

OFFICE OF  
ATTORNEY GENERAL  
MAURA HEALEY


FAIR LABOR DIVISION

PREVAILING WISDOM—  
CONFRONTING POTENTIAL PITFALLS  
AND APPLYING SOLUTIONS

*Practical Application of the Public Construction  
Prevailing Wage Laws for Public Procurement and  
Project Management Professionals*

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## What is Prevailing Wage?

The Massachusetts prevailing wage laws require that covered employees on public works projects be paid a minimum hourly rate set by the Department of Labor Standards (DLS).

The prevailing wage laws apply to both union and non-union employers/employees.

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## What is Prevailing Wage?

- The Department of Labor Standards (DLS) sets the prevailing wage.  
*www.mass.gov/dols · 617-626-6953*
- The Office of the Attorney General enforces the prevailing wage laws.

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## What is Prevailing Wage?

### Covered Projects

- Public construction work, including additions and alterations to public buildings: M.G.L. c. 149, §§ 26 - 27D
- Use of trucks, vehicles, and other equipment to perform public works functions including trash and recycling collection and hauling: M.G.L. c. 149, § 27F
- Moving office furniture and fixtures: M.G.L. c. 149, § 27G
- Cleaning state office buildings or buildings leased by the state: M.G.L. c. 149, § 27H
- Transportation of students to public schools, including charter schools: M.G.L. c. 71, § 7A
- Certain housing authority employees such as maintenance workers, laborers, and mechanics: M.G.L. c. 121B, § 29
- MA Convention Center Authority security guard services: Chapter 195 of the Acts of 2014
- MassDOT relocation of utilities or utility facilities: M.G.L. c. 6C, § 44

**If you have a question about whether or not a project requires prevailing wages, you must contact DLS.**

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## Determinations

- DLS determines whether or not a project is subject to the prevailing wage law.
- DLS determines the appropriate hourly wage for each classification of worker on the project.
- DLS handles questions regarding applicability or worker classification.

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## DLS Applicability Determinations

Factors considered by DLS to determine whether the prevailing wage laws apply to a particular construction project:

- 1) Is the project "construction"?
- 2) Is the project a "public works"? **and**
- 3) Is the project being undertaken by a "public entity"?

DLS has broad and sole discretion as to applicability determinations.

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## Construction

“Construction” for the purposes of the prevailing wage laws, is defined by statute.

Per M.G.L. c. 149, § 27D, the words “construction” and “constructed” shall include “additions to and alterations of public works.”

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## Public Works

“Public Works” is not defined by the prevailing wage statutes.

Mass. Appeals Court has noted, *“The core concept of ‘public works,’ in Massachusetts and elsewhere, is commonly expressed as involving the creation of public improvements having a nexus to land, such as a building, road, sewerage or waterworks facility, bridge, or park.”*

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## Public Body (Public Entity / Awarding Authority)

“Public Body” includes the commonwealth, county, town, authority or district.

DLS considers all relevant factors including, but not limited to:

- Is the property owned by a public body?
- Are public funds being utilized, in whole or in part, to cover construction costs?
- Will the structure be used for a public purpose & be operated and maintained by the public entity?
- Is the project the type typically performed by a public entity rather than a private entity?

DLS has broad and sole discretion as to applicability determinations and statutory interpretation.

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## Prevailing Wage Requirements

### Rates:

- apply for all time worked on project
- change for each project
- must be updated annually (multi-year construction projects)
- re-prints available on DLS website ([www.mass.gov/dols/pw](http://www.mass.gov/dols/pw))

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## Prevailing Wage Requirements

For public construction projects...

