Prevailing Wage Law Compliance and Critical Updates

Presented by:
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June 18, 2020
• Prevailing Wage
• Apprenticeship
• AB 5
• Legal Update Labor Code Section 2699.6
• Skilled and Trained Workforce
Projects Subject to PWL

Primary Rule

Prevailing wage must be paid on all projects that involve construction, alteration, demolition, installation, repair or maintenance.

- Of $1,000 or more
- Done under contract
- Paid for “in whole or in part out of public funds”
New Coverage AB 1768

1. Work conducted during site assessment or feasibility studies.
2. All preconstruction work is covered regardless of whether any further construction is conducted.
► Does not apply to work done by public agency’s own forces.

► Applies to ANY contract — does not have to be publicly bid.

► Do not have to directly contract with public agency (i.e., may contract with developer, who contracts with contractor).

► “Paid for in whole or in part out of public funds.”

► Labor Code Sections 1781 and 1784.
Follow the Money

► Payment of money or equivalent of money.
► Performance of a portion of work by the agency.
► Money loaned on a contingent basis.
► Credits against repayment obligations.
► Transfer for less than fair market value.
► Rent, fees, charges, etc. that are reduced below fair market value.
Workers employed “in the execution of the contract” are entitled to Prevailing Wage Labor Code § 1772 and § 1774.

Owner Operators?
Trucking?
Safe Harbor Protections to Avoid Penalties

1. Have appropriate contract language including Labor Code §§ 1771, 1776, 1777.5, 1813 and 1815;
2. Monitor the payment of prevailing wages including requirement to provide certified payroll records;
3. Take appropriate action in the event subcontractor fails to pay prevailing wages or comply with apprenticeship requirements;
4. Declaration of compliance;
5. Debarment avoidance.
Apprenticeship

► All public works contracts valued at $30,000 or more carry an obligation to hire apprentices, unless the craft or trade does not require the use of apprentices, as indicated in the corresponding prevailing wage determination. This duty applies to all contractors and subcontractors on a project, even if their part of the project is less than $30,000.
DAS 140

Submit contract award information for each craft required on the project using the DAS 140 form:

► If you are approved to train apprentices, you must send the contract award information to your apprenticeship committee.

► If you are not approved to train apprentices, you must send the DAS 140 to all apprenticeship committees that can supply apprentices to the site of the public works project.
PUBLIC WORKS CONTRACT AWARD INFORMATION

Contract award information must be sent to your Apprenticeship Committee if you are approved to train. If you are not approved to train, you must send the information (which may be this form) to ALL applicable Apprenticeship Committees in your craft or trade in the area of the site of the public work. Go to: http://www.dir.ca.gov/das/dasprovcrnt.asp for information about programs in your area and trade. You may also consult your local Division of Apprenticeship Standards (DAS) office whose telephone number may be found in your local directory under California, State of, Industrial Relations, Division of Apprenticeship Standards.

Do not send this form to the Division of Apprenticeship Standards.

This is not a request for dispatch of apprentices.

Contractors must make a separate request for actual dispatch, in accordance with Section 230.1 (a) California Code of Regulations.

Check One Of The Boxes Below

1. We are already approved to train apprentices by the Apprenticeship Committee. We will employ and train under their Standards. Enter name of the Committee

2. We will comply with the standards of Apprenticeship Committee for the duration of the job only. Enter name of the Committee

3. We will employ and train apprentices in accordance with the California Apprenticeship Council regulations, including § 230.1 (c) which requires that apprentices employed on public projects can only be assigned to perform work of the craft or trade to which the apprentice is registered and that the apprentices must at all times work with or under the direct supervision of journeyman/men.

