

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE SENATE BILL 5035

Chapter 242, Laws of 2019

66th Legislature
2019 Regular Session

PREVAILING WAGE--NONPAYMENT

EFFECTIVE DATE: January 1, 2020

Passed by the Senate April 19, 2019
Yeas 34 Nays 15

KAREN KEISER

President of the Senate

Passed by the House April 10, 2019
Yeas 59 Nays 36

FRANK CHOPP

Speaker of the House of Representatives

Approved May 7, 2019 9:40 AM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5035** as passed by the Senate and the House of Representatives on the dates hereon set forth.

BRAD HENDRICKSON

Secretary

FILED

May 13, 2019

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 5035

AS AMENDED BY THE HOUSE

Passed Legislature - 2019 Regular Session

State of Washington 66th Legislature 2019 Regular Session

By Senate Labor & Commerce (originally sponsored by Senators Saldaña, Hasegawa, Conway, Keiser, Wellman, and Kuderer; by request of Attorney General)

READ FIRST TIME 02/14/19.

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

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

7 NEW SECTION. **Sec. 1.** The legislature finds:

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

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

17 **Sec. 2.** RCW 39.12.010 and 1989 c 12 s 6 are each amended to read
18 as follows:

19 (1) The "prevailing rate of wage" (~~(, for the intents and purposes~~
20 ~~of this chapter, shall be)~~) is the rate of hourly wage, usual

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

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

15 (3) The "usual benefits" (~~(for the purposes of this chapter~~
16 ~~shall)~~) includes the amount of:

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

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

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

39 (5) An "inadvertent filing or reporting error" is a mistake and
40 is made notwithstanding the use of due care by the contractor,

1 subcontractor, or employer. An inadvertent filing or reporting error
2 includes a contractor who, in good faith, relies on a written
3 determination provided by the department of labor and industries and
4 pays its workers, laborers, and mechanics accordingly, but is later
5 found to have not paid the proper prevailing wage rate.

6 (6) "Unpaid prevailing wages" or "unpaid wages" means the
7 employer fails to pay all of the prevailing rate of wages owed for
8 any workweek by the regularly established pay day for the period in
9 which the workweek ends. Every employer must pay all wages, other
10 than usual benefits, owing to its employees not less than once a
11 month. Every employer must pay all usual benefits owing to its
12 employees by the regularly established deadline for those benefits.

13 (7) "Rate of contribution" means the effective annual rate of
14 usual benefit contributions for all hours, public and private, worked
15 during the year by an employee (commonly referred to as
16 "annualization" of benefits). The only exemption to the annualization
17 requirements is for defined contribution pension plans that have
18 immediate participation and vesting.

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

21 (1) Any contractor or subcontractor who files a false statement
22 or fails to file any statement or record required to be filed or
23 fails to post a document required to be posted under this chapter and
24 the rules adopted under this chapter, shall, after a determination to
25 that effect has been issued by the director after hearing under
26 chapter 34.05 RCW, forfeit as a civil penalty the sum of five hundred
27 dollars for each false filing or failure to file or post, and shall
28 not be permitted to bid, or have a bid considered, on any public
29 works contract until the penalty has been paid in full to the
30 director. The civil penalty under this subsection (~~shall~~) does not
31 apply to a violation determined by the director to be an inadvertent
32 filing or reporting error. The burden of proving, by a preponderance
33 of the evidence, that an error is inadvertent rests with the
34 contractor or subcontractor charged with the error. Civil penalties
35 shall be deposited in the public works administration account.

36 To the extent that a contractor or subcontractor has not paid
37 wages at the rate due pursuant to RCW 39.12.020, and a finding to
38 that effect has been made as provided by this subsection, such unpaid

1 wages (~~shall~~) constitute a lien against the bonds and retainage as
2 provided in RCW 18.27.040, 19.28.041, 39.08.010, and 60.28.011.

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

13 The director shall issue his or her findings that a contractor or
14 subcontractor has violated the provisions of this subsection after a
15 hearing held subject to the provisions of chapter 34.05 RCW, unless a
16 notice of violation is not timely appealed. A notice of violation not
17 timely appealed is final and binding, and not subject to further
18 appeal.

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

21 (1) Upon complaint by an interested party, the director of labor
22 and industries shall cause an investigation to be made to determine
23 whether there has been compliance with this chapter and the rules
24 adopted hereunder, and if the investigation indicates that a
25 violation may have occurred, the department of labor and industries
26 may issue a notice of violation for unpaid wages, penalties, and
27 interest on all wages owed at one percent per month. A hearing shall
28 be held following a timely appeal of the notice of violation in
29 accordance with chapter 34.05 RCW. The director shall issue a written
30 determination including his or her findings after the hearing unless
31 a notice of violation is not timely appealed. A notice of violation
32 not timely appealed is final and binding, and not subject to further
33 appeal. A judicial appeal from the director's determination may be
34 taken in accordance with chapter 34.05 RCW, with the prevailing party
35 entitled to recover reasonable costs and attorneys' fees.