### Posting requirement

- Project's wage rates must be posted where workers will see it

### Certified payroll records (CPRs)

- Contractors and sub-contractors must submit certified payroll records to awarding authority to show payment of proper wage rate
- CPRs are public records and can be requested of the awarding authority

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## Prevailing Wage Requirements

### CPRs must contain:

- Employee name
- Employee address
- Classification
- Hours worked
- Wage rate paid
- Deductions
- Copy of DAS apprentice ID card (attached each week)
- Copy of OSHA 10 card (attached the 1<sup>st</sup> time an employee is listed on the CPRs )

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## Types of Violations

### Wage Violations

- Failure to pay the prevailing wage
- Misclassification of work performed
- Misclassification of employees as independent contractors
- Overtime

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## Types of Violations

### Records Violations

- Failure to submit CPRs to the Awarding Authority
- Failure to submit *weekly*
- Failure to submit upon demand to AGO
- Failure to submit/maintain true and accurate CPR

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# Debarment

In order to be debarred, an employer must either:

- be criminally convicted of violating prevailing wage law or
- fail to pay or appeal the citation or
- receive 3 intentional citations within a period of 3 years

Debarment applies to all affiliates of the contractor or subcontractor as well as any successor company or corporation.

Public awarding authorities must check the Attorney General’s debarment list before awarding contracts for public construction and public works. See [www.mass.gov/ago/fairlabor/data](http://www.mass.gov/ago/fairlabor/data)

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# Complaints and Enforcement Actions Available Online

[www.mass.gov/ago/fairlabor/data](http://www.mass.gov/ago/fairlabor/data)


### Fair Labor Division Data

- ✓ Download/view list of complaints
- ✓ Download/view list of enforcement actions
- ✓ Download/view debarred contractors


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## Potential Pitfalls and Possible Solutions



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## Potential Pitfalls and Possible Solutions

After the bid solicitation is issued, the awarding authority (AA) realizes the bid package failed to state the requirement to pay PW and the AA failed to request a PW wage rate sheet.

- ✓ Request the rate sheet from DLS immediately.
- ✓ Issue an amendment to the bid solicitation and inform all bidders.
- ✓ Utilize whatever system you are using to communicate with potential bidders; post a notice on your website ; e-mail / mail all potential bidders.
- ✓ Document your actions to remedy.

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## Potential Pitfalls and Possible Solutions

**No written contract exists:**

- Verbal agreement with contractor.
- Contractor on an “emergency” list and is called when needed and paid via invoice.

- ✓ Make sure you request a “Periodic Rate Sheet” from DLS every 6 months and have that on hand to give to the contractor when you ask them if they can provide the service. Periodic Rate Sheets are for small, unanticipated repairs (i.e. a broken window).
- ✓ Remind the contractor that the labor is subject to payment of PW.
- ✓ Document your actions to remedy.

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## Potential Pitfalls and Possible Solutions

**After the project starts, the AA realizes the bid solicitation did not contain reference to PW requirement or a PW rate sheet, and there’s no rate sheet included with the contract.**

- ✓ The AA has to re-bid the project.
- ✓ M.G.L. c. 149, § 27 requires that, prior to awarding a contract for the construction of public works, the awarding authority shall request the PW rate sheet from DLS. It also requires that in advertising/calling for bids, the awarding authority shall incorporate the PW wage rate schedule by appropriate reference thereto and shall furnish a copy of the schedule to any bidders.

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## Potential Pitfalls and Possible Solutions

Contractor starts the project and the AA realizes the rate sheet, which was part of the bid documents, was not attached to the final contract.

- ✓ Contact the contractor right away and provide the rate sheet.
- ✓ Attach the rate sheet as part of the final executed contract.
- ✓ Document your actions to remedy.

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## Potential Pitfalls and Possible Solutions

Project starts and AA realizes the contract has language in it that directs the contractor to pay the incorrect rate or to not pay prevailing wage for certain tasks that are considered to be construction.

- ✓ Seek clarification from DLS about the proper rate and applicability of PW to certain tasks.
- ✓ Contact the contractor right away with the clarified information.
- ✓ Amend the contract with the corrected information. The contractor may require negotiations for additional monetary compensation.
- ✓ Document your actions to remedy.

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## Potential Pitfalls and Possible Solutions

AA seeks quotes from 3 vendors on an OSD Statewide Contract for Audio, Video, Multimedia Presentation Equipment and Services to purchase and install 5 smartboards in an elementary school. AA did not request a PW rate sheet prior to soliciting quotes.