Signature Date
Typed Name
Title

Explanation to box 1 - 3 on form DAS 140

- Box 1 is for contractors who are already approved to train by an apprenticeship program (signatory/member).
- Box 2 indicates that a contractor is willing to comply with a program's Standards for the current project only. This generally means that the fringe benefits and the training funds will be paid to that Committee's Trust Fund. It also allows a contractor to take advantage of a more generous maximum ratio than the CAC Standards, but does not affect the minimum ratio of 1 apprentice hour for every 5 journeyman hours.
- Box 3 means that a contractor will be governed by the regulations of the California Apprenticeship Council. Generally this means that the minimum and maximum ratio for apprentices is the same – 1 apprentice hour for every 5 journeyman hours per each craft, totaled at the end of the project. It also means the Training Fund Contribution is usually paid to the California Apprenticeship Council.
Contact the applicable apprenticeship committee to request apprentices for each craft or trade on your project using the DAS 142 form. The form must be submitted at least three (3) business days before apprentices are required.
# REQUEST FOR DISPATCH OF AN APPRENTICE — DAS 142 FORM

**DO NOT SEND THIS FORM TO DAS**

You may use this form to request dispatch of an apprentice from the Apprenticeship Committee in the craft or trade in the area of the public work. Go to [http://www.dir.ca.gov/databases/das/pwaddstart.asp](http://www.dir.ca.gov/databases/das/pwaddstart.asp) for information about programs in your area and trade. You may also consult your local Division Apprenticeship Standards (DAS) office whose telephone number may be found in your local directory under California, State of, Industrial Relations, Division of Apprenticeship Standards. **Except for projects with less than 40 hours of journeyman work, you must request and employ apprentices in no less than 8 hour increments.**

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<tr>
<th>Date:</th>
<th>Contractor Requesting Dispatch:</th>
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<tr>
<th>To Applicable Apprenticeship Committee:</th>
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## Project Information:

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## Dispatch Request Information:

<table>
<thead>
<tr>
<th>Number of Apprentice(s) Needed:</th>
<th>Craft or Trade:</th>
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<table>
<thead>
<tr>
<th>Date Apprentice(s) to Report:</th>
<th>(72 hrs. notice required)</th>
<th>Time to Report:</th>
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<th>Name of Person to Report to:</th>
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<tr>
<th>Address to Report to:</th>
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You may use this form to make your written request for the dispatch of an apprentice. Requests for dispatch must be in writing and submitted at least 72 hours in advance (excluding weekends and holidays) via first class mail, fax or email. **Proof of submission may be required.** Please take note of California Code of Regulations, Title 8, § 230.1 (a) for all applicable requirements regarding apprenticeship requests and/or visit [https://www.dir.ca.gov/das/PublicWorksForms.htm](https://www.dir.ca.gov/das/PublicWorksForms.htm)

DAS 142 (Revised 12/11)
Ratio

- Employ apprentices in the correct ratio. Be sure to employ one hour of apprentice work for every five hours performed by a journeyman level worker.
Minimum Ratios

The minimum apprentice hourly ratio of five journeymen hours per one apprentice hour as required by Labor Code 1777.5(j) is per craft and only includes straight time hours, not overtime. At the end of the project, straight time apprentice hours must equal one hour for every five straight time journeyman hours for each craft. For example, if you have a total of 100 journeyman hours at the end of the project in a craft, you would need 20 apprentice hours in that same craft.

If you fall under the regulations set forth in a specific programs standards, then you are allowed to use the maximum ratio set forth in those standards. Please contact the program or DAS for a copy of its standards.

If you agree to be governed by the regulations set forth by the California Apprenticeship Council, then the minimum and maximum ratio is the same: a total of one apprentice hour for every five journeyman hours for the project as a whole.

Contractors with an Individual Contractor Exemption granted by the Chief of DAS per Labor Code Sections 1777.3(j) or § 1777.5(j) must follow the Notice of Contract Amendment Information (DAS 140) to the appropriate apprenticeship committee(s). The Individual Contractor Exemptions and Apprentice Committee exemptions pertain only to the ratio of apprentices on a Public Works project.

Minimum Ratio Exemptions

The following are exemptions to the minimum ratio, however an employer can and is encouraged to employ an apprentice as the second person on the job whenever possible and allowed by the apprenticeship program standards.

