEW SECTION. **Sec.**  This act takes effect January 1, 2020.

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