- ✓ Any addition or alteration to a public work requires payment of prevailing wage. Prevailing wage must be paid for the installation of equipment if it will serve as an “addition to” or “alteration of” the building or other public work.
- ✓ Request a rate sheet from DLS and re-seek quotes providing the vendors with the project rate sheet.
- ✓ Document your actions to remedy.

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## Potential Pitfalls and Possible Solutions

Contractor tells the AA that he doesn't have to pay PW because all of the workers on the project are owners of the company.

- ✓ Ask the contractor to submit documentation showing ownership of the business.
- ✓ DLS has opined that a legitimate “owner/operator” under the Prevailing Wage Law, is an employee who owns at least a bona fide twenty percent (20%) equity interest in the enterprise in which he is employed, regardless of the type of business organization (e.g. corporation, partnership, etc.), and who is actively engaged in its management. See Opinion Letter PW- May 8, 2013.
- ✓ Document your actions to verify the contractor's contention.
- ✓ Contact AGO/FLD if contractor's explanation is not legitimate or if he ignores you.

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## Potential Pitfalls and Possible Solutions

**Contractor/subcontractor is not submitting Certified Payroll Records (CPR).**

- ✓ Contact the contractor/subcontractor and remind them of their obligation to submit certified payroll records under M.G.L. c. 149, § 27B. CPRs must be submitted to the awarding authority by mail, e-mail or in-person, on a weekly basis. May wish to follow-up your conversation in writing for documentation purposes.
- ✓ Contact the AGO/FLD if the contractor fails to adhere to the requirement.

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## Potential Pitfalls and Possible Solutions

**AA reviews invoices and realizes the work performed constitutes covered work under the statute yet prevailing wage is not being paid and CPRs are not being submitted.**

- ✓ Contact the contractor and alert them that the work performed needed to be paid at the applicable PW rate(s).
- ✓ Remind them of the obligation by contractors and subcontractors to submit certified payroll records under M.G.L. c. 149, § 27B. CPRs must be submitted to the awarding authority by mail, e-mail or in-person, on a weekly basis.
- ✓ Contact the AGO/FLD.

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## Potential Pitfalls and Possible Solutions

AA realizes workers are performing duties that require professional licensure (i.e. electrician, plumber) but the workers are not licensed. Proper PW rate may (or may not) be being paid to the workers.

- ✓ Contact your legal counsel.
- ✓ Questions about licensed trade work can be answered by the MA Division of Professional Licensure:  
(617) 727-3074  
[www.mass.gov/orgs/division-of-professional-licensure](http://www.mass.gov/orgs/division-of-professional-licensure)

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## Potential Pitfalls and Possible Solutions

AA realizes subcontractor to the GC has no working knowledge of prevailing wage laws, including the submission of CPRs, paying PW, trade classification, etc.

- ✓ Contact the AGO/FLD.

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## Potential Pitfalls and Possible Solutions

AA fails to request an updated wage rate sheet for a multi-year contract.

- ✓ Request the annual update from DLS right away.
- ✓ Contact the contractor right away and provide the rate sheet.
- ✓ Document your actions to remedy.

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## Potential Pitfalls and Possible Solutions

Contractor has a municipality-wide, on-call, 3-year contract and submits CPRs for some, but not all, of the work performed when replacing parts.

- ✓ AA contact the contractor and advise that he contact the Department of Labor Standards for clarification of which tasks require payment of PW to ensure proper payment to workers.

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## Potential Pitfalls and Possible Solutions

Contractor/subcontractor fails to submit copies of apprentice ID cards on CPRs that show workers receiving apprentice wage rates.

- ✓ Contact the contractor and remind them of the obligation to submit copies of apprentice ID cards with any/all certified payroll records that show workers being paid at an apprentice rate, pursuant to M.G.L. c. 149, § 27B.
- ✓ Give a short deadline for contractor to submit amended CPRs and hold him to it. Review and file the amended CPRs with the project file.
- ✓ Contact the AGO/FLD if the contractor fails to remedy the matter.

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## Potential Pitfalls and Possible Solutions

Contractor/subcontractor fails to submit copies of OSHA 10 training certification for all workers.