Operating Engineers

| Northern California – Applies to all Contractors | Contractors are required to utilize a minimum ratio of not less than one apprentice for each four journeymen | Exemption letter |
| Southern California – Applies to all Contractors | Contractors are required to utilize a minimum ratio of not less than one apprentice for each five journeymen | Exemption letter |

Laborers

| Northern California — Participating contractors are not required to hire an apprentice until there are four journeymen on the jobsite |
| Southern California — Approved contractors are not required to hire an apprentice until there are four journeymen on the jobsite |

Teamsters

| Southern California – Applies to all Contractors | Contractors are required to utilize a minimum ratio of not less than one apprentice for each five journeymen | Exemption letter |

April 2017

Quick Links

- How to become an apprentice
- How to set up an apprenticeship program
- DAS Laws and Regulations
- Program Sponsors
- Program Standards
- Publications, reports, and forms
- Refinery safety
California Apprenticeship Council

- Making training fund contributions in the amount established in the prevailing wage rate — either to the applicable apprenticeship committee, or the California Apprenticeship Council (CAC).
CAC - Training Fund Contributions

You must enter all requested information in order to ensure successful submission and processing of your payment.

Training Fund Contributions are due on the 15th of each month.

All fields with * are required. If no Project ID number use None.

If there is no work for a particular month you do not need to submit a CAC2 form with zero amount for that month.

You must use the "Submit" button on the bottom of the page to submit for an invoice coupon.

To navigate between fields, do not hit return or enter key after each entry. Use the tab key instead.

You need to have a working printer currently connected to your computer in order to print the complete paper form in the end of this session so that you can mail it with your payment.

Training Fund Contributions Form CAC2

Date: 9/27/2018

<table>
<thead>
<tr>
<th>Contractor/Sub Contractor making contributions</th>
<th>Contractor License Number</th>
<th>Period covered by contribution (from – to)</th>
<th>Industry location (including County)</th>
</tr>
</thead>
<tbody>
<tr>
<td>* Name:</td>
<td>* License Number</td>
<td>* Period Start:</td>
<td>If applicable, give name of hospital, building, etc.</td>
</tr>
<tr>
<td>* Address:</td>
<td>* Contract/Project Number</td>
<td>* Period End:</td>
<td>Comments:</td>
</tr>
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<td>* City:</td>
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<td>(MM/DD/YYYY)</td>
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<td>* State:</td>
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<td>* ZIP:</td>
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AB 5: A Sea Change In The law

► *Dynamex* decision

► “ABC” Test

► AB 5 Exemptions
  – Specific occupation exemptions
  – Professional services exemption
  – Business-to-business exemption
  – Construction subcontractor exemption
  – Construction trucking exemption
How Did We Get Here?

► *Dynamex v. Superior Court* (April 30, 2018)
  
  – California Supreme Court adopts the “ABC” test
  
  – Complete reversal of existing law regarding contractor status under *Borello*
  
  – Most restrictive test for independent contractor status in the country
The “A-B-C” Test

A. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

B. The worker performs work that is outside the usual course of the hiring entity’s business; and

C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.
AB 5: Specific Jobs Carved Out of ABC Test

- Insurance Salespersons
- Doctors, Surgeons, Psychologists & Dentists
- Lawyers
- Veterinarians
- Engineers
- Private Investigators
- Accountants
- Stockbrokers
- Direct-sales persons
- Commercial fishermen
Professional Services Exemption

- Marketing professionals, HR professionals, Travel Agents, Graphic Designers, Grant Writers, Fine Artists, Tax Advisers, Payment Processing Agents, Occasional Photographers, Occasional Copywriters, Cosmetologists, Real Estate Agents, Repossession Agents.

- If the following are satisfied:
  - Separate business location;
  - Maintain business license and professional service license (if applicable);
  - Able to negotiate own rates;
  - Set own hours per project deadlines and reasonable business hours;
  - Customarily engaged in the same type of work, and holds themselves out to potential customers;
  - Customarily and regularly exercises discretion and independent judgment.
B2B Exemption: The “Easy” Factors

The independent contractor must:

- Be formed as a recognized business entity.
- Be free from the control and direction of the contracting business entity both under the contract for the performance of the work and in fact.
- The contract with the business service provider is in writing.
- Have all required business and tax registrations.
- Maintain a business location that is separate from the contracting business.
- Be customarily engaged in an independently established business of the same nature as that involved in the work performed.
- Provides its own tools, vehicles, and equipment to perform the services.
- Be able to negotiate its own rates.
- Consistent with the nature of the work, the business service provider can set its own hours and location of work.
- The work must not require a contractor’s license.
B2B Factors: The “Tough” Factors

► Must provide services directly to the contracting business rather than to customers of the contracting business.

► Must “actually” contract with other businesses to provide the same or similar services and “maintains” a clientele without restrictions from the hiring entity.

► “Advertises” and holds itself out to the public as available to provide the same or similar services.

Also:

► B2B not apply “to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business.”
Construction Industry Exemption

► Subcontract is in writing.
► Work requires a contractor’s license and work is within the scope of that license.
► All required business and tax registrations.
► Maintain a separate business location.
► Has authority to hire and fire other persons assisting in work.
► Responsible for errors and omissions, either through insurance, bonds or warranty obligations.
► Customarily involved in an independently established business of the same type as the work performed.
Construction Trucking Exemption

► Hauling and trucking services provided in the construction industry pursuant to a contract with a licensed contractor utilizing vehicles that require a CDL to operate or have a GVWR of 26,001 or more pounds.

► Only applies to work performed before January 1, 2022.
Construction Trucking Exemption: The “Easy Factors”

- Formed as a business entity.
- Customarily engaged in an independent business of the same type as the work performed.
- After January 1, 2020, registered with the DIR as a public works contractor regardless of whether performing public works.
Construction Trucking Exemption: The “Tough” Factors

► Subcontractor negotiates and contracts with, and is compensated directly by, the licensed contractor.

► Subcontractor utilizes its own employees to perform the construction trucking services, unless the subcontractor is a sole proprietor who operates their own truck to perform the entire subcontract and holds a valid motor carrier permit.
Construction Trucking Exemption - Employee of the Contractor Can Provide Own Vehicle

► Law does not prohibit a truck owner from working as an employee of a construction trucking employer.

► Employee must be reimbursed for the reasonable cost of using his or her truck in employment.
Construction Trucking Exemption

AB 5 states that any business entity that provides construction trucking services using more than one truck shall “be deemed” to be the employer for all drivers of those trucks.
Labor Code Section 2699.6

► Background to Labor Code Section 2699.6
► Arbitration and Wage Hour Class Action
► Requirements of Collective Bargaining Agreement
Requirements of CBA

1. Expressly provides for wages, hours of work, and working conditions of employees.

2. Premium wage rates for all overtime hours worked.

3. Employees receive a regular hourly rate of not less than 30% more than the state minimum wage rate.

4. Expressly prohibit the violations of PAGA and provides for a grievance and binding arbitration procedure to address those violations.

5. Expressly waives the requirements of PAGA in clear and unambiguous terms.
The exemption from PAGA expires on the date that a Collective Bargaining Agreement expires or January 1, 2028, whichever is earlier.
Skilled & Trained

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<tr>
<th>Skilled</th>
<th>Trained</th>
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<tr>
<td>100%</td>
<td>30%</td>
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<td>must be “Skilled”</td>
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Contractors must have at least 30% of journeypersons be graduates of apprenticeship program for following trades:

- Acoustical installer
- Bricklayer
- Carpenter
- Cement mason
- Drywall installer or fater
- Marble mason, setter, or finisher
- Modular furniture or system installer
- Operating engineer
- Pile driver
- Plasterer
- Roofer
- Waterproofer
- Stone mason
- Surveyor
- Terrazzo worker or finisher
- Teamster
- Tile layer, setter or finisher

Annual graduation rate requirement as of January 1, 2019, for all other apprenticeable trades (except teamsters)

Increases to 60% on January 1, 2020
Amendments to Skilled and Train Workforce

1. Labor Commissioner to receive monthly report for issuance of Civil Wage and Penalty Assessment; if monthly report is not in compliance.

2. Failure to submit monthly report allows 150% percent of the value of the monthly billing to be withheld from the relevant subcontractor.
Penalty

- Penalty of $5,000 per month for failure to use a skilled and trained workforce; second violation is $10,000 per month
- Safe Harbor for General Contractors
- Debarment
THANK YOU

For questions or comments, please contact:

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QUESTION & ANSWER SESSION
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