36 A complaint concerning nonpayment of the prevailing rate of wage
37 shall be filed with the department of labor and industries no later
38 than (~~thirty~~) sixty days from the acceptance date of the public
39 works project. The department may not charge a contractor or

1 subcontractor with a violation of this section when responding to a
2 complaint filed after the sixty-day limit. The failure to timely file
3 such a complaint (~~shall~~) does not prohibit the department from
4 investigating the matter and recovering unpaid wages for the
5 worker(s) within two years from the acceptance of the public works
6 contract. The department may not investigate or recover unpaid wages
7 if the complaint is filed after two years from the acceptance of a
8 public works contract. The failure to timely file such a complaint
9 also does not prohibit a claimant from pursuing a private right of
10 action against a contractor or subcontractor for unpaid prevailing
11 wages. The remedy provided by this section is not exclusive and is
12 concurrent with any other remedy provided by law.

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

22 (a) The retainage or bond in lieu of retainage as provided in RCW
23 60.28.011;

24 (b) If the claimant was employed by the contractor or
25 subcontractor on the public works project, the bond filed by the
26 contractor or subcontractor with the department of labor and
27 industries as provided in RCW 18.27.040 and 19.28.041;

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

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

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

39 (3) A contractor or subcontractor that is found, in accordance
40 with subsection (1) of this section, to have violated the requirement

1 to pay the prevailing rate of wage (~~(shall be)~~) is subject to a civil
2 penalty of not less than (~~(one)~~) five thousand dollars or an amount
3 equal to (~~(twenty)~~) fifty percent of the total prevailing wage
4 violation found on the contract, whichever is greater, interest on
5 all wages owed at one percent per month, and (~~(shall)~~) is not (~~(be)~~)
6 permitted to bid, or have a bid considered, on any public works
7 contract until such civil penalty has been paid in full to the
8 director. If a contractor or subcontractor is found to have
9 participated in a violation of the requirement to pay the prevailing
10 rate of wage for a second time within a five-year period, the
11 contractor or subcontractor (~~(shall be)~~) is subject to the sanctions
12 prescribed in this subsection and as an additional sanction (~~(shall)~~)
13 is not (~~(be)~~) allowed to bid on any public works contract for two
14 years. Civil penalties shall be deposited in the public works
15 administration account. If a previous or subsequent violation of a
16 requirement to pay a prevailing rate of wage under federal or other
17 state law is found against the contractor or subcontractor within
18 five years from a violation under this section, the contractor or
19 subcontractor shall not be allowed to bid on any public works
20 contract for two years. The two-year period runs from the date of
21 notice by the director of the determination of noncompliance. When an
22 appeal is taken from the director's determination, the two-year
23 period commences from the date the notice of violation becomes final.
24 A contractor or subcontractor (~~(shall)~~) is not (~~(be)~~) barred from
25 bidding on any public works contract if the contractor or
26 subcontractor relied upon written information from the department to
27 pay a prevailing rate of wage that is later determined to be in
28 violation of this chapter. The civil penalty and sanctions under this
29 subsection (~~(shall)~~) do not apply to a violation determined by the
30 director to be an inadvertent filing or reporting error. The burden
31 of proving, by a preponderance of the evidence, that an error is
32 inadvertent rests with the contractor or subcontractor charged with
33 the error. To the extent that a contractor or subcontractor has not
34 paid the prevailing wage rate under a determination issued as
35 provided in subsection (1) of this section, the unpaid wages
36 (~~(shall)~~) constitute a lien against the bonds and retainage as
37 provided herein and in RCW 18.27.040, 19.28.041, 39.08.010, and
38 60.28.011.

39 (4) The director may waive or reduce a penalty or additional
40 sanction under this section including, but not limited to, when the

1 director determines the contractor or subcontractor paid all wages
2 and interest or there was an inadvertent filing or reporting error.
3 The director may not waive or reduce interest. The department of
4 labor and industries shall submit a report of the waivers made under
5 this section, including a justification for any waiver made, upon
6 request of an interested party.

7 (5) If, after the department of labor and industries initiates an
8 investigation and before a notice of violation of unpaid wages, the
9 contractor or subcontractor pays the unpaid wages identified in the
10 investigation, interest on all wages owed at one percent per month,
11 and penalties in the amount of one thousand dollars or twenty percent
12 of the total prevailing wage violation determined by the department
13 of labor and industries, whichever is greater, then the violation is
14 considered resolved without further penalty under subsection (3) of
15 this section.

16 (6) A contractor or subcontractor may only utilize the process
17 outlined in subsection (5) of this section if the department of labor
18 and industries has not issued a notice of violation that resulted in
19 final judgment under this section against that contractor or
20 subcontractor in the last five-year period. If a contractor or
21 subcontractor utilizes the process outlined in subsection (5) of this
22 section for a second time within a five-year period, the contractor
23 or subcontractor is subject to the sanctions prescribed in subsection
24 (3) of this section and may not be allowed to bid on any public works
25 contract for two years.

26 NEW SECTION. Sec. 5. A new section is added to chapter 39.12
27 RCW to read as follows:

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

38 (2) A contractor, subcontractor, or employer shall file a copy of
39 its certified payroll records using the department of labor and

1 industries' online system at least once per month. If the department
2 of labor and industries' online system is not used, a contractor,
3 subcontractor, or employer shall file a copy of its certified payroll
4 records directly with the department of labor and industries in a
5 format approved by the department of labor and industries at least
6 once per month.

7 (3) A contractor, subcontractor, or employer's noncompliance with
8 this section constitutes a violation of RCW 39.12.050.

9 NEW SECTION. **Sec. 6.** This act takes effect January 1, 2020.

Passed by the Senate April 19, 2019.

Passed by the House April 10, 2019.

Approved by the Governor May 7, 2019.

Filed in Office of Secretary of State May 13, 2019.

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