- ✓ Contact the contractor and remind them of the obligation to submit a copy of OSHA 10 training certification for every worker employed on the project, pursuant to M.G.L. c. 149, § 44E. (Each worker that appears on a CPR should have a corresponding copy of OSHA 10 training certification).
- ✓ Give a short deadline for contractor to submit amended CPRs and hold him to it. Review and file the amended CPRs with the project file.
- ✓ Contact the AGO/FLD if the contractor fails to remedy the matter.

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## Potential Pitfalls and Possible Solutions

AA has designated the responsibility for collecting and retaining all of the project CPRs to the general contractor.

- ✓ The legal obligation to receive and retain CPRs and corresponding documentation (apprentice ID cards, OSHA 10 training certification, Statements of Compliance) is on the awarding authority. This responsibility cannot be transferred to the general contractor for the project.
- ✓ Awarding authorities must maintain CPRs and appurtenant documents for 3 years from the date of completion of the contract.

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## Potential Pitfalls and Possible Solutions

The GC goes bankrupt/leaves the project and bond company takes over.

- ✓ Prevailing wage still applies to the labor on the project.
- ✓ Send the project's PW wage rate schedule to the bond company.
- ✓ Receive, review and retain CPRs from contractors/subcontractors working on the project.

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## Potential Pitfalls and Possible Solutions

The AGO contacts the AA for copies of the CPRs for a recently-completed project and the AA realizes that they failed to collect them for that project.

- ✓ Be honest with the AGO investigator.

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## Responding to Requests from the AGO/FLD

- ✓ Promptly respond to AGO – if there are any questions contact the Investigator listed on letter.
- ✓ If more time is needed to respond, notify the Investigator and ask for extension.
- ✓ Be as inclusive as possible in response and state if any requested item does not exist (i.e. photos).
- ✓ If CPRs are submitted electronically, please provide any/all documentation that indicates the date the CPRs were submitted.
- ✓ If AGO requests records from you and a contractor has not submitted CPRs, notify the Investigator rather than following up directly with the contractor

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## Contact AGO/FLD

Heather Rowe, CFE, MCPPO  
Chief of Investigations – Fair Labor Division  
617-963-2564

*A Guide to Prevailing Wage for Awarding Authorities:*  
[www.mass.gov/service-details/prevailing-wage-for-awarding-authorities](http://www.mass.gov/service-details/prevailing-wage-for-awarding-authorities)

*A Guide to Prevailing Wage for Contractors:*  
[www.mass.gov/service-details/prevailing-wage-for-contractors](http://www.mass.gov/service-details/prevailing-wage-for-contractors)

*File a wage/hour/prevailing wage complaint:*  
[www.mass.gov/ago/flid](http://www.mass.gov/ago/flid)

*Fair Labor Division Hotline:*  
(617) 727-3465

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## Contact DLS

[www.mass.gov/dols/pw](http://www.mass.gov/dols/pw)

617-626-6953

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<p>OFFICE OF ATTORNEY GENERAL MAURA HEALEY</p>  <p>FAIR LABOR DIVISION</p>	<p>Prevailing Wage Law Overview</p> <p><i>a free webinar for Massachusetts awarding authorities</i></p> <div data-bbox="755 451 1193 651"><p>Tuesday, January 14, 2020 Tuesday, April 14, 2020 Tuesday, August 11, 2020 Tuesday, November 10, 2020 11:00AM-12:00PM No registration necessary</p></div> <p><i>Log-in Instructions:</i></p> <p>Join the webinar from your computer, tablet or smartphone. <a href="https://global.gotomeeting.com/join/644044301">https://global.gotomeeting.com/join/644044301</a></p> <p>Dial in using your phone. United States: <a href="tel:+12245013412">+1 (224) 501-3412</a></p> <p>Access Code: 644-044-301</p> <p>New to GoToMeeting? Get the app now and be ready when your meeting starts: <a href="https://global.gotomeeting.com/install/644044301">https://global.gotomeeting.com/install/644044301</a></p